

[Commercial Contract Drafting and Review Checklist](#)

This checklist outlines what counsel should consider when drafting or reviewing a commercial contract. It addresses, among other terms and provisions, pricing and payment, term and termination, representations & warranties, indemnifications, limitations on liability, confidentiality, insurance, ownership and licensing rights, assignability, and dispute resolution procedures.

This checklist is industry and jurisdiction neutral and, as such, counsel should consult state and industry specific law when drafting or reviewing a commercial contract on behalf of his or her client.

For more information on commercial contract drafting and review, see [Commercial Contract Drafting and Review](#).

Meet with Key Business Executives

- Ensure that all agreed upon business terms have been provided to counsel by the appropriate executives; maintain an open line of communication throughout the process
- Ensure a formal process for commencing attorney involvement. For a sample contract review and intake form, see [Contract Review and Preparation Intake Form](#)
- Consider the factors that will affect the negotiating, drafting, or review of the agreement, which may include some or all of the following:
 - The scope of the transaction, including financial value, territory, and exclusivity
 - The term of the agreement
 - The level of contract standardization desired for the applicable transaction
 - Antitrust issues, such as price discrimination or tying agreements (see [FTC Enforcement of Consumer Protection Laws](#))
 - The parties' relative bargaining power
 - The importance of the deal to the company's overall business
 - The importance of the relationship between the parties
 - The company's risk tolerance
 - The counterparty's creditworthiness
 - The likelihood of a breach of the agreement
 - Consistency with pre-existing agreements (such as covenants not to compete and exclusivity arrangements)
- For a sample contract review and approval policy, see [Contract Review and Approval Policy](#) and for more information on contract management, see [Contract Management Process Checklist](#)

Identify the Agreement, the Parties, and the Effective Date

- Provide a bolded title at the top of the first page of the document to reflect the type of agreement being entered into (i.e., **Distribution Agreement**)
- Provide, in the preamble, a short description of the parties, ensuring that they are each accurately identified by:

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- Using their full legal names, including the form and state of organization (i.e., a New York LLC)
- Including their business addresses (this may also be set forth in a notice provision)
- Assigning each party with a name (such as “Client”) for use and ease of reference throughout the document
- Specify the effective date of the agreement in the preamble, such date which can be based:
 - On execution of the contract
 - As of a specific past or future date - or -
 - On satisfaction of certain preliminary conditions

Draft or Review the Agreement

- Draft or review the agreement’s key business provisions to ensure conformance with all agreed upon business points (meet with business executives where necessary)
- Depending on the nature of the deal, material terms may include:
 - Services to be provided or goods to be sold
 - Pricing and payment information
 - Terms relating to exclusivity and territory
 - Ordering procedures
 - Return and refund information
 - Approval and consultation rights
 - Review processes
 - Shipment terms
 - Milestones
 - Key executives
- Draft or review all other standard terms and conditions, including:
 - Representations & Warranties
 - Indemnifications
 - Limitations on Liability
 - Insurance
 - Term
 - Termination
 - Ownership and Licensing Rights
 - Confidentiality
 - Audit and Inspection Rights
 - Equitable Relief/No Equitable Relief
 - Dispute Resolution Terms
 - Relationship of the Parties
 - No Assignment
 - Severability

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- Cumulative Remedies and/or Exclusive Remedies
- Survival
- No Third-Party Beneficiaries
- Force Majeure
- Notices
- Attorneys' Fees
- Entire Agreement
- Broaden or restrict the scope of each clause to best support the client's goals and concerns
- Make sure that the clauses work together and do not contradict one another in any manner
- Ensure all language is clear, unambiguous, and sufficiently detailed to cover each party's rights and obligations

Establish or Review the Terms Addressing Each Party's Primary Rights and Obligations

- Ensure all rights and obligations are set forth in sufficient detail
- Include, as applicable:
 - Minimum guarantee information
 - Ordering and return procedures
 - Shipment and delivery terms
 - Territory
 - Delivery and deadline information
 - Key personnel
- Pricing and discount information (see below)
- Warranty information (see below)
- Review, approval, and rejection terms
- Address whether sublicensing is an available option and if so, on what terms
- Address whether the deal is exclusive or non-exclusive and if exclusive:
 - Whether exclusivity should be made mutual or one-way
 - How far the exclusivity reaches (for example, exclusivity is oftentimes limited to a specific industry)

Establish or Review Pricing and Payment Terms

- Consider the type of transaction when determining pricing
 - Select a pricing structure. Pricing can be fixed, formula based (such as on a time and materials basis), or variable pursuant to specific factors such as frequency of purchase or quantity
 - Consider making pricing subject to a most favored nations provision
 - Consider the provision of refund rights
- Determine payment due dates. They can be set at specific dates or based on events such as "completion of all services"
- Provide for a right of reimbursement for interest charges and collection costs associated with a party's having to pursue late payments

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- Specify requisite invoicing requirements (including procedures for disputing invoices)
- Specify whether set-offs are permissible
- Specify acceptable payment methods (i.e., cash or check; U.S. dollars only)
- Potentially provide the purchaser with the right to pre-pay or defer payment pursuant to specific terms
- Consider requiring the purchaser to provide the seller or lessor with:
 - A security interest (such as a purchase money security interest (PMSI))
 - A letter of credit
 - An advance deposit
 - A guaranty from a larger investor or affiliate - and/or –
 - A performance bonds or surety
- For more information on mitigating payment risk, see [Comparing Types of Credit Support in Sale of Goods Transactions - Checklist](#)
- For sample pricing and payment clauses, see [Pricing/Fees Clauses](#)

Establish or Review Representations & Warranties

- Incorporate representations and warranties to allocate exposure to loss, including:
 - Each party's valid existence, due organization, and good standing
 - Each party's right and ability to conduct the business being contemplated for by the agreement
 - Each party's legal right to enter into and perform the terms of the agreement without violating any laws or other agreements to which it may be a party
 - The validity and enforceability of the agreement; and
 - Each party's obligation to comply with all applicable laws, rules, ordinances, and other regulations
- Include additional representations and warranties as necessary, such as:
 - An obligation not to violate any third party intellectual property rights in a creative services agreement - or -
 - A representation respecting clear title in a sale of goods agreement
- Provide adequate limitations when making representations and warranties by:
 - Narrowing their scope
 - Limiting their survival period
 - Preventing the extension of their terms to any third party or parties
 - Making them contingent on certain events
 - Disclosing exceptions
 - Adding a knowledge qualifier
 - Adding a materiality qualifier
 - Disclaiming any additional representations and warranties, whether express or implied, other than those specifically set forth in the agreement. For more information on disclaiming warranties, see [Warranty and Disclaimer of Warranty Drafting](#)

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- Including an express acknowledgement of each party's non-reliance on any non-incorporated terms or conditions
- Ensure adequate protection when receiving representations and warranties by:
 - Protecting broadly phrased provisions
 - Extending their terms to assignees, successors-in-interest, or other, designated third parties
 - Removing stringent qualifications or restrictions
 - Ensuring survivability of the clause after expiration or termination of the agreement
 - Removing or not including a knowledge qualifier
- Ensure consistency with the remainder of the agreement's terms, such as the indemnification, limitation on liability, product warranty, and cumulative remedies clauses
- For more information on representations and warranties, see [Commercial Agreement Representations, Warranties, Covenants, Rights, and Conditions](#) and [Representations and Warranties Drafting](#)
- For clauses, see [Representations and Warranties Clauses](#)

Establish or Review Indemnifications to Allocate Risk

- Determine which types of liabilities should be covered and which should be expressly excluded:
 - Ensure coverage of each party's material, uncured breaches, negligence, and willful misconduct
 - Provide all exclusions in a clear and conspicuous manner
 - Commonly excluded liabilities include taxes, pending litigation, and direct claims between parties
- Consider including a defense obligation
- Define the scope of recoverable losses
- Expressly state that the indemnification covers legal fees (if desired), as courts typically exclude their recoverability unless the agreement specifically provides for it
- Draft the provision carefully to ensure that each party is responsible solely for its own actions (i.e., "Client shall indemnify Service Provider for all losses *"to the extent arising out of Client's negligence, breach or misconduct" instead of "in any way arising out of or related to"*)
- Expressly state which third parties, if any, are also entitled to benefit from its terms, such as the indemnified party's parent, subsidiaries, affiliates, employees, directors, officers, agents, and permitted assigns
- Include an indemnification procedure; ensure it addresses notification and cooperation requirements
- Draft indemnifications very clearly, since ambiguity is most commonly resolved in the indemnifying party's favor
- Ensure their equitability to protect their enforcement. For example, indemnifications covering loss regardless of fault are generally not enforced as a matter of public policy
- For more information on drafting indemnities, see [Indemnification Provision Checklist](#)

Review or Consider Incorporating a Limitation on Liability Clause

- Assess whether inclusion of a limitation on liability clause will help or hurt the client. It is generally most desirable for service providing clients to protect against a potentially large infringement and/or negligence claim
- Consider excluding one or both parties' liability for specific types of damages, such as indirect, punitive, consequential, special, and incidental

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- Determine whether the limitation applies to the agreement or only to specific provisions
- Potentially include a liability cap; ensure ceiling is high enough to provide the necessary protection. Caps can be set forth as:
 - A fixed dollar amount
 - A fixed percentage - or –
 - A multiple of an amount (such as “2x the fees paid hereunder”)
- Carve out exceptions as desired, such as making the limitation not applicable to damages arising out of fraud, intentional misconduct, reckless misconduct, and/or a breach of the agreement’s indemnification or confidentiality provisions
- Potentially add a statute of limitations (one-year is typical)
- Make the language clear and conspicuous —ALLCAPS will achieve this purpose
- For more information on limitation on liability clauses, see [Negligence, Gross Negligence, and Willful Misconduct Terms in Commercial Contracts](#)

Establish or Review Insurance Obligations

- Specify all insurance requirements, including:
 - Acceptable insurance providers
 - Required insurance policies (i.e., general liability, intellectual property insurance, workman’s comp, etc.)
 - Duration of coverage
 - Minimum limits
 - Acceptable exceptions
- Require the insuring party to timely notify the insured party of any material changes to, or cancellation of, any applicable policy
- Require the insuring party to add the insured party as an “additionally insured” or “loss payee,” depending on the type of insurance, to all applicable policies
- Address whether and to what extent the parties may self-insure
- Require the insuring party to provide the insured party with a certificate evidencing coverage
- Ensure risk management personnel are brought into the conversation
- For more information on insurance, see [Business Insurance Basics](#)

Establish or Review the Agreement’s Term

- Establish or confirm the agreement’s term. Terms can be based on time, completion of a project, or events outside of the parties’ control
- Determine potential renewal terms, including whether renewal rights are unilateral or mutual, whether renewal is subject to any conditions, and whether renewal happens automatically or not (auto renewals are commonly referred to as evergreen provisions)
 - Make evergreen clauses clear and conspicuous to protect their enforceability
 - Ensure that their applicable deadlines are not missed
- Include applicable price adjustments for renewal terms, if desired

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- For sample term provisions, see [Term Clauses](#)

Establish or Review Termination Provisions

- Decide whether either or both parties may terminate the agreement for:
 - Cause (such as an uncured material breach, bankruptcy, insolvency, or change of control)
 - Convenience (permitting termination at any time without requiring a bona-fide reason)
- Ensure language granting termination for convenience is enforceable (for instance, it is prohibited in franchise agreements)
- Define the events triggering termination rights (i.e., breach, misconduct, violation of applicable law, etc.)
- List the provisions that will survive any termination (or expiration) of the agreement. Such provisions generally include the representations and warranties, ownership terms, payment obligations, indemnifications, limitations on liability, confidentiality, audit, and insurance obligations, among others
- Include advance notification obligations (i.e., terminations for convenience often require 90-days' advance written notice)
- Include post-termination obligations such as:
 - Requiring a termination fee for terminations without cause
 - Rendering a final accounting
 - Accelerating outstanding payment obligations
 - Disposing of property, including the other party's confidential information
 - Assisting in the transition of work-in-progress to a third party
- For sample termination provisions, see [Termination Clauses](#)

Establish or Review Ownership and Licensing Rights

- Determine ownership rights
 - Creative deliverables are most commonly prepared on a "work-for-hire" basis and as such, owned by the purchaser upon their creation
 - Ownership rights in deliverables can also be assigned after their creation
 - Include applicable holdbacks (for example, ownership rights in and to pre-existing materials incorporated in deliverables generally do not transfer – such rights are generally licensed instead)
- Determine licensing rights
 - Include information about the license's term, revocability, exclusivity, transferability, fees (if any), and territory
 - Provide restrictions, if any, such as "no right to modify"
- Set forth each party's responsibilities with respect to obtaining and paying for third-party rights

Protecting Confidential Information

- Determine whether a confidentiality clause should be included and if so, whether it should be made one-way or mutual
- Define the term "confidential information" and include standard carve-outs
 - Include all of the disclosing party's proprietary information, such as its financial, marketing, and personnel related records

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- Include the terms of the agreement as well
- Standard carve-outs generally include material in the public domain, material already known through proper means, independently discoverable information, and information required to be disclosed pursuant to applicable law
- Specify the receiving party's obligations, including:
 - Non-disclosure, other than as required to fulfill contractual obligations
 - Level of treatment and handling of confidential information, which should be not less than the same degree of care the receiving party uses for its own confidential information
 - An obligation to require those employees and agents receiving confidential information to execute separate confidentiality agreements in advance
 - An obligation to either return or destroy, at the disclosing party's request, confidential information post-term. Carve-out the right to retain one archived copy confidentially
- Include a term, which ideally continues after termination or expiration of the agreement for at least a couple of years
- Provide the disclosing party with the right to seek equitable relief (see below) if the receiving party breaches its confidentiality obligations
- Require compliance with all applicable trade secret laws, including:
 - The Defend Trade Secrets Act of 2016 (DTSA) (*114 P.L. 153, 130 Stat. 376, 114 P.L. 153, 130 Stat. 376*)
 - The Uniform Trade Secrets Act (UTSA), which is a model law published by the Uniform Law Commission in 1979 and adopted by 48 states
 - Industry specific laws including: (1) for health care, the Health Insurance Portability and Accountability Act (HIPAA) (HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996, 1996 Enacted H.R. 3103, 104 Enacted H.R. 3103, *110 Stat. 1936, 104 P.L. 191, 1996 Enacted H.R. 3103, 104 Enacted H.R. 3103*) and the Health Information Technology for Economic and Clinical Health Act (HITECH) (enacted under Title XIII of the American Recovery and Reinvestment Act of 2009 (*111 P.L. 5*); (2) for children, the Children's Online Privacy Protection Act (COPPA) ([15 USCS § 6501](#)); and (3) for certain financial information, the Gramm-Leach-Bliley Act (GLBA) ([15 USCS § 6801](#)) and the Fair Credit Reporting Act (FCRA) ([15 USCS § 1681](#))
- For a sample non-disclosure agreement, see Mutual Confidentiality and Non-Disclosure Agreement and [Confidentiality Clause](#)

Establish or Review Audit and Inspection Rights

- Delineate sufficiently detailed audit rights if desired by the parties, including:
 - How frequently they can take place and during what time period/term
 - Advance notice requirements
 - Limitations on the times and days of the week that audits can take place
 - Cost (audit costs are generally borne by the auditing party unless a breach is discovered)
 - Access restrictions, including the audited party's right to protect its confidential information from being audited other than as required to verify compliance with the agreement
 - The audited party's right to accompany the auditing party's auditor at all times
 - Requirement of auditors to execute a confidentiality agreement in advance of any audit

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- Consider including inspection rights if physical access to the audited party's facilities is desired (for example, to inspect a manufacturing or storage process). Consider providing for the inspecting party's right to engage the services of an independent third-party inspector to handle the process
- Counsel for the auditing party should seek broad auditing rights, and vice-versa
- Require the audited party to retain all books and records necessary for the auditing party to conduct an audit for a certain period of time
- For stand-alone audit rights clauses, see [Audit Clauses](#) and for a stand-alone inspection rights clause, see [Inspection Rights Clause](#)
- For a combined audit and inspection rights clause, see [Audit and Inspection Rights Clause](#)

Equitable Relief/No Equitable Relief

- Assess whether the agreement should provide for, or expressly deny, the right to equitable relief and if so, should the clause be made mutual or one-way
- Consider whether the provision should apply to the agreement as a whole or only to certain provisions (such as a breach of confidentiality obligations)
- Where equitable relief is provided for in an agreement, ensure that the language is specific and applicable to breaches where such relief is commonly awarded by courts
- Standard clauses granting equitable relief general include:
 - An acknowledgment by the parties that a material breach would cause irreparable harm to the non-breaching party
 - An acknowledgement by the parties that there is no adequate remedy at law (i.e., monetary damages would be insufficient) to compensate the victim
 - A statement that the non-breaching party is entitled to equitable relief
- Counsel should also consider inclusion of the following terms:
 - A statement that the non-breaching party does not have to post a bond or other form of security in his or her claim for equitable relief
 - A statement that the non-breaching party need not prove damages to obtain relief
 - A statement that the breaching party waive its right to contest a final equitable relief court order
 - A statement that the non-breaching party be entitled to seek equitable relief
- For a sample equitable remedies clause, see [Equitable Remedies Clauses](#)
- For no equitable remedies clauses, see [No Equitable Relief Clauses](#)

Establish or Review Dispute Resolution Terms

- Ensure inclusion of a governing law provision
- Consider the agreement's governing law at the beginning of the negotiations because the law selected provides the context in which the agreement is to be drafted
- Consider how different state laws may affect the agreement
- Ensure inclusion of a forum state (i.e., where, exactly, the conflict will get resolved). It does not need to be the same as the governing law state
- For more on governing law and dispute forum provisions, see [Choice of Law and Choice of Forum Clauses](#)

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- Consider including language excluding the applicability of the United Nations Convention on Contracts for the International Sale of Goods (CISG)
- Consider incorporating language expressly excluding the right to a trial by jury
 - If included, the language should be clear and conspicuous to protect its enforceability
 - Ensure enforceability in the applicable jurisdiction, as jury waiver clauses are not enforceable in many states, including Georgia and California
 - For sample jury waiver clauses, see [Waiver of Jury Trial Clauses](#)
- Consider having binding arbitration apply instead of litigation to potentially save time and money
 - If an arbitration clause is included, it should be made clear and conspicuous
 - For sample arbitration clauses, see [Arbitration Clauses](#)
- Consider inclusion of a multi-tiered alternative dispute resolution (ADR) clause (also known as an escalation clause). For a sample clause, see [Multi-tiered Alternative Dispute Resolution Checklist](#)

Ensure Inclusion of All Requisite Boilerplate Provisions

- Relationship of the Parties. Most commercial contracts call for independent contractor arrangements (i.e., versus employment relationships). Include specific language to avoid confusion
- No Assignment' Clauses
 - Assess whether assignment restrictions should be made mutually or unilaterally
 - Ensure inclusion of key exceptions, including the right to freely assign the agreement to affiliates and/or pursuant to a change of control event such as a merger or acquisition
 - Consider requiring permitted subcontractors and other pre-approved assignees to execute transfer of ownership, licensing, and/or confidentiality agreements, as applicable
 - Consider requiring the assignor to remain secondarily liable post-assignment
 - Include language providing that unauthorized assignments are null and void
 - For more information on assignment, see [Offers, Acceptance, Revocation, Assignment, and Delegation of Duties](#)
- Severability. Such a clause can help protect the enforceability of an agreement when one or more of its terms are separately unenforceable. For a sample clause, see [Severability Clause](#)
- Cumulative Remedies and/or Exclusive Remedies
 - Ensure all remedies meant to be either cumulative or exclusive are stated as such somewhere in the agreement
 - For cumulative remedies clauses, see [Cumulative Remedies Clauses](#)
 - For more information on cumulative and exclusive remedies, see [Remedies](#)
- Survival. Provide a specific reference to those terms which survive the expiration or termination of the agreement for any reason. For more information on drafting a survival clause, see [Merger, Survival, and Notice Clauses](#)
- No Third-Party Beneficiaries. Include all requisite exceptions (such as those entitled to enforce the agreement's indemnification). For sample clauses, see [Third Party Beneficiaries Clauses](#)

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- Force Majeure

- Include language requiring each party to notify the other party in writing of an event of force majeure as soon as practically possible
- Require the affected party to use all commercially practicable efforts to limit its impact on performance
- Ensure sufficiently broad coverage, particularly for service providers
- Consider including language allowing the non-affected party to terminate the agreement if a particular event of force majeure continues for a specified period of time, particularly for time sensitive service agreements
- or more information on force majeure clauses, see [Force Majeure Clause Drafting](#)

- Notices

- Include information about when notices are effective (i.e., “upon receipt”)
- Be careful when including e-mail as an acceptable delivery method, as e-mails often arrive late, get lost, go accidentally unread, land in junk folders, and get intercepted by unauthorized third parties
- For more information on notice provisions, see [Merger, Survival, and Notice Clauses](#)

- Attorneys’ Fees

- Consider granting attorney fee reimbursement to the prevailing party
- Counsel for the non-prevailing party should seek to limit recovery to “outside” legal fees only
- Absent an attorneys’ fees clause, the “American rule” generally applies, requiring litigation costs to be borne by the party incurring the expense
- Note that, depending on the jurisdiction, recovery may be limited by statute or otherwise in the judge’s discretion

- Entire Agreement

- Ensure that the agreement incorporates all of the parties’ agreed upon terms and that this is explicitly stated in the contract
- Ensure inclusion of a “no modification” provision, effectively stating that the agreement may be modified only pursuant to a written amendment signed by an authorized representative of each party
- Include prioritization of documents to address conflicts, such as providing that the main agreement trumps the terms of any attached exhibit
- For entire agreement clauses, see [Entire Agreement Clauses](#)