

# Project Contracts

PMG323

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**Lecture 8**



# Contract Terms & Implementation

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# Lecture

Section 2

Implementation

Section 1

- Notices
- Force Majeure
- Entire Agreement/Integration/Merger
- Legal Expenses/Legal Fees
- Survival
- Authority
- Counterparts
- Signature Block

# Notices

Notice requirements can look innocuous, but they must be read and followed carefully, particularly when the objective is to reject inadequate performance, provide notice of an alleged breach, terminate an agreement, or provide notice of an indemnifiable claim.

**Here is a typical Notice clause:**

All notices, consents and other communications under or regarding this Agreement shall be in writing and shall be deemed to have been received on the earlier of the date of actual receipt, the third business day after being mailed by first class certified air mail, or the first business day after being sent by a reputable overnight delivery service. Any notice may be given by email or facsimile, provided that a signed written original is sent by one of the foregoing methods within twenty-four (24) hours thereafter.

Unless a Party provides written notice to the other Party of a change of address, each Party's address of record for notices shall be the address provided by it on the signature page hereto.

**And here is a Notice clause that takes a different approach to when notice is deemed received:**

NOTICES. Except as otherwise expressly provided in this Vendor Agreement, all notices or demands shall be in writing, and shall be sent (a) by courier or in person with signed receipt, (b) by nationally recognized overnight delivery service, prepaid, with signature required or (c) by email (with confirmation of transmission), and in each case shall be sent to the other party at its address set forth in the Program Terms or to such other address or email address designated from time to time in accordance with this Section. Notices are deemed received upon actual receipt or refusal of delivery.

Strict compliance with Notice provisions is important whenever time is of the essence for the communication in question. If, for example, a party wants to accuse the other party of breach and commence a cure period with a view toward trying to terminate an agreement, strict compliance with the Notice requirements is required to “start the clock.” Overnight delivery to the correct person at the correct address is almost always a safe approach.

## Notice of Non-Renewal

The same is true if a party wants to give timely notice of its intent to “non-renew” a contract that renews annually or on some other cycle. If the non-renewing party sends notice by email instead of sending a required mailing or overnight delivery, the contract in question will auto-renew.

## Address Updating

In addition to sending notices correctly, it is equally important to ensure you are receiving notices correctly. If official notices under a commercial agreement are going to the wrong place because you moved and communicated this incorrectly, you are still “deemed” to have received them and you are out of luck if important communications were missed.

## Address Updating

When your company changes its mailing address, it is not sufficient to casually mail out generic change of address letters to everyone the company does business with using whatever addresses you think might work.

Providing an effective “Notice of Address Change” under a commercial agreement almost always requires strict compliance with the Notice provision itself. Notice provisions vary widely and may require that notice be sent to the Chief Executive Officer, the Chief Financial Officer or to the General Counsel, and possibly to more than one such person at entirely different addresses.

**Force Majeure**

Force Majeure is Latin for “superior force.” Force Majeure clauses spell out when and the extent to which a party’s performance is excused temporarily if it becomes unable to perform its obligations due to events beyond its reasonable control, such as fire, flooding, war, civil unrest, natural disaster, or other specified events.

As with other common contract provisions that all start to look the same from one agreement to another, subtle variations can have significant unexpected implications, including potentially trapping a party for too long in an uncertain relationship and with uncertain remedies.

## Here is a very basic example:

Force Majeure. Neither Company nor Reseller shall be liable for any delay or failure in performance arising out of acts or events beyond its reasonable control, including, but not limited to, fires, labor disputes, embargoes, impacts to or loss of cellular or other wireless coverage, requirements imposed by government regulation, civil or military authorities, judicial decisions, acts of God, or by the public enemy.

- (i) the force majeure occurrence cannot have been caused by the non-performing party through its negligence or poor planning,
  - (ii) the non-performing party has a duty to use commercially reasonable efforts to mitigate,
  - and (iii) the other party has the right to terminate after ninety days.
- Among other things, this clause makes it clear, consistent with much of the case law, that the non-performing party is not excused simply because performance turns out to be more burdensome or difficult than anticipated.

## Mutual Suspension of Performance

A buyer that would otherwise be burdened with ongoing payment obligations or other performance commitments might also add a mutual suspension of performance clause like the following at the end of the above example:

“During any period of delayed or suspended performance hereunder, the other party’s performance obligations shall also be suspended and that party shall be entitled to a refund of any fees paid by it covering the period of the other party’s nonperformance.”

**Entire Agreement/Integration/Merger**

“Entire Agreement,” “Integration,” and “Merger” are three terms used for the same type of clause that essentially says “this is the parties’ entire agreement.”

Here is a typical clause:

The Client acknowledges the Client has read, understands, and agrees to be bound by this Agreement and further agrees it is a complete and exclusive statement of agreement between the parties which supersedes all proposals, oral or written, relating to the subject matter of this Agreement.



This language should always be a reminder to consider (and ask others if necessary) whether there are any RFP (Request for Proposals) responses, side letters, email communications, oral assurances, or other sources of representations about the product, service or other expected or promised attributes of performance that should be incorporated into the document. Otherwise, this clause renders them unenforceable.

## **Legal Expenses/Legal Fees**

Legal Expenses or Legal Fees clauses are not found in every agreement, but any party that believes it will generally be on the correct side of the law and the facts might consider regularly including something along the following lines in its agreements:

The substantially prevailing Party in any action arising out of or related to this Agreement is entitled to reimbursement of its reasonable lawyers' fees and expenses resulting from the action.

A prevailing party clause substantially increases the financial risks to any party that might consider breaching an agreement opportunistically. Being reminded of the clause, such a party will have to think twice about breaching to force new concessions or to leave the other party in favor of a lower cost provider of similar services.

Legal Expenses or Legal Fees clauses are not found in every agreement, but any party that believes it will generally be on the correct side of the law and the facts might consider regularly including something along the following lines in its agreements:

The threat of a potential attorneys' fee award gives the party with "clean hands" substantial leverage in any negotiations before or during litigation.

**Survival**

Survival clauses spell out which provisions of a contract remain in force despite the contract's termination. These would normally include the following types of clauses:

- Intellectual Property
- Confidentiality
- Representations and Warranties
- Effects of Termination
- Remedies for Breach
- Disclaimers and Limitations of Liability
- Indemnification
- Governing Law
- Venue and Jurisdiction
- Legal Expenses

The following paragraphs of this Agreement shall survive termination: 5, 6, 7(a), 8, 10, 12 and 13.

More elaborate Survival clauses sometimes contain potentially helpful “catch all” language and may also deal with outstanding payment obligations and similar matters, along the following lines:



More elaborate Survival clauses sometimes contain potentially helpful “catch all” language and may also deal with outstanding payment obligations and similar matters, along the following lines:

Notwithstanding the expiration or termination of this Agreement for any reason, (a) any provision of this Agreement that imposes or contemplates continuing obligations on a party shall survive the expiration or termination of this Agreement for any reason, including without limitation, the rights and duties of the parties under Sections 2, 6, 9, 13 and 14; and (b) all undisputed fees due and payable hereunder through the termination date in accordance with Section 4 shall be paid within thirty (30) days of the termination date.

Although disputes involving Survival clauses seem to be rare, it is always a good drafting exercise to make a check by all provisions in an agreement that should survive its termination and make sure they make it into the list of surviving clauses.

**Authority**

Authority clauses are often repetitive of similar statements found under clauses captioned Representations and Warranties and suffer from somewhat flawed logic, but they are nonetheless common and potentially valuable in the event of certain types of disputes.

**Here is a typical Authority clause:**

Each of the parties represents and warrants to the other that the execution and delivery of this Agreement and the performance of the obligations under this Agreement have been duly authorized by all requisite action of the governing body of the party, if any, and that the person executing this Agreement is fully authorized to bind that party.

The somewhat flawed logic in such an assurance is that the person signing on behalf of a particular company could be lying, in which case the company would likely seek to disavow the contract as unauthorized.

Each party to an agreement should always take reasonable steps to ensure that the person signing for the other party does in fact hold the proper title or role to bind that party to the agreement and to make the Authority representations and warranties enforceable against that party as its duly authorized officer owner or agent.

# Counterparts

"Counterparts" is a fancy word that means the parties may sign more than one copy of the same document or even separated signature pages. This language was particularly helpful when it was common for parties to fax signed signature pages to each other.

**Here is a typical clause:**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

Notwithstanding the presence of a Counterparts clause in an agreement, once the necessary signatures have been obtained, including by electronically swapping signed signature pages, it is critical that one of the parties take responsibility for providing itself and the other party with identical versions of the entire agreement, with all required signature pages and all required exhibits, schedules, and attachments.

When parties simply swap signature pages without taking steps to assemble final, complete, fully executed (signed by both parties) copies of the agreement, there is a substantial risk that one or both parties is likely to be completely unable later to accurately confirm that both parties actually signed and exactly what they signed. This is a common and potentially costly mistake that is easily avoided with minimum effort, particularly with the use of electronic document signing platforms.

**Signature Block**

**There are at least two points worth making about the Signature Block.**

First, as noted just above, it is surprising how often parties have difficulty finding their signed copies of agreements. Sometimes in the excitement of closing a deal, one party or the other fails to get a fully executed copy of an agreement or fails to properly file it away in a place where it can later be located.

**There are at least two points worth making about the Signature Block.**

Second, with respect to any important contract being signed by a subsidiary of a larger company, consider requiring the parent company also to be a party to the agreement. This can provide added insurance that the other party will perform and, if not, that you will be able to look to the more substantial assets of the parent to satisfy any damages available under the contract. This is an issue that needs to be identified earlier than at the signing stage, since large companies rarely move quickly to sign anything.

# Implementation

## Tracking

When dealing with lots of contracts, it is important to establish

- (i) a spreadsheet, database or other system for organizing and tracking key information about a company's contracts,
- (ii) and (ii) a “tickler” system to provide timely alerts of auto-renewals and other deadlines.

## Tracking

The contract tracking system should capture and organize the following types of information for each agreement so key information about each contract (and groups of contracts) can be quickly and easily obtained without having to retrieve and read individual contracts repeatedly for the same information:

- Counterparty Name
- Counterparty Address
- Contract Title/Name
- Type of Agreement
- Effective Date
- Expiration Date
- Notice Period Required to Cancel or Non-Renew

## Tracking

The contract tracking system should capture and organize the following types of information for each agreement so key information about each contract (and groups of contracts) can be quickly and easily obtained without having to retrieve and read individual contracts repeatedly for the same information:

- Next Notice Date
- Contract Amount(s)
- Internal Department
- Internal Legal Contact/Employee
- Miscellaneous Notes
- Limitation of Liabilities
- Insurance Requirements
- Assignability

## Tracking

A tickler system can be as simple as an entry in standard appointment software or it can be just one of many features within a fully integrated contract management software platform. Whatever system is used, it is important to ensure that the proper individuals receive timely notice of any performance deadlines, deadlines for non-renewing, contract expiration dates and deadlines for exercising options to extend.

## Contract Management Technology

In recent years, numerous contract management software platforms have been developed and launched to handle a range of tasks relating to contracts. These systems boast varying functions and features, including automatically reviewing contracts, highlighting issues and suggesting language changes, facilitating red-lining and version control during negotiations, managing contract approval and signing, providing indexed and searchable storage repositories, and alerting contract administrators of renewal notice dates and performance deadlines.

## Contract Management Technology

As potentially useful as these systems are, they are relatively expensive and probably most suitable in the following types of circumstances:

Companies with high volumes of contracts.

Business activities prone to disputes, where reliably retaining every edited version of each agreement showing marked changes and editing notes would reduce those risks. Examples might include contracts involving construction and development, intellectual property licensing, joint ventures and mergers and acquisitions.

## Contract Management Technology

As potentially useful as these systems are, they are relatively expensive and probably most suitable in the following types of circumstances:

Other circumstances where technology-assisted contract reviewing and contract administration features would be important to offset risks of mistakes and missteps due to poor contract drafting skills or weak internal administrative capabilities.

## Contract Management Technology

As potentially useful as these systems are, they are relatively expensive and probably most suitable in the following types of circumstances:

Testing one or more of these platforms on a trial basis would be the best way to determine the extent to which one might warrant the additional expense by providing drafting or administrative efficiencies, creating a more reliable record of contract negotiations, or otherwise reducing risks of drafting or administrative missteps.

## Performance

Once a contract is signed, entered into a database and tickler system, and filed, the next important step is ensuring that both parties perform. In order to avoid disputes and to receive the benefits of your bargain, it is important to watch your own performance as well as the other party's.

### Managing Your Own Contract Performance Problems

If you are unable to meet your obligations under an agreement, the best course is to get a signed waiver or modification from the other party as soon as possible.

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### Managing Your Own Contract Performance Problems

In situations where even a temporary waiver or minor modifications of your commitments is not enough, you should either exercise any termination rights you have under the agreement or negotiate a termination or major modification.

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### Managing Your Own Contract Performance Problems

Any time a contract dispute could be looming, consider consulting competent counsel without delay. Unlike cheese or wine, legal problems rarely improve with age.

## Performance

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### Managing Your Own Contract Performance Problems

Acknowledging one's own contract performance problems quickly and, where appropriate, looking for the best possible exit, might allow the other party to mitigate its damages. Acting quickly and in good faith also reduces or eliminates arguments by the other party that, in bad faith, you strung it along with false representations, knowingly hid serious problems, or caused it to futilely invest additional resources to its detriment.

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### Managing Your Own Contract Performance Problems

conduct that is dishonest or not consistent with the commercial standards of the industry might result in otherwise difficult to obtain punitive damages or awards of costs and legal fees on top of other successfully proven damages.

So when your own performance is the problem, fix it, get a waiver, get a modification, or seek a negotiated termination of the agreement if that is the best path for cutting both parties' losses. But do not do anything that will allow the other party to characterize you as dishonest, deceitful, or otherwise morally reprehensible.

## Performance

### Managing The Other Party's Contract Performance Problems

On the other hand, if it is the other party who appears unable to perform, this also cannot be ignored. Another party's poor performance should not be permitted to continue without either

- (i) a mutually signed written waiver acknowledging the performance shortcomings and providing for corrective actions within a stated timeframe,
- or (ii) written notice to the other party that it is in breach and that the breach must be cured within any stated cure period or rights of termination might be exercised.

## Performance

### Early Intervention

Although these are awkward communications that can strain relationships, non-performance issues rarely work themselves out. Without intervention and, left uncorrected, they often lead to bigger and more troubling problems. Early intervention conducted in a non-antagonistic manner is usually best, even when the issues are tough for both parties to acknowledge.

Missing an opportunity to document non-performance or to set rights of termination into motion often represents a painful lost opportunity, after which the parties' rights and obligations may become clouded, less certain, and more costly to resolve.

## Performance

### Tactical Termination or Renegotiation

It is also worth noting that another party's performance shortcomings sometimes provide a perfect opportunity to terminate an agreement for tactical reasons – perhaps a pivot away from an unprofitable business line, signing a deal with a more promising business partner for similar services, or just simply getting out of a bad agreement.

When value still exists in a relationship despite another party's shortcomings, another tactical possibility is to force a renegotiation of the contract. In these cases, review the markups exchanged during negotiations and look for the highest value concessions to try to force on the other party in exchange for a waiver of the performance shortcomings or a modification of the performance obligations.

## Performance

### Acting in Good Faith

It can be tempting sometimes in business to see tactical advantages in terminating an agreement based on inflated or poorly substantiated allegations of poor performance. Most jurisdictions recognize an implied duty of good faith and fair dealing in commercial contracts.

Claiming a clearly immaterial breach as justification for termination when the agreement really only allows for termination for material breaches could very well be found to violate this implied covenant.

Breach of contract claims, therefore, whether based on performance issues or other alleged violations, should be provable and made in good faith. Terminating an agreement for spurious reasons that will not stand up in court could backfire.

## Performance

### Deal Evolution

Sometimes business deals evolve over time beyond the parameters of what was originally negotiated. Be alert for this. Once you are operating beyond the “four corners” of your agreement, it becomes more difficult to pin down each party’s rights and responsibilities.

This can have particularly serious consequences. For example, where new intellectual property rights are created, or where new potential liabilities to third parties could arise. Contractual arrangements should not be permitted to evolve materially outside the requirements of the written document.

## Performance

### Deal Evolution

The parties should enter into as many written amendments or addendums as necessary to keep up with any such changes. Although it is best to not “open up” the entire agreement every time something immaterial changes, it is a good idea to consider whether other aspects of the business relationship have changed also or should change.



Thank You