

Drafting the Contract Concepts — A Summary Chart

The following chart summarizes the material in Chapters 9 through 13. Reading it does not replace reading the chapters. Use it as a handy, quick reference tool.

Contract Concept	Drafting Considerations
Representations and Warranties—Chapter 9	<ul style="list-style-type: none"> ■ If representing the maker, draft the representations and warranties narrowly, and qualify them as much as possible. ■ If representing the recipient, draft the representations and warranties broadly and with as few qualifications as possible. ■ Representations and warranties may deal with past or the present facts, but not with future “facts.” ■ Draft in the active voice, unless the focus is on the action rather than the actor. Then, use the passive voice.
Covenants—Chapter 10	<ul style="list-style-type: none"> ■ Determine the appropriate degree of obligation, using qualifiers as appropriate. ■ Use the <i>who</i>, <i>what</i>, <i>when</i>, <i>where</i>, <i>why</i>, <i>how</i>, and <i>how much</i> tests to help determine a provision’s substance. ■ Use <i>shall</i> to signal a covenant, except if the sentence has a negative subject. Then use <i>may</i>.
Conditions to an Obligation—Chapter 11	<ul style="list-style-type: none"> ■ If your client must satisfy the condition, draft it so that the client can satisfy it easily. If the other party must satisfy the condition, consider how difficult it should be in the context of the transaction. ■ Outside a conditions article, <ul style="list-style-type: none"> ➢ use <i>must</i> and include an interpretive provision; or ➢ state that a provision is a condition; ➢ state the consequences of the failure to satisfy the condition; ➢ use some combination of these methods. ■ Inside a conditions article, use <i>must</i> with another verb in one of three ways: <ul style="list-style-type: none"> ➢ <i>must + be</i>, to indicate a fact that must exist on the closing date. ➢ <i>must + have + the past tense of a verb</i>, to indicate something that must have happened after the signing date but no later than the closing date.

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	<ul style="list-style-type: none"> ➤ <i>must have been</i> + the <i>past tense of a verb</i>, this is the passive version of the preceding use of <i>must</i> and should be used when the issue is the action, not the actor. ■ Real-world note: Most firms continue to use <i>shall</i> instead of <i>must</i> within conditions articles.
Discretionary Authority— Chapter 12	<ul style="list-style-type: none"> ■ Consider how broad or narrow the grant of discretionary authority should be and to what degree it will be fettered. Will your client have the discretionary authority (a broad grant) or will the other party have the discretionary authority (a narrow grant)? ■ Use <i>may</i> to signal discretionary authority. ■ If a party may exercise discretionary authority only on the satisfaction of a condition, consider how difficult it should be to satisfy it. Again, consider whether it is your client or the other party who must satisfy the condition.
Declarations—Chapter 12	<ul style="list-style-type: none"> ■ Draft declarations in the present tense. Any condition to a declaration should also be drafted in the present tense.
Proper Use of <i>Shall</i> — Chapter 13	<ul style="list-style-type: none"> ■ If a party does not precede <i>shall</i>, <i>shall</i> is always wrong. ■ If a party precedes <i>shall</i>, <i>shall</i> is generally correct with three exceptions: <ul style="list-style-type: none"> ➤ If <i>shall</i> is coupled with the verb <i>to be</i>, <i>shall</i> is wrong. ➤ If <i>shall</i> is coupled with the verb <i>to have</i>, <i>shall</i> is wrong. ➤ If <i>shall</i> is in a clause that establishes a condition or other circumstance, <i>shall</i> is wrong (clue words: <i>when, if, as, in the event of, that, and provided</i>).
Proper Use of <i>Will</i> — Chapter 13	<p>Use <i>will</i> in the following circumstances:</p> <ul style="list-style-type: none"> ■ If a provision states a party's opinion, determination, or belief about the future. ■ When a provision states that a party or a nonparty ("Person A") will take action in the future and Person A is not the contract party promising to perform a covenant or to whom discretionary authority has been granted. ■ If a provision contrasts the present with the future or the past with the future. ■ If a provision warrants future performance of a good or a future state of facts.