

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	<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	<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	<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>; ➤ state that a provision is a condition; ➤ state the consequences of the condition; ➤ include an interpretive provision; or ➤ 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.

continued on next page >

Contract Concept	Drafting Considerations
	<ul style="list-style-type: none"> ➤ <i>must + have + the past tense of a verb</i>, to indicate something that someone must have cause to happen after the signing date but no later than the closing date. ➤ <i>must have been + the past tense of a verb</i>, to indicate that the issue is the action, not the actor; this is the passive version of the preceding use of <i>must</i>. ■ Real-world note: Most firms continue to use <i>shall</i> instead of <i>must</i> within condition articles.
Discretionary Authority	<ul style="list-style-type: none"> ■ Consider how broad or narrow the grant of discretionary authority should be. 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 upon 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 that must satisfy the condition.
Declarations	<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. ■ Determine whether the declaration needs to be kicked into action and if so, draft the associated provision.
Proper Use of <i>Shall</i>	<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 circumstance, <i>shall</i> is wrong (clue words include <i>when</i>, <i>if</i>, <i>in the event of</i>, and <i>that</i>).
Proper Use of <i>Will</i>	<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. ■ If a provision is a covenant that includes a statement about the future. ■ If a provision is a right that includes a statement about the future. ■ If a provision grants a party discretionary authority with respect to some future event. ■ If a declaration includes a statement about intent.