

THE FRONT OF THE CONTRACT

- 1.1** The body of the contract—that which the parties are agreeing to—is preceded by the title, the introductory clause, any recitals, and the lead-in, as well as a cover sheet and related features, as appropriate. (Regarding “front-loading”—the practice of pulling select provisions out of the body of a commercial contract and placing them at the top of the contract—see 3.57.)

THE TITLE

- 1.2** The title of a contract is generally placed at the top center of the first page, in all capital letters (see sample 1). (Nothing would be gained by using, instead or in addition, another form of emphasis.) The title should simply state, without using a definite or indefinite article, the kind of agreement involved—whether it’s an employment agreement, option agreement, or some other kind of agreement. Don’t include party names in the title.
- 1.3** Be concise. For example, don’t use a title that looks at a given transaction from different perspectives, as in *AGREEMENT OF PURCHASE AND SALE*—it goes without saying that a purchase necessarily also entails a sale.
- 1.4** And don’t feel obligated to track the terminology of state statutes. For example, statutes in Nevada, New York, and some other states use the term “plan of merger.” As a result, it’s commonplace for drafters to give merger agreements a title that includes, in some manner, the phrase “plan of merger.” But if you were to file in Nevada articles of merger that are accompanied by, or refer to, a merger agreement bearing the title *MERGER AGREEMENT* rather than, say, the more cumbersome *AGREEMENT AND PLAN OF MERGER*,

the Nevada Secretary of State wouldn't reject the articles of merger for using improper terminology—they're sensibly enough of the view that there's no particular significance to the term "plan of merger," and that if a merger agreement contains the information that the statute requires of a plan of merger, it doesn't matter what the agreement's called. The same would apply with respect to a certificate of merger filed in New York, and it's appropriate to assume that other states would be equally rational.

- 1.5 Similarly, don't let use of the term "plan of exchange" in state statutes governing share exchanges dissuade you from using the title *SHARE EXCHANGE AGREEMENT* rather than *SHARE EXCHANGE AGREEMENT AND PLAN OF EXCHANGE* or something similar.
- 1.6 But don't be too concise: giving a contract the title *PURCHASE AGREEMENT* leaves one wondering what's being sold—assets, securities, or something else? And don't use just *AGREEMENT* unless you can't come up with a more informative title, either because the contract in question is unusual or because it contains a heterogeneous mix of provisions.
- 1.7 Most contracts use the word *agreement* in the title rather than *contract*, perhaps because *agreement* sounds more genteel. By tradition, contracts stating the terms of bonds, debentures, or trusts often use the term *indenture*; see 12.148.
- 1.8 If a company routinely enters into a given kind of contract, it might want to supplement the title, for instance by adding additional information in parentheses immediately below the title. For example, it might be helpful to specify beneath the title *TRADEMARK LICENSE AGREEMENT* which mark is being licensed, and in which territory. (Alternatively, such information could be frontloaded; see 3.57.)
- 1.9 Regarding the title to give amendments or amended and restated contracts, see 17.5.

THE INTRODUCTORY CLAUSE

- 1.10 The title is followed by the introductory clause, which states the type of agreement involved, the date of the agreement, and the parties to the agreement (see sample 1).

SAMPLE 1 ■ TITLE AND INTRODUCTORY CLAUSE**ASSET PURCHASE AGREEMENT**

This asset purchase agreement is dated May 3, 2008, and is between HASTINGS WASTE MANAGEMENT, INC., a Delaware corporation ("**Hastings**"), JORVIK RECYCLING SYSTEMS, LTD., a New York corporation ("**Hastings Sub 1**"), ROGER HASTINGS, an individual ("**Mr. Hastings**"; together with Hastings and Hastings Sub 1, the "**Hastings Parties**"), and JARROW HOLDINGS LLC, a Delaware limited liability company ("**Jarrow**").

Format

- 1.11** The introductory clause in sample 1 is formatted as a single paragraph; that's the general practice in the U.S.
- 1.12** The elements of the introductory clause could instead be broken up, or "tabulated," so that each stands by itself. (Regarding tabulation of enumerated clauses, see 3.25.) In some countries, particularly England and other Commonwealth nations, the preference is for tabulating the introductory clause. This manual doesn't recommend that usage—it takes up more space without making the introductory clause appreciably easier to read.

Reference to the Type of Agreement

- 1.13** Begin the introductory clause by referring again to the type of agreement involved, repeating the wording of the title. And begin the reference with *This*, with a view to structuring the introductory clause as a sentence, thereby making it easier to read than it would otherwise be.
- 1.14** Use all lowercase letters for the introductory clause's reference to the type of agreement involved. It would be distracting to emphasize it with all capital letters, given that the title, which occurs immediately above, is in all capital letters (see 1.2). It would also be inappropriate to use initial capitals in this reference or any other reference to a particular contract, wherever in a contract that reference is located: a contract shouldn't be treated like the title of a book or movie, and the words *merger agreement* in a reference to "the merger agreement between Acme and Dynaco" are no more deserving of initial capitals than is the word *letter* in "Here's the letter that Aunt Mildred sent me." Initial capitals would be appropriate if the reference

to an agreement were a defined term—if, for example, “the merger agreement between Acme and Dynaco” were given the defined term *the Merger Agreement*. But the introductory-clause reference to the type of agreement involved doesn’t constitute a defined term. (And it shouldn’t constitute the definition of a defined term either; see 1.84.)

Verb

- 1.15** If it’s to be a sentence, the introductory clause needs a verb. Among the various options, *is dated* is simpler and clearer than *is made* or *is entered into* and is doubly clearer and simpler than *is made and entered into*. (Regarding redundant synonyms, see 16.11.)

Date

WHETHER TO INCLUDE

- 1.16** You can date a contract in one of two ways: you can state the date in the introductory clause or you can instead have those signing the contract date their signatures and have the contract state that it will be effective when the last party signs (see 4.5–7).
- 1.17** Stating the date in the introductory clause is the more usual way of dating a contract, but dating the signatures makes sense in three contexts.
- 1.18** First, although it’s commonplace for one or more parties to sign a contract on a date other than the date stated in the introductory clause (see 1.25), that could be confusing if the discrepancy were more than a few days (see 1.28).
- 1.19** Second, for compliance purposes a company might decide to use dated signatures in some or all of its contracts so as to preclude use of an introductory-clause date that is other than the date the last party signed. For example, a company or its outside auditors might require that all the company’s sales contracts include dated signatures, the aim being to help ensure that revenue is recognized in the appropriate quarter. Dating signatures doesn’t preclude use of fake dates, but outright falsehood would be a riskier proposition than disingenuous reliance on a misleading date in the introductory clause.
- 1.20** Third, if your contracts are signed electronically (see 4.44), each signature would automatically be dated.

- 1.21** Avoid including a date in the introductory clause *and* dating signatures, as that would invite confusion. If you date your signatures but appreciate the ease of having a date to refer to on the first page of the contract, you might want to consider stamping at the top of the contract the date that it became effective. (An alternative would be to place the signature blocks on the first page; see 3.62.)

FUNCTION

- 1.22** The date stated in the introductory clause is presumed to be the date that the parties signed it, and by extension it's the date that the contract is effective, unless the contract states otherwise or unless parol evidence ultimately indicates otherwise. Nothing is gained by defining the date in the introductory clause as *the Effective Date*—it's simplest to refer throughout the contract to *the date of this agreement*. (See also 1.32.)

FORMAT

- 1.23** For dates, use the format *October 24, 2008*, rather than the format *this 24th day of October, 2008*, which is old-fashioned and long-winded.
- 1.24** Don't use purely numerical dates, as they're not appropriate in formal writing and can cause confusion, given the different international conventions for expressing dates numerically.

DIFFERENT FROM DATE OF SIGNING DUE TO SIGNING LOGISTICS

- 1.25** The introductory-clause date may be the date that the contract is actually signed by the parties, but often one or more parties sign the contract before or after that date.
- 1.26** This timing discrepancy is often due to logistics. For example, if the closing date for a transaction slips by a day or two from the scheduled date, the parties might agree that it's not worth changing the date in each of the deal documents, or that it wouldn't be feasible to do so. And a party to a contract might not get around to signing it until a day or two after the date in the introductory clause, or might find it more convenient to sign it a day or two before the date in the introductory clause.

- 1.27** The conventional way of reflecting that one or more parties signed a contract on a date other than the date stated in the introductory clause is to make the introductory-clause date an *as of* date. But this practice is simply a matter of professional courtesy. It's observed haphazardly, in that some drafters always use *as of* dates, regardless of when the contract was signed, and others never use them. If the date that a contract was actually signed were to become an issue, it's unlikely that using or failing to use an *as of* date would be dispositive.
- 1.28** If it appears that it might take more than a few days for all the parties to sign a given contract, it would be best not to include a date in the introductory clause and to instead have the parties date their signatures (see 4.5–7). Using as the date in the introductory clause the date that the contract was distributed or the date the first party signed it would be misleading, as the contract wouldn't be effective until it had been signed by all the parties. You could use a blank date in the introductory clause, with the idea of filling it in once all the parties had signed, but that would invite confusion.

DIFFERENT FROM DATE OF SIGNING DUE TO TIMING OF PERFORMANCE

- 1.29** Drafters sometimes use in the introductory clause a date other than the date of signing if the contract provides for an arrangement that won't come into effect until sometime after the date of signing. For example, Acme and Jones might sign Jones's employment agreement on March 1 even though Jones won't start working for Acme until May 1. A drafter might address this by using Jones's start date as the date in the introductory clause. To signal that it's not the date of signing, a drafter might refer to that date as an *as of* date (see 1.27) or as *the effective date* (see 1.22) or might use the phrase *dated for reference* or *dated for reference purposes only*.
- 1.30** And to capture past performance, drafters sometimes use in the introductory clause a date earlier than the date of signing. For example, in commercial contexts it's commonplace for the parties to reach an informal understanding on terms, then start the process of reflecting those terms in a contract. Due to deal complexity or need for approvals, that process can sometimes be protracted, leading the parties to agree that one or both sides should start

performing before the contract has been signed. Once it has been signed, the parties might use in the introductory clause a date that precedes any performance, so as to paper over the fact that performance had occurred without a contract. To indicate that it's not the date of signing, a drafter might use one of the signals noted in 1.29.

- 1.31** But using in the introductory clause a date in the future to reflect delayed performance or a date in the past to encompass pre-contractual performance would be misleading, as the contract would in fact be effective once the parties had signed it (see 1.22). Such dating would also obscure the actual time frame of the transaction.
- 1.32** In such situations, use instead in the introductory clause the date of signing and structure the applicable provisions in the body of the contract to reflect the date of performance. (It would be best not to use the term *effective date* for the start date of performance, as the contract would be effective when it's been signed by all parties. Consider using instead a term such as *start date*.) It might also be helpful to describe in the recitals any aspect of the transaction time frame that's out of the ordinary. If the parties want to make the date of performance stand out, that information could be frontloaded; see 3.57.

BROADER IMPLICATIONS

- 1.33** The date a contract is entered into can have legal implications beyond the parties' rights and obligations under that contract. It can affect a company's tax exposure, someone's rights under another contract, or any number of other matters. Consequently, playing games with the date one gives a contract—including by means of a date in the introductory clause—can give rise to civil or criminal liability. Witness how backdating of sales contracts and option grants has in recent years given rise to corporate scandals.

“Between” Versus “Among”

- 1.34** In all cases, use *between* as the preposition in the introductory clause rather than *among* or a couplet (see 16.11) such as *by and between*.
- 1.35** It's commonly held that whereas one speaks of a contract *between* two parties, the correct preposition to use in the

case of a contract involving more than two parties is *among*. But according to *The Oxford English Dictionary*, not only can you use *between* with more than two parties, it's in fact preferable that you use *between* instead of *among*.

- 1.36** That said, whether you use *between* or *among* or a couplet such as *by and between* has no effect on meaning. The great *between* versus *among* debate is, in the context of the introductory clause, a nonissue.

Identifying the Parties

- 1.37** In the introductory clause, identify each individual who is a party by his or her full name, and identify each legal-entity party by the full name under which it was registered in its jurisdiction of organization. Include the designation of the form of entity, whether domestic (*Inc.*, *LLC*) or foreign (*B.V.*, *GmbH*). If it would help to avoid confusion, refer also to any other name by which a given party is known or was previously known.
- 1.38** To help them stand out, state party names in all capitals.
- 1.39** No purpose would be served by enumerating the parties.
- 1.40** When describing a party in the introductory clause, don't tack on *including its affiliates and direct and indirect subsidiaries* or comparable language. The affiliates and subsidiaries aren't party to the contract and so wouldn't be bound by any of its provisions.

Parties with a Limited Role

- 1.41** You can be party to a contract solely with respect to select provisions. For example, in an acquisition, the buyer's parent might be party to the acquisition agreement solely to guarantee the buyer's obligations or solely to undertake to pay a termination fee in certain circumstances. It's appropriate to reflect a party's limited role not only in that party's signature block (see 4.32) but also in the introductory clause, by stating, before the party's name, between offsetting commas, *solely with respect to [specified provisions]*. It's best for a party with a limited role to come last in the introductory clause.
- 1.42** Bear in mind that a party with a limited role might well also be subject to provisions with respect to governing law, notices, and related matters, whether or not that's specified in the introductory clause.

Referring to Lists of Parties

- 1.43** The parties to a contract can be sufficiently numerous that it would be impractical to list them in the introductory clause. That's often the case with loan agreements and securities purchase agreements.
- 1.44** In the case of a loan agreement, one alternative would be to refer to the lenders as follows: *the financial institutions listed as Lenders on the signature pages of this agreement*. That would serve to distinguish the lenders from the other parties whose names appear on the signature pages.
- 1.45** Another alternative would be to refer to the lenders as *the financial institutions listed on schedule A*. This would be preferable if in addition to identifying the parties in question one wants to provide information, such as addresses and other contact information, that would be out of place on the signature pages. Because the list in question would be on a schedule, one wouldn't need to refer to the parties in question as being *listed as Lenders*.

Describing the Parties

CORE INFORMATION

- 1.46** After the name of each legal-entity party, state its jurisdiction of organization and what kind of entity it is. Be concise: use, for example, *a Delaware corporation* rather than *a corporation organized under the laws of the State of Delaware*. With non-U.S. entities, make sure you refer accurately to the kind of legal entity.
- 1.47** After the name of each party that's an individual, state that he or she is an individual—*John Doe, an individual*.
- 1.48** To distinguish a legal-entity party from any other entity bearing the same name, the only information you'd need is its jurisdiction of organization. Consequently, stating the address of a legal-entity party in the introductory clause would serve only to clutter it up. If the parties need to know each other's addresses for purposes of sending notices, the notices provision would be the place to state them.
- 1.49** By contrast with legal-entity parties, the simplest way to distinguish a party that's an individual from any other individual bearing the same name would be to state that party's address in the introductory clause. (In doing so, write out in full the name of any U.S. state rather than using a United States Postal Service abbreviation, but include

the ZIP code.) But if the contract contains a notices provision, you should omit that party's address from the introductory clause and instead state it in the notices provision, along with the other party addresses—you wouldn't want to state the same address twice in one contract.

1.50 In many jurisdictions outside the U.S., when a legal entity is formed it's given a registration number. If knowing that number would make it easier to determine the history and status of a given entity, it would be appropriate to include the number in the introductory clause. By contrast, the address of any party's registered office would, like any other entity address, be superfluous in the introductory clause. And in any given jurisdiction outside the U.S. it may be customary to use another form of information to distinguish individuals, such as a national identification number.

1.51 If a party is serving some administrative function or otherwise acting on behalf of one or more individuals or entities, that should be stated in the introductory clause:

- ACME BANK, N.A., as collateral agent for the Secured Parties (in that capacity, the "Collateral Agent")
- JOHN DOE, as Shareholders' Representative

1.52 Any individual or entity that's wearing two hats in a transaction should be mentioned twice in the introductory clause, once in each capacity:

- ACME CAPITAL CORPORATION (in its individual capacity and not as Administrative Agent, "Acme Capital")
- ACME CAPITAL CORPORATION, as administrative agent for the Lenders (in that capacity, the "Administrative Agent")

1.53 It's unnecessary to state that someone is acting solely in a given capacity—that use of *solely* would constitute rhetorical emphasis (see 16.29).

PERFORMANCE BY A DIVISION

1.54 If a company's performance under a contract would be by a division of that company, you should make that clear. You could do so in the recitals, or you could do so in the intro-

ductory clause by supplementing the core information for that party: *ACME CORPORATION, a Delaware corporation acting through its Widgets division ("Acme")*. Because the defined-term parenthetical comes just after the reference to the division, a reader might assume that the defined term relates only to the division, not the company. But in the context, that would be an unlikely reading. And using the name of the company, not the division, in the signature block for that party would eliminate any possibility of confusion; see 4.24.

- 1.55** Don't make the division itself party to the contract—a division lacks the capacity to enter into a legally enforceable contract, so conceivably the company could subsequently claim that the contract isn't enforceable. And don't say that the company *is represented by* the division, as that phrase is generally used to refer to an individual.

INCIDENTAL INFORMATION

- 1.56** Consider the following introductory clause:

This merger agreement is dated September 18, 2008, and is between DARIUS TECHNOLOGIES, INC., a California corporation ("Parent"), SWORDFISH ACQUISITION, INC., a California corporation ~~and a wholly owned subsidiary of parent~~ ("Sub"), TROMBONE SOFTWARE, INC., a Delaware corporation ("Target"), ~~and the stockholders of Target,~~ ~~namely~~ XYLER XAVIER, an individual ("Xavier"), YOLANTA YOUNG, an individual ("Young"), and ZENEDINE ZELIG, an individual ("Zelig"; together with Xavier and Young, the "Stockholders").

- 1.57** The strikethrough text constitutes incidental information. Once you start including incidental information in the introductory clause, such as information regarding relationships among the parties and what role a party has in a given transaction, it's hard to know when to stop, and the introductory clause can become cluttered with such information. Putting all such information in the recitals would as a general matter make it more accessible to the reader.
- 1.58** But as in the example in 1.56, using common nouns as defined terms for party names (see 1.72) and using defined terms to refer to parties collectively (see 1.75) can

convey efficiently to the reader the essence of incidental information in the recitals.

EXTRANEOUS INFORMATION

1.59 Each of the following assertions is extraneous and shouldn't be included in the introductory clause:

- that a party is represented by a duly authorized representative address this instead in a representation (but see 4.26)
- that a party is duly organized and validly existing address this instead in a representation
- that the agreement states the binding agreement of the parties address this instead in a representation
- that the parties intend to be legally bound omit (except see 1.124)—it's not a condition to enforceability of a contract that the parties have, or express, an intent to be legally bound

Defined Terms for Party Names

1.60 Defined terms are discussed in chapter 5, but some guidelines regarding their use in the introductory clause are discussed in 1.61–87.

CREATING AND USING A DEFINED TERM FOR A PARTY NAME

1.61 If in a contract you use a shortened form of a party's name—as is almost invariably the case—make that shortened name a defined term and define it in the introductory clause, even if not defining it wouldn't present any risk of confusion. (See the second bullet point in 1.51 for an example of a party reference that doesn't require a shortened form of party name.)

1.62 To create a defined term for a party name, place the defined term in parentheses after the party name. The defined term, excluding *the*, if it's used (see 1.73), should be in quotation marks and in bold for emphasis. (So as to avoid distracting the reader, only in the samples in this manual are defined terms stated in bold in this manner.) Don't include any

introductory text in the parentheses, such as *hereinafter referred to as*—it's unnecessary. (Regarding conventions for defining terms, see chapter 5.)

- 1.63** When creating a defined term for the name of an entity, place the defined-term parentheses after the jurisdiction reference (see 1.46): *Excelsior Corporation, a Delaware corporation* (“*Excelsior*”). For purposes of an integrated definition, a term should be defined after the phrase representing its definition (see 5.34). This would suggest that the parenthetical should come after *Excelsior Corporation*, as a party name constitutes a noun phrase unto itself and can therefore appropriately be regarded as the definition. But it doesn't seem awkward to place the defined-term parenthetical after *a Delaware corporation*, because *Excelsior Corporation* and *a Delaware corporation* are both noun phrases referring to the same thing. And placing it there presents one advantage: if when defining the term for a party name you take the opportunity to create additional defined terms within the same set of parentheses (if, in other words, you “stack” two or more definitions; see 5.49), placing the parentheses after the party name would make the jurisdiction reference seem like an awkward afterthought; see sample 1.
- 1.64** Just as it would be a mistake to tack on *including its affiliates and direct and indirect subsidiaries* or similar language when describing a party, as the affiliates and subsidiaries aren't party to the contract (see 1.40), it would be a mistake to add such language to the defined-term parenthetical—(*including its affiliates and subsidiaries, “Acme”*).
- 1.65** Also, avoid indicating in a defined-term parenthetical that the defined term includes that party's successors. (One often sees this with parties acting on someone's behalf; see 1.51.) The contract provisions governing succession should make it clear that any successor would step into the shoes of the predecessor.
- 1.66** Don't use all capitals or some other form of emphasis for party-name defined terms throughout a contract—it makes the contract harder to read.

THE TWO KINDS OF DEFINED TERM FOR A PARTY NAME

- 1.67** When selecting the defined term for a party name, you have a choice between basing it on the party's name (see 1.69–1.70) or using a common noun such as *the Company* or

the Shareholder (see 1.72). As a general matter, basing defined terms on party names would make a contract slightly more accessible to the reader. But common nouns would likely be the more suitable choice in the following contexts:

- if the parties play traditional, clearly defined roles, such as lender and borrower, or landlord and tenant
- when the contract focuses on a single entity, as is the case with a limited-liability-company operating agreement
- when the identity of the signatories is as yet unknown

1.68 In some contexts it would make sense to use a mix of the two approaches. Consider, for example, the template for a commercial agreement, such as a software license agreement, that a given company would use repeatedly. Because the company would be party to each such transaction, it would be appropriate, as a matter of readability and corporate identity, to use in the template a defined term based on its name. By contrast, the party on the other side of the transaction would change with each transaction, so the only sensible choice would be to use a common noun such as *the Licensee* as the defined term for the other party.

USING DEFINED TERMS BASED ON PARTY NAMES

1.69 If a party is an individual, you could use a defined term based on that individual's last name or, if the contract refers to two or more individuals with the same last name, his or her first name. If you find that the last name on its own is too stark, you could add an appropriate honorific (*Mr.*, *Ms.*, *Dr.*). And using an honorific might help the reader distinguish legal-entity parties from parties who are individuals.

1.70 In the case of companies, select a word or two from the name (Sargasso Realty Holdings, Inc. could be referred to as *Sargasso Realty* or simply *Sargasso*). Alternatively, use an initialism, such as *SRH* for Sargasso Realty Holdings, Inc.

1.71 In the interest of readability, use whenever possible a defined term consisting of one or more words from an entity's name rather than an initialism. But using an initialism for a party name can be the best option in the following contexts:

- when other parties to the contract include affiliates with similar names
- when the party's name includes that initialism
- when the party is commonly known by that initialism
- when the nature of the party's name precludes something more imaginative—it would, for example, be challenging to find a non-initialism alternative to *BNY* as a name-based defined term for The Bank of New York Company, Inc.

USING A COMMON NOUN AS THE DEFINED TERM FOR A PARTY NAME

- 1.72** If you wish to use a common noun as the defined term for a party name, you have a choice between a noun that refers to the form of legal entity of the party (*Company*, *Corporation*) and one that indicates the role the party is playing in the transaction (*Seller*, *Employer*, *Lender*). To avoid confusion, don't use paired defined terms that differ only in their final syllable (*Grantee–Grantor*, *Licensee–Licensor*, *Mortgagee–Mortgagor*).
- 1.73** If a party name consists of a common noun, using the definite article—*the Purchaser* rather than *Purchaser*—results in prose that's marginally less stilted. In any event, be consistent throughout a contract in using or not using the definite article.
- 1.74** Don't give alternative defined terms for a party, as in "*Widgetco*" or *the "Company"* or as in "*Widgetco*," *sometimes referred to herein as the "Company."* Doing so serves no purpose and places on the reader the burden of remembering that *Widgetco* and *the Company* are one and the same.

DEFINED TERMS USED TO REFER TO PARTIES COLLECTIVELY

- 1.75** Often it's helpful to use a collective defined term such as *the Stockholders*; sample 1 contains the collective defined term *Hastings Parties*. Define such collective defined terms either in the singular or the plural, but not both; see 5.6.
- 1.76** But don't use the defined term *the Parties*. It ostensibly spares the drafter from having to refer throughout a contract to *the parties to this agreement* (or *the parties hereto*),

but one can simply refer to *the parties*, because such a reference couldn't conceivably be construed to mean the parties to some other agreement.

1.77 A more nuanced argument advanced in favor of using the defined term *the Parties* relates to contract provisions specifying that no rights or remedies are being conferred on anyone other than the parties. Such provisions are commonplace.

1.78 To preclude nonparties from being able to enforce any rights or remedies under a contract—something that would be an issue only if the contract contemplates intended third-party beneficiaries—you should make it clear in such provisions that only the parties who sign the contract have enforceable rights and remedies. If you refer simply to *the parties*, a court might hold that that term includes persons other than the signatories, namely intended third-party beneficiaries.

1.79 It has been suggested that you could address this issue by creating the defined term *the Parties* and defining it to mean only the signatories. But a better alternative would be to name each party in any such provision. Another would be to refer to *the signatories*—that would be more concise than listing all the parties, particularly if there are more than two.

1.80 Creating the defined term *the Parties* would accomplish the same goal as naming the parties or referring to *the signatories*, but in the process would force the drafter to use throughout the contract the defined term *the Parties*, even though outside that one context the defined term would serve no purpose. Given the toll that defined terms take on readability—see 5.74—in this case the cost of using the defined term *the Parties* clearly outweighs the limited benefit, particularly as valid alternatives are available.

“PARTY OF THE FIRST PART” AND “PARTY OF THE SECOND PART”

1.81 Parties to a contract were once divided into classes, or “parts,” with one party being identified in the introductory clause as *party of the first part*, the other as *party of the second part*. (Anyone other than a party to the contract was referred to as a *third party*; see 12.386.) Throughout the contract the parties were referred to by those labels. This practice had nothing to recommend it—not only was it cumbersome, it

also invited confusion and litigation, given how easy it was to inadvertently transpose the labels.

- 1.82** In the U.S. this usage survives, barely, mostly in the occasional real-estate contract. Rather more common is use of *party of the first part* and *party of the second part* in the introductory clause but nowhere else—the parties are also given conventional defined terms in the introductory clause, and it is those defined terms that are used throughout the contract. This usage seems particularly pointless, but it lives on; it appears to be slightly more prevalent in Commonwealth countries than in the United States.
- 1.83** It has been suggested that if one or both sides to a transaction consist of more than one party, using *party of the first part* and *party of the second part* in the introductory clause would be an efficient way to group the parties according to which side of the transaction they're on. But information regarding party relationships is best placed in the recitals; see 1.57. Furthermore, using common nouns as defined terms for party names and using defined terms to refer to parties collectively can convey efficiently to the reader the essence of party relationships; see 1.58.

The Defined Term “This Agreement”

- 1.84** It's common practice to create in the introductory clause the defined term *this Agreement*. (Analogous defined terms include *this Amendment*—see 17.6—and *this Assignment*.) But this defined term is unnecessary: the definite article *this* in references to *this agreement* makes it clear which agreement is being referred to. The title (see 1.6) and introductory clause (see 1.13) of any given contract might describe that contract as being a particular kind of agreement, such as an agency agreement or a franchise agreement, but that wouldn't be an impediment to referring thereafter to *this agreement* without having made it a defined term.
- 1.85** And for the same reason that one should use lowercase letters in any reference to an agreement (see 1.14), it's preferable not to use a capital *A* in references to *this agreement*.
- 1.86** The term *this agreement*, as used in any given provision, could in theory be construed to refer to some part of a contract—a section, a subsection, a sentence, an enumerated

clause—rather than the entire contract. But when you consider it in practical terms, this notion becomes implausible. The likelihood of a party's arguing that *this agreement* refers to a part of the whole, and the likelihood of a court's accepting this argument, is utterly remote.

- 1.87** Sometimes the defined term *this Agreement* is defined to include any attachments to the contract. That doesn't render the defined term any more useful—having a contract provision mention an attachment is sufficient to make that attachment part of the contract, without a need to say so explicitly. (See also 12.125.)

RECITALS

- 1.88** Most contracts of any length or complexity contain, following the title and before the lead-in, a group of paragraphs known as the “recitals.” The recitals in sample 2, which accompany the introductory clause in sample 1, reflect the recommended format for recitals.

Function

- 1.89** The recitals to a contract state any background information that the parties regard as relevant. One can distinguish three kinds of recital:
- 1.90** *Context recitals:* These describe the circumstances leading up to the parties entering into the contract. Typical context recitals include recitals describing the business operated by one or more parties (see the first recital in sample 2) and recitals describing transactions entered into previously by one or more of the parties (see the second, fourth, and fifth recitals in sample 2).
- 1.91** *Purpose recitals:* These indicate succinctly and in broad terms what the parties wish to accomplish (see the third recital in sample 2). They shouldn't be used to shoehorn deal terms into the recitals.
- 1.92** *Simultaneous-transaction recitals:* If a contract is part of a broader transaction, these describe the other elements of that transaction that are taking place concurrently with the signing of the contract (see the sixth recital in sample 2).
- 1.93** A complex agreement might have a dozen or more recitals. If a transaction is sufficiently straightforward that you can

SAMPLE 2 ■ RECITALS

Hastings Sub 1 is a wholly owned subsidiary of Hastings. Hastings Sub 1 owns and operates collection and hauling operations, transfer stations, landfills, and recycling facilities in the State of New York (that business, the “**Business**”). Mr. Hastings is chief executive officer of Hastings and Hastings Sub 1.

Jarrow, the Hastings Parties, Hastings Newton, Inc., a New York corporation and a wholly owned subsidiary of Hastings (“**Hastings Sub 2**”), and Raven Fund Ltd., a Bahamas corporation (“**Raven**”), are party to a letter of intent dated February 23, 2008, concerning sale to Jarrow of assets of Hastings Sub 1 and Hastings Sub 2 (the “**Letter of Intent**”).

Hastings Sub 1 wishes to sell to one or more persons designated by Jarrow, and Jarrow wishes to cause those Persons to purchase from Hastings Sub 1, certain assets of Hastings Sub 1.

Raven asserts a security interest in all assets owned by Hastings Sub 1, and under the restructuring agreement dated September 25, 2007, between Raven, Hastings, and certain Affiliates of Hastings, Hastings Sub 1 may not sell any of its assets to Jarrow without Raven’s prior written approval.

Jarrow, the Hastings Parties, Raven, and Bratton Friedman LLP, as escrow agent, are party to a deposit agreement dated March 2, 2007 (the “**Deposit Escrow Agreement**”), in accordance with which Jarrow paid to the escrow agent on October 3, 2007, a good-faith deposit of \$500,000 toward the purchase price of the assets.

Concurrently with its entry into this agreement, Hastings, Hastings Sub 2, and Jarrow are entering into an asset purchase agreement providing for purchase by Jarrow of certain assets of Hastings Sub 2.

The parties therefore agree as follows:

dispense with recitals, you should do so. It’s unnecessary to provide recitals that simply state, for instance, that Doe wants to sell some shares to Holdings and that Holdings wants to purchase those shares from Doe, given that this information could readily be discerned from the contract title and the initial provisions of the body of the contract.

1.94 Because courts regard recitals as subordinate to the body of the contract, don’t address in any detail in the recitals the rights and obligations of the parties. For instance, state in the body of an asset purchase agreement rather than in the recitals that the buyer may designate an affiliated company to complete the purchase.

1.95 But courts do use recitals to help determine the intent of the parties. For instance, having the parties to an equipment lease state in a recital that they intend their agreement to be a true lease could help avoid a court’s holding that the transaction is a disguised conditional sale subject to article 9 of the UCC. (See also 1.126.)

Giving the Recitals a Heading

- 1.96** Many drafters give recitals a heading.
- 1.97** A traditional choice of heading is *WITNESSETH*. It's archaic and premised on the mistaken assumption that the word is a command in the imperative mood; it's in fact the remnant of a longer phrase along the lines of *This document witnesseth that . . .*
- 1.98** Other possible headings are *RECITALS* or *BACKGROUND*. These represent an improvement over *WITNESSETH*, but recitals don't need a heading. For one thing, one can readily identify recitals based on their content and their position after the introductory clause and before the lead-in. Also, the legal effect of recitals depends on their content rather than on how they are introduced. And if one is giving the recitals a heading, consistency would suggest giving a heading to the body of the contract—a problematic notion; see 1.130—not to mention to the introductory clause and the concluding clause. For these reasons, the recitals in sample 2 don't include a heading.
- 1.99** On the other hand, if it would make those who are going to use a contract feel more comfortable, don't hesitate to give the recitals a heading.

Enumeration

- 1.100** There's no need to number or letter each recital. Doing so would only serve a purpose if in the contract you needed to refer to a particular recital, and that shouldn't be necessary.

Use Simple Narrative Prose

- 1.101** The recitals serve a storytelling function, so they're the one part of a contract that calls for simple narrative prose.
- 1.102** Consistent with that, don't begin recitals with *WHEREAS*, as this meaning of *whereas*—"in view of the fact that," "seeing that"—is archaic.
- 1.103** And use a conventional paragraph structure for recitals, with complete sentences rather than clauses ending in semicolons. Don't feel constrained to limit yourself to one sentence per recital.

Using “In Accordance with this Agreement” in Purpose Recitals

- 1.104** Sometimes a purpose recital will state that the parties propose to engage in certain activities “in accordance with this agreement.” Use of this phrase is a little incongruous—a purpose recital should say in general terms what the parties have in mind, but if you make a purpose recital subject to the terms of the agreement, it no longer constitutes a general statement of intent. In effect, you’re simply saying in the recital, unnecessarily, that the parties want to do what the contract provides.
- 1.105** And expressing in purpose recitals a general intent that isn’t tied to the terms of the contract poses no risk. No rational court could ever say that a general expression of intent trumps the specific terms that it introduces. But obviously a purpose recital shouldn’t state a purpose that’s broader than what the contract seeks to accomplish (not counting any conditions, termination provisions, and other restrictions).
- 1.106** So don’t use in a purpose recital *in accordance with this agreement* or anything comparable, such as *upon the terms and subject to the conditions set forth in this agreement*.

Incorporation by Reference

- 1.107** Contracts sometimes state, either in the lead-in (as part of a traditional recital of consideration; see 1.117) or in a separate section in the body of the contract, that the recitals are “incorporated by reference” into the contract. Such statements are in response to case law stating that recitals don’t constitute part of the contract, or rather don’t form part of the substantive provisions. See, e.g., *Jones Apparel Group, Inc. v. Polo Ralph Lauren Corp.*, 791 N.Y.S.2d 409, 410 (N.Y. App. Div. 2005).
- 1.108** The notion of incorporating recitals by reference is presumably intended to bring within the scope of the body of the contract any substantive provisions that are contained in the recitals. But recitals shouldn’t contain substantive provisions. If a set of recitals contains substantive provisions, it would be rash to rely on incorporation by reference to clear up any resulting uncertainties. A far better fix would be to remove the substantive pro-

visions from the recitals. (Regarding incorporation by reference generally, see 12.125.)

“True and Correct”

- 1.109** Provisions that seek to incorporate recitals by reference (see 1.107) often also state that the recitals are *true and correct*. Drafters who use this archaic couplet presumably seek to turn into representations any facts stated in the recitals, so that a party would potentially have a remedy if any of those facts turn out to have been inaccurate.
- 1.110** But as a general matter, recitals convey background information of the sort that shouldn’t be at issue; nothing would be gained by converting such information into representations. And if any party is uncertain of the accuracy of facts stated in the recitals, that party would do well to have the one or more parties with knowledge of those facts make representations as to those facts—such representations would constitute a stronger foundation for any claim that those facts were inaccurate.

Defined Terms in the Recitals

- 1.111** Defining terms in the recitals is unobjectionable, but don’t unduly clutter with definitions what should be a succinct introduction to the contract.
- 1.112** On the other hand, don’t use in the recitals defined terms that aren’t defined until later in the contract, as that’s inconsistent with the notion of using the recitals to introduce the reader to the transaction. In particular, if you use in the recitals a defined term that doesn’t have an obvious meaning—such as *the Business* or *the Merger*—and don’t define it until later in the contract, you make the recitals harder to read by forcing the reader to go in search of the definition of that defined term.

THE LEAD-IN

Wording

- 1.113** The lead-in comes immediately before the body of the contract and serves to introduce it. If a contract doesn’t contain recitals, the lead-in should say *The parties agree as follows*. If the contract does contain recitals, the lead-in should say *The parties therefore agree as follows* (see sample 2).

- 1.114 Don't use *hereby* in the lead-in. *Hereby* is a feature of language of performance, and the lead-in constitutes language of agreement (see 2.9), not language of performance.
- 1.115 You could refer to the parties by name in the lead-in, but doing so would serve no purpose and would unnecessarily lengthen the lead-in, particularly in a contract with more than two parties. (Regarding this issue in the context of the concluding clause, see 4.4.)
- 1.116 Sometimes when the body of the contract would otherwise consist of a single simple provision, that provision is wrapped into the lead-in, with the concluding clause following. Straightforward amendments can be handled in this manner; see 17.7.

Consideration

- 1.117 In many contracts, the lead-in refers, in a "recital of consideration," to consideration for the promises made by the parties to the contract. Traditional recitals of consideration can take many forms; the following lead-in contains a relatively full-blown example:

NOW, THEREFORE, in consideration of the premises and the mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto covenant and agree as follows.

- 1.118 Traditional recitals of consideration raise a number of issues of legal usage. Just as you should dispense with *WITNESSETH* (see 1.97) and *WHEREAS* (see 1.102), you should also refrain from beginning a lead-in with the archaic *NOW, THEREFORE*. And *in consideration of the premises* is simply an obscure way of saying "therefore." Furthermore, references to the value and sufficiency of consideration are outdated: with the rise of the "bargain test of consideration" reflected in the *Restatement (Second) of Contracts*, the focus of judges has shifted from the substance of the exchange to the bargaining process.
- 1.119 But of greater interest is whether recitals of consideration serve any purpose, or rather enough of a purpose to justify their presence.
- 1.120 The ostensible function of a recital of consideration is to render enforceable a contract that would otherwise

be held unenforceable due to lack of consideration. But in this respect the utility of recitals of consideration is very circumscribed—it's well established that a recital of consideration cannot transform into valid consideration something that cannot be consideration, and a false recital of consideration cannot create consideration where there was none. See 1-3 *Murray on Contracts* § 61.

- 1.121** The *Restatement (Second) of Contracts* and the *Restatement (Third) of Suretyship* suggest, however, that for purposes of option contracts and guaranties, a false recital of consideration would support a promise. You could conclude from this that whereas in most contexts a traditional recital of consideration wouldn't be effective to create consideration where none exists, it nevertheless would be prudent to retain it so that it could be relied on in those contexts where a false recital of consideration would support a promise.
- 1.122** There are three problems with this reasoning. First, the approach of the *Restatements* not only elevates form over substance but also would have the law recognize a sham.
- 1.123** Second, the case law doesn't uniformly reflect the *Restatements'* approach. In the context of options, some courts have found a false recital to be legally effective—for one, the Supreme Court of Texas; see *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 110 (Tex. 2004). But others have held the opposite. And in the context of guaranties, the reporter's notes to section 88 of the *Restatement (Second) of Contracts* cite only one decision of uncertain significance.
- 1.124** And third, some states have adopted statutes specifying that certain contracts no longer need to be supported by consideration. For example, section 5 of the New York General Obligations Law provides that an option contract doesn't need to be supported by consideration, and under the Uniform Written Obligations Act, enacted only in Pennsylvania, any written release or promise will not be unenforceable for lack of consideration if the signer states that it intends to be legally bound. (Unless there is some question whether a contract governed by Pennsylvania law is supported by consideration, there would be no point in including such a statement in a contract; see 1.59.)
- 1.125** So the traditional recital of consideration will, in most contracts, be ineffective to remedy a lack of consideration, whereas in the case of option contracts and guaranties a

recital of consideration either cannot be counted on to remedy a lack of consideration (except in those few states that have adopted the *Restatements'* approach) or would be unnecessary because the requirement for consideration has been dispensed with by statute.

- 1.126** But that doesn't mean that recitals have no bearing on consideration. Since recitals can shed light on the parties' intent (see 1.95), courts give some weight to recitals when determining whether a promise is supported by consideration. But that's not an argument for retaining the traditional recital of consideration. Given that the parties to a contract, and their lawyers, invariably give no thought to the traditional recital of consideration, a court should disregard it when determining whether a promise was supported by consideration.
- 1.127** On those rare occasions when it's not otherwise readily apparent whether a contract is supported by consideration, don't rely on a traditional recital of consideration. Instead, ensure that the recitals contain meaningful information pertaining to consideration. For example, if Acme Financing were proposing to lend money to Widgetco on the strength of a guaranty from Doe, one might state in the recitals of the guaranty that it's a condition to Acme's lending the money that Doe provide Acme with the guaranty and that Doe, as the principal shareholder of Widgetco, has an interest in Acme's providing financing to Widgetco.
- 1.128** If a transaction seems that it might be lacking consideration, your best bet would be to seek to remedy any lack of consideration. How best to do that might depend on the jurisdiction and the nature of the transaction. If, for instance, a landowner proposes granting to a potential purchaser, without receiving any payment in return, an option to purchase the property, in a given jurisdiction it might be advisable to arrange for the optionholder to pay a fee for the option. It would be best not to try resolving this issue by making the contract one under seal; see 4.37.
- 1.129** Because the traditional recital of consideration is ineffectual, you should omit it. Stripping the traditional recital of consideration from the lead-in makes the lead-in much more readable. Once you eliminate the remaining archaisms and redundancies, what remains is the recommended form of lead-in.

Giving a Heading to the Body of the Contract

- 1.130** Some drafters place the heading *AGREEMENT* after the lead-in and before the body of the contract, but it's counterproductive to do so. For one thing, this heading is unhelpful, in that it suggests that the word *agreement* doesn't refer to the entire contract (see 1.86). But more generally, there would seem little point in introducing the body of the contract twice, by means of the lead-in and a heading. It's best to dispense with any heading.

**COVER SHEET, TABLE OF CONTENTS, AND INDEX
OF DEFINED TERMS**

- 1.131** If a contract is more than about 20 pages long, provide from the first draft onward a table of contents that lists page numbers for articles and sections and lists all attachments. With word-processing software, creating a table of contents and keeping it up to date is a straightforward process.
- 1.132** Place the table of contents before the contract proper, and use a cover sheet so that the first page of the table of contents is not the first page of the contract. The cover sheet generally contains an edited-down and spread-out version of the introductory clause.
- 1.133** If the contract contains an index of defined terms (see 5.64), place it immediately after the table of contents.