"Bauhaus Drafting" Tips and Tricks for Modern English language contracts

Dr. *Keith E. Wilder*, LL.M.

Topic 7: Endgame Provisions

All good things must come to an end, including contract relationships. Therefore, it is essential for lawyers to determine, map out and make provisions for how the agreement between the parties will conclude. While many lawyers refer to these clauses as "termination provisions", this term of art is only properly associated with default and, is therefore too narrow. That is why it is preferable to use the term "endgame provisions", in order to capture the whole spectrum of terminal contractual stipulations, both big and small, delineated within the contract. In this article we will explore typical types of endgame provisions found in English language contracts, highlight what purpose they serve and demonstrate how best to draft them in order to achieve a clear, concise and legally appropriate remedy.

When discussing endgame provisions, it is normal to break them down into 'friendly' and 'unfriendly' termination provisions. In both cases, however, the core duties on the part of the lawyer remain the same, namely: defining fault, providing suitable remedies, articulating any continuing obligations, and establishing exit strategies.

At the most basic level, the first step of drafting endgame provisions is to go through each section of the contract and ask yourself "What if?": What if this duty is breached? What if a condition is not satisfied? What if a representation is not true? Normally if a party does not do what they are supposed to do, there is a remedy available at law.

Regarding 'friendly' termination, sometimes the parties may choose to articulate the general remedy in the document. Although this is not required under the common law, it is still often done simply to put 3rd parties on notice of the contracting parties' intentions:

For Example:
The term of this Agreement continue until terminated by X and Y by mutual consent or by judicial decree of a court of competent jurisdiction.

Or

*Term. This Agreement is effective as of the Effective Date and continues through ***, unless terminated earlier.*

Additionally, the parties are free to articulate their own remedies, either more broadly or narrowly defined than the general legal remedy at law, often in the form of an indemnity clause.

Regarding 'unfriendly' termination, this is typically the more challenging side of the equation for attorney's counselling their clients. Firstly, clients do not always wish to address these sorts of provisions, as they deal with the consequences of the agreement failing. Secondly, clients realize that these sorts of provisions are harder and more uncomfortable to negotiate. Nevertheless, the negative "What if?" questions must also be addressed and incorporated into the document. While there are a myriad of 'unfriendly' termination events, some of the most common are insolvency, failure to satisfy a condition, breach of warranty, misrepresentation, breach of a duty and *force majeure* events.

After all the "What if?" possibilities are thought through to their logical legal conclusion, the next step is to formulate a series of "if/then" propositions: "**If** X event (good or bad) happens, **then** this is the consequence". When drafting this into a legal context within a contract, normally it is composed of two elements: 1) defaults/events of default and 2) remedies.

A default is defined as an event that allows a party to exercise its remedies. Additionally, one often runs across the phrase *"in event of default…"* when reviewing English language contracts. It is important to distinguish between a 'default' and an 'event of default'. A 'default' occurs at the moment either one party or the other party fails to perform an obligation under the contract. Often though, rather than immediately seeking legal redress, the parties allow for a 'notice period' or 'grace period' in order to give the party in default a chance to cure the failed performance on their own. If, however, the party fails to cure within the notice or grace period, the failure to perform the obligation then transmutes into an 'event of default' and the other party can then exercise whatever legal remedy is available at law or provided for in the contract itself:

Example 1:

If X orY defaults in the performance of any of its material obligations hereunder, The non-defaulting party may terminate this Agreement upon sixty days prior written notice to the defaulting party describing the default with particularity and referring to appropriate provisions of this Agreement, unless within such sixty day period, the default is cured or unless the defaulting party provides evidence satisfactory to the other party of prompt action taken by the defaulting party which may be reasonably expected to cure the default within such period.

Example 2:

Cure Period. If Tenant fails to make full payment as due on uly 1 or January 1, Tenant has until September 1 and February 1, respectively to make full payment. If Tenant fails to make full payment during the relevant cure period, Landlord is entitled to withdraw from the Escrow Account an amount not to exceed the unpaid balance. Tenant is not default for non-payment of rent unless and until the cure period expires.

Often, the drafter can employ the typical language of "occurred" or "continuing":

If an event of default has occurred and is continuing, X is entitled to enforce this Guarantee Agreement for the benefit of Y.

Once the default is defined (or notice/grace period delineated and event of default established) it is then necessary to determine the remedy. A remedy is defined as the means of enforcing a right or preventing or redressing a wrong".[1] Contract remedies include damages, contract termination and indemnification. Again, if not specifically articulated, it can be assumed that the parties wish the normal remedy at law to apply. These remedies can then either be drafted into the contract or not. Alternatively, the parties are able to devise their own broader or narrowly tailored remedy, again often in the form of an indemnity clause. These tailored provisions can be further narrowed by providing different remedies for different types of termination. For example, if a condition is not satisfied, multiple remedies could be provided, each depending on the reason for why it was not satisfied.

As far as drafting default provisions into the contract, there are two common structures. One is to list the offending events in one section and the consequences in another. Alternatively, many lawyers choose to create a separate section for each parties potential defaults, and often using a third section for defaults that could be committed by either party. After these sections are created, the lawyer then drafts subsections, the first subsection stating what qualifies as a default, and the second articulating what the consequences of a default are. While various endgame provisions can be found scattered throughout the contract, normally tied to conditions that create a 'walk away' right if the condition is not met, it is most common to have the endgame provisions appear at the end of a contract in one section, typically titled "Termination", "Dissolution and Termination" or "Term and Termination."

By maintaining awareness of the "end game provisions" in English language contracts, particularly in regards to adequately articulate default/event of default provisions, as well as assuring that the proper remedy is in place; the attentive attorney can assure that, regardless of how the contract comes to an end - 'friendly' or 'unfriendly' - they have done their best to protect their clients' interests.

[1] Black's Law Dictionary, 9th Ed., p. 1407.