

COPYRIGHT CONTRACT MANUAL

Produced by Kenya Copyright Board (KECOBO) for advisory purposes only

This manual is intended to explain the basic essential elements of contracts to non-lawyers (artists and creatives) working in the Copyright sector. It is hoped that this will empower them to exploit their Copyright. For that reason, use of legal terms is avoided or where such terms are used every effort has been made to explain them. This manual focuses on some of the most important clauses and their effect in a contract.

CONTRACT LAW - A BACKGROUND

But at the outset, let me discuss the two concepts central to the contract law. These are freedom of contract and privity of contract. I wish to address some fallacies that result from ignorance of the real legal position. One fallacy is that the government or the law ought to prescribe specific terms of a contract. This goes against the concept of freedom of contract. The concept states that subject to what the law explicitly or implicitly outlaws, there are no limits to what parties can agree in a contract. This is a public policy issue that the law only sets regulatory boundaries.

The second fallacy is that parties outside a contract can intervene in a contractual relation. This is not the case. The principle of privity of contract provides that only parties to a contract can sue and act upon it.

These two concepts must be kept in mind if one is to effectively utilize the template contracts attached hereafter.

CONTRACT - MINIMUM STANDARDS

A contract is an agreement between parties usually for a commercial purpose or for **other** mutually beneficial purpose. As such a contract is the result of negotiation (discussion, give and take) and agreement between parties. Agreement indicates consensus of interests and mind.

There are certain legal requirements therefore that must be fulfilled for an agreement to become a valid contract enforceable by law. These are the absolute minimum standards absence of which would spoil an agreement. They include;-

1. All parties must have capacity to enter into the contract.
2. An offer must be made by one party and accepted by the other.
3. Legal consideration must be exchanged.

4. The parties must be in mutual agreement.
5. The parties must intend to create a legal relationship.
6. The contract's object and purpose must be legal.
7. The contract must be capable of being performed.

In relation to capacity to contract, the parties must be competent to contract. They must have the ability to know and understand the terms of contract. Hence a minor or a person of sound mind must be represented by a person who has that capacity and legal power. An organization which is created by law is considered 'a person' and hence has capacity to contract through its chief officers. For individuals, one must be an adult of sound mind and not bankrupt to have legal capacity.

Language and form are of no consequence for a contract. Consequently, a binding contract can result from an oral agreement as long as the parties intended to create a legal relation and all the other essentials are present. Where the law requires a contract to be written it must be signed by both parties. Copyright contracts fall within this category. An agreement to undertake illegal acts is void for being against public policy.

CLAUSES IN A CONTRACT

NAMES AND DESCRIPTION OF PARTIES

The names, description and address of parties to a contract are basic components of a contract. The description must be sufficient enough to identify the parties to the contract. The parties generally bind heirs and successors in title in any contract to guard against uncertainty. Where a person is representing an organization, reference must be made to the authority to do so. If the person signing a contract is an agent of another, the contract must state so and document of appointment form part of the annexures e.g. a power of attorney.

Any wrong description of parties may therefore nullify a contract since it is not possible to have an agreement with a stranger under the concept of privity of contract.

RECITALS

Recitals usually start with the words 'whereas' or 'and whereas'. The purpose of the clause is to provide a background to the contract e.g. the intention of the parties and reason for the contract. All explanations can come under this provision. The clause serves an important purpose for any third party looking into the document especially during dispute resolution.

RIGHTS AND PROPERTY UNDER CONTRACT

It is important to define clearly the subject matter of the agreement. Where the subject matter is Intellectual Property (IP), the nature of the Intellectual Property must be clearly described. Where there is a transfer of a part of the rights granted, the part must be clearly demarcated. The nature of transfer of rights must also be clear, i.e. whether it is exclusive or non-exclusive. In cases of Intellectual Property registered in multiple jurisdictions, the territory should be defined. Since some IP rights are subject to renewal or expiry, the contract must take that into account. In the case of Copyright and confidential, which are rights not based on registration, information, the form in which they exist and assertion of ownership must be stated.

In cases where new IP is likely, the clause must address the question of its ownership i.e. whether it is shared by parties or reserved for one party

CONFIDENTIALITY

Apart from IP, certain information exchanged during negotiation and as part of contractual obligations is of huge value to the holders and competitors. The contracts must therefore have a provision to safeguard it from abuse and unauthorized dissemination. This is done through the confidentiality clause. The clause deals mainly with the obligations of the party receiving such information not to disclose the information to third parties including the consequences of any breach.

RIGHTS AND OBLIGATIONS OF PARTIES

A contract is generally the sharing of rights and obligations by parties and as such this clause is where the intention of the parties is best found. It follows usually that the rights of one party are obligation on the other party. This clause defines with greater detail how the IP shall be utilized e.g. for research, sublicensing, role of parties in litigation, payment of license fees and confidentiality issues.

CONSIDERATION

This is the amount that passes from one party to the other as benefit for performance of contract obligations. The clause on consideration must include the amount and the mode of payment. Consideration need not be limited to money but money is the most common form of consideration. Services and exchange of Intellectual Property information may be adequate consideration. The law does not offer guidance or limits to what is payable due to the concept of freedom of contract and privity of contract. Even then, there can be no binding contract if consideration or benefit is not provided for in a contract.

WARRANTIES AND INDEMNITIES CLAUSE

The warranty clause contains 'representations' by parties to each other. Representations are statements of respective positions and promises to each other at the date of contract. It may include title to the property subject of the contract. Any representation made cannot be changed later under a principle called 'estoppel' (prevented or stopped) hence parties are bound during the existence of the contract by them.

On the other hand, indemnity is the promise to make certain payment or take up any consequences if the warranties are not true and the party relying on them has suffers as a result.

MANNER OF TERMINATION

The contract being an agreement presupposes a possibility that it may not last forever. This clause therefore sets out the procedure of termination of the contract e.g. service of notice and the reasons that may lead to termination of a contractual relationship for it to be effective. The consequences of such termination on the information and property held on account of the contract can be defined under this provision. Usually non-performance and breach of contractual obligations are the main causes of terminations of contract. There is no legal limitation as to factors that may lead to termination of contracts.

Where a contract is breached and terminated, the aggrieved party can seek compensatory damages.

ARBITRATION

Litigation in court by way of civil suits is expensive or unaffordable. It is recommended that in case of a dispute arbitration should follow instead of a civil suit. The clause may provide a procedure of appointment of a person or persons knowledgeable in the area of the subject matter of the contract to save on time and costs.

TERM / DURATION

The length of the engagement must be clearly defined and also the process of disengagement. Some laws may impose terms into your contract in case it is not indicated. The term is set by parties based on what they consider appropriate for their business. Under Intellectual Property the only limit is that no agreement can be based on expired Intellectual Property rights.

SCHEDULE AND ANNEXES

Any documents or lists mentioned and marked at the main contract are found here. A contract without a referred schedule or annex is therefore incomplete. Any power of attorney or letter of authority to execute a contract could also form part of the schedules and annexes. Schedules and annexes is a good strategy to avoid overloading the contract.

CHOICE OF LAW

In a contract where the parties are from different countries, choice of law is important to avoid uncertainties during litigation. It is recommended that the law and place of dispute resolution preferably Kenyan law and courts to save on costs for a Kenyan party. It is also possible to choose another country's law and Kenyan courts and vice versa.

CONCLUSION

This manual is intended to show the choices and options available to parties in preparing a contract with reference to the manual. In short except for what is expressly objectionable to the law, what remains can form part of a contract. Even then beware also of provisions in a contract that create a burden to the other party as the courts may consider them unacceptable especially where one party is dominant to another.

CAVEAT

Take notice that the above document is not a substitute to legal advice.