

MATCHING THE PARTS OF SPEECH

- 6.84** As with autonomous definitions (see 6.45), in integrated definitions the part of speech of the defined term should match that of the definition. Mismatch occurs more with integrated definitions than with autonomous definitions.
- 6.85** Here's an example of such a mismatch: *At the Effective Time, Merger Sub will merge into Acme (the "Merger").* It's not clear what the definition is, because the preceding sentence uses the verb *merge* whereas the defined term is a noun. You can fix this by adding transition language before the defined term. In this case, revise the defined-term parenthetical to read as follows: *(the merger thus effected, the "Merger").* That makes the definition of *Merger* a combination of the preceding sentence and the transition language. But perhaps curing a particular mismatch is best accomplished by restructuring the provision or defining the term elsewhere.

WHICH TYPE OF DEFINITION TO USE

- 6.86** How to present a definition is in part a function of how long it is. If a definition is relatively succinct, it's probably more efficient to present it as an integrated definition rather than as an autonomous definition, to save space and avoid disrupting the reading process unnecessarily. The longer the definition, the more likely it is that it would be best to present it as an autonomous definition, to avoid clogging up the related provision. Another factor in determining which type of definition to use is whether the best place for a definition is "on site" or in a definition section, an issue discussed immediately below.

THE DEFINITION SECTION

- 6.87** A definition can be placed in a definition section, which lists autonomous definitions in alphabetical order by defined term. Use the heading *Definitions*, and not *Glossary*, which is less informative. In longer documents, the definition section can constitute an entire article, and in particularly lengthy contracts it can be many pages long. (Regarding language to introduce the autonomous definitions in a definition section, see 6.31.)

Versus Defining Terms On Site

- 6.88** Alternatively, you can create a defined term "on site" by placing the definition, in the form of an integrated or autonomous definition, with a provision that uses the related defined term. An on-site autonomous definition can simply be a sentence among others in a section or subsection, or it can be placed in a separate subsection, either on its own or with other autonomous definitions (see 6.33–.34). Either way, the autonomous definition should come right after the provision that uses the defined term—placing it before would likely puzzle readers (see 6.35).

- 6.89** Drafters have traditionally favored placing definitions in definition sections. That has the disadvantage of forcing any reader who encounters an unfamiliar defined term to turn to the definition section to read the definition of that term. From there, the reader might have to consult the definition of one or more other defined terms in the definition section before resuming reading. In a document with many, or complex, defined terms, this flipping back and forth can disrupt one's reading.
- 6.90** But the definition section serves a purpose, in that it reduces clutter that would otherwise be caused by defining on site a term that readers likely know the meaning of. So deciding which terms can be placed in a definition section involves assessing the extent to which they can be understood independently of their definition.
- 6.91** Readers can be counted on to know the meaning of initialisms of relevant government agencies (for example, in the United States, *the SEC* and *the IRS*), relevant statutes (for example, in the United States, *ERISA*), and a basic business term such as *GAAP*, meaning "generally accepted accounting principles."
- 6.92** Somewhat less inherently comprehensible are defined terms with definitions that can vary somewhat from transaction to transaction—defined terms such as *Affiliate*, *Lien*, *Government Authority*, *Business Day*, and *Subsidiary*. To know the exact meaning of such a defined term you would need to read the definition, but the defined term on its own gives a good general sense of its meaning. It's unlikely that your understanding of the provisions in which such a defined term occurs would be meaningfully compromised if you haven't yet read the definition.
- 6.93** At the other end of the spectrum are defined terms such as *Equity Infusion* or *Excess Insurance Proceeds*—defined terms with a definition that is unique to the transaction, so the defined term can't be understood without consulting the definition.
- 6.94** Define in the definition section terms in the first category (6.91) and second category (6.92), so they don't unnecessarily clutter up the text. Define on-site terms in the third category (6.93), so they're readily accessible to the reader.

Where to Place the Definition Section

- 6.95** The definition section has traditionally been placed at the beginning of the body of the contract. This is inconsistent with the notion that provisions that are more important should come first (see 4.84). Readers generally turn first to the deal provisions rather than slogging through the definitions, and those who tackle the definitions head-on would likely need to reread them when they encounter, often many pages later, the provisions using the defined terms.
- 6.96** If you pare the definition section down to terms that are inherently familiar, no justification remains for keeping it at the beginning of the body of the contract, since readers would need to refer to it only to fine-tune their understanding. You can safely move a pared-down definition

section toward the back of the contract, to the boilerplate. When purged of terms best defined on site, the definition section might be slight enough to consist of a single section rather than an entire article. In fact, it might be slight enough for you to dispense with a definition section entirely and define on site those few defined terms that would otherwise have been defined in the definition section.

- 6.97** It's best not to place the definition section in an attachment (see 5.101). Offering readers the convenience of being able to pull out the definition section and read it side by side with the rest of the contract is trivial compared with putting on site, with the relevant provisions, the definitions that readers would need to consult.

The Two-Column Definition Section

- 6.98** In contracts drafted in Commonwealth countries, the definition section is commonly presented in two columns, with the defined terms in the first column and the definitions in the second column. This manual recommends not using a two-column format for the definition section.
- 6.99** The rationale for the two-column format is that keeping the defined term apart from the rest of the definition makes it easier to scan through the defined terms and find the one you're looking for. (If you use a paragraph structure and the definition is more than one line long, the defined term will have text immediately below it.)
- 6.100** One version of the two-column format omits the definitional verb, making it implicit that *means* is the connection between the first column and the second column. But that precludes using other definitional verbs, including *refers to* (see 6.45).
- 6.101** If you use the definitional verb with the two-column format, whatever nominal advantage is presented by stating the defined term free of any surrounding text is offset by the awkwardness of chopping a sentence in two.
- 6.102** The two-column definition section is consistent with an approach to layout that places undue emphasis on breaking up text (see 4.73).

CROSS-REFERENCES TO DEFINITIONS

- 6.103** Cross-referencing in general is discussed in 4.100–.114, but it also applies to definitions.

The Index of Definitions

- 6.104** Definition sections have traditionally been used to provide, besides definitions, cross-references to sections where other terms are defined. But definition sections aren't suited to this task. The cross-references are rather cumbersome (the typical format is "*Material Permits*" *has the meaning given that term in section 3.4*). And because the cross-references are interspersed with autonomous definitions and occur throughout the definition section,

it's likely that any reader consulting the definition section to see where a particular term is defined would have to flip through some pages.

- 6.105** A more efficient vehicle for helping readers quickly find their way around definitions is an index of definitions that lists the defined terms in two columns in alphabetical order and indicates the page where the definition of each term is located. (A page number is more useful than a section number, because readers told the page on which a section occurs would be able to turn to it more quickly than they would if they were given just the section number. Also, sections routinely occupy more than one page.)
- 6.106** The conventional term for such indexes is "index of defined terms." But seeing as they don't state the page number of each page where a defined term is used, "index of definitions" is a more accurate term.
- 6.107** Place an index of definitions after the table of contents (see 2.217). If a contract is too short to warrant a table of contents, you can assume that it's also too short to warrant an index of definitions.
- 6.108** You could instead place an index of definitions at the end of a definition section and include only those terms defined on site. But such an index would be less accessible and less useful than a comprehensive index of definitions placed after the table of contents, so this option is perhaps best reserved for those times when you want to use an index of definitions even though the contract doesn't have a table of contents.
- 6.109** Generate an index of definitions using Microsoft Word's indexing feature. As with any word-processing function that uses field codes, ensuring that an index of definitions remains accurate through the drafting and negotiating process usually requires that one person retain control of the draft (see 4.113).

Referring to the Definition Section

- 6.110** If a definition section is located someplace other than at the beginning of the body of the contract (see 6.95), the first section of the contract sometimes states that all or some defined terms are defined in a specified section, namely the definition section. Such provisions run counter to the principle that more-important provisions should come before less-important provisions (see 4.84). And such a provision would serve little purpose if, as recommended in 6.91, the definition section contains only definitions of terms with inherently familiar meanings. Omit such provisions and instead include in longer contracts an index of definitions.

If a Defined Term Is Used Before It Is Defined

- 6.111** Convention has it that a defined term should be defined where it's first used, so the reader doesn't have to flip pages looking for the definition. But in contracts that follow that convention, sometimes a defined term is used upstream of the definition, perhaps because the first use of that defined term is an incidental one. And sometimes revisions to a contract result in a defined term being inserted upstream of its definition and it's not thought worthwhile to relocate the definition. In such situations it's

commonplace to add in parentheses, after the first use of the defined term, the unhelpfully imprecise *as defined below*, the more precise *as defined in section X*, or some variant.

- 6.112** The problem with this approach is that it assumes that readers start at the top of the contract and work their way methodically through to the end. Instead, it's likely that most readers skim through the text and focus on whichever provisions are of interest to them.
- 6.113** This has two implications. First, defining a term when it's first used doesn't necessarily help readers. Unless it makes more sense to define it in a definition section (see 6.91), define a term on site, right after the provision that makes the most extensive use of that defined term (see 6.88).
- 6.114** Second, parenthetical cross-references to where a term is defined are of little value. For readers jumping from one provision to another, it would be a matter of chance whether any such parentheticals happen to be of use. Also, it's tedious to have to check drafts to ensure that every defined term that precedes its definition is given a cross-reference the first time it's used. One could include many more such cross-reference parentheticals, but they would clog up the contract. Instead, in general drop such cross-references in favor of an index of definitions, if appropriate (see 6.104), using them only when, in the absence of an index of definitions, a defined term stranded in a far corner of the contract might have a reader wondering where it's defined.

USE DEFINED TERMS EFFICIENTLY

- 6.115** Don't create a defined term if you don't use it after having defined it. And usually it's not worthwhile to create a defined term if you use it only once or twice. Defined terms make prose harder to read, and creating a defined term adds clutter, so create a defined term only if the efficiencies it offers more than offset the drawbacks.
- 6.116** But a concept might be sufficiently complex that the only sensible course is to state it separately as an autonomous definition—even if it's only used once—rather than working it into a provision.
- 6.117** Also, if in revising a template contract for a transaction you delete all but one or two instances of a defined term, it might not be worthwhile to go back and eliminate that defined term on grounds of insufficient use.
- 6.118** Be alert to provisions that don't reflect the full meaning of a defined term. For example, in a reference to *Change in Control of the Company*, the words *of the Company* would be redundant if, as is usually the case, *Change of Control* is defined with respect to the Company.