

CATEGORIES OF CONTRACT LANGUAGE

- 3.1** This chapter explores the categories of contract language: language of agreement, performance, obligation, discretion, prohibition, policy, declaration, intention, and recommendation, as well as how to express conditions. They're the antidote to the random and chaotic verb structures of traditional contract language.
- 3.2** Between the recitals and the concluding clause is the body of the contract, which contains what the parties are agreeing to. Each clause or sentence in the body of the contract has the potential to express one of several different kinds of meaning. This manual allocates each kind of meaning to a category of contract language, and each category makes use of one or more associated verb structures.
- 3.3** Who benefits from drafting that applies the categories of contract language? The drafter benefits—instead of improvising verb structures, you cycle through the choices to determine which kind of meaning is appropriate for the context, then you select the appropriate associated verb structure. Because the categories give you a framework for determining what you want to say, not just how you say it, they establish a foundation for controlled drafting.
- 3.4** Readers benefit too—instead of the random and chaotic verb structures of traditional contract language, they're presented with a limited range of consistent verb structures.
- 3.5** But applying the categories of contract language requires commitment. For every clause and every sentence, you select the appropriate category and the appropriate associated verb structure. (Don't short-circuit the process by going straight to the verb structure, whether *shall*, *will*, *must*, or something else. Always start by choosing the category of contract language.) And you subject every *shall* to the *has a duty test* (see 3.92). At first, you'll likely find it challenging, annoying, and slow to apply the categories. But if you work at it, you'll make the connections faster and faster, until it becomes a reflex.
- 3.6** The categories of contract language aren't rules of grammar. Instead, they were devised by this author, based on standard English, with such adjustments as were required to permit the different categories to be associated with different verb structures.
- 3.7** Below is figure 1, a "quick reference" chart showing each category of contract language and the recommended verb structures. It aims to make

this topic more accessible; you might find it helpful to return to it occasionally.

FIGURE 1 ■ QUICK REFERENCE FOR THE CATEGORIES OF CONTRACT LANGUAGE

<i>Category of Contract Language</i>	<i>Verb Structure</i>	<i>Context</i>	<i>Example</i>	<i>Ref.</i>
Agreement	<i>agree</i>	Used only in the lead-in	<i>The parties therefore agree as follows:</i>	3.45
Performance	<i>hereby + simple present</i>	Expresses actions performed by signing the contract	<i>Acme hereby purchases the Assets from Jackson.</i>	3.48–.50
ALTERNATIVE	Negative form of the present continuous	Language of policy expressing that the party isn't taking the specified action on signing the contract	<i>In this agreement the Buyer is not assuming any Excluded Liabilities.</i>	3.67
Obligation (Imposed on the Subject of the Sentence)	<i>shall + infinitive</i>	A duty is imposed on the subject of the sentence (if it's a party)	<i>Acme shall purchase the Shares from Hughes.</i>	3.89–.92
Obligation (Imposed on Someone Other Than the Subject of the Sentence)	<i>must + infinitive</i>	The subject isn't a legal person and so cannot assume a duty	<i>The Closing must take place at Acme's offices.</i>	3.149
	<i>must + infinitive</i>	The subject, although a legal person, isn't a party and so cannot assume a duty	<i>The arbitrator must issue the award no later than 20 days after the last day of the hearing.</i>	3.150
ALTERNATIVE	<i>shall cause</i>	Language of obligation imposed on the subject of the sentence—used if the subject is one or more parties and the object isn't a person	<i>Parent shall cause the Closing to take place at Acme's offices.</i>	3.160–.161
	<i>shall cause</i>	Language of obligation imposed on the subject of the sentence—used if the subject is one or more parties and the object is an instrumentality of the subject	<i>Parent shall cause Sub to sell the Widget Assets.</i>	3.160–.161

Category of Contract Language	Verb Structure	Context	Example	Ref.
Discretion	<i>may + infinitive</i>	If the subject has the discretion to take a specified action	<i>Schmidt may transfer the Shares to Lee.</i>	3.206
	<i>is not required to + infinitive</i>	Expresses absence of obligation	<i>Acme is not required to replace the Widget Equipment.</i>	3.292
	<i>is not prohibited from + gerund</i>	Expresses absence of prohibition	<i>Acme is not prohibited from removing the Widget Equipment.</i>	3.304
Prohibition	<i>shall not + infinitive</i>	Imposes a prohibition on the subject of the sentence	<i>The Customer shall not modify the Equipment without Acme's prior written consent.</i>	3.305
Policy	Simple present	Policies that apply on effectiveness of the contract	<i>New York law governs this agreement.</i>	3.334
	Simple present	Policies that state a time of effectiveness or lapsing of effectiveness	<i>This agreement terminates on 31 December 2019.</i>	3.334
	<i>will + infinitive</i>	Policies that relate to future events that might not take place or the timing of which is uncertain	<i>This agreement will terminate upon the closing of a Qualified IPO.</i>	3.334
	<i>will + linking verb</i>	Policies that relate to future events that might not take place or the timing of which is uncertain	<i>Any attempted transfer of Shares in violation of this agreement will be void.</i>	3.334
Expressing Conditions (Generally)		A condition is a future and uncertain event or circumstance on which the existence of a legal relation depends		3.348

Category of Contract Language	Verb Structure	Context	Example	Ref.
Expressing Conditions Using a Conditional Clause	Simple present	Used in the conditional clause	<i>If Jones ceases to be employed by the Company, ...</i> [continued in next row]	3.358
	<i>will</i> + infinitive	Used in the matrix clause, if the verb in a matrix clause would, absent the conditional clause, be in the present tense (<i>shall, may,</i> and <i>must</i> are unaffected by presence of a conditional clause)	[continued from previous row] ... the Option will terminate.	3.361
Expressing Conditions Using Language of Policy	Present perfect (a different condition might use the simple present)	Expressing a single condition	<i>It is a condition to Tanaka's employment as the Company's chief financial officer that Tanaka has settled the Litigation.</i>	3.394, 3.397
	Simple present (a different condition might use the present perfect)	Expressing one of a group of conditions, each introduced with a <i>that</i> -clause	<i>The Buyer's obligations under this agreement are subject to satisfaction of the following conditions: ... that Acme's statements of fact are accurate ...</i>	3.395--396, 3.397
Expressing Conditions Using Language of Obligation	<i>must</i>	Introduced with a <i>to</i> infinitive clause or a clause beginning with <i>for</i>	<i>To be reimbursed, Acme must submit to Widgetco.</i>	3.386, 3.391
Declaration	<i>states</i>	Asserts as accurate a fact the declaring party has knowledge of	<i>Acme states that the Equipment is listed on schedule A.</i>	3.457
	<i>acknowledges</i>	Accepts as accurate a fact the other party has knowledge of	<i>Acme acknowledges that the Consultant is in the business of providing services to others.</i>	3.485

<i>Category of Contract Language</i>	<i>Verb Structure</i>	<i>Context</i>	<i>Example</i>	<i>Ref.</i>
Intention	<i>intends that + will</i>	Used instead of language of policy if a given status depends on circumstances after the contract is signed	<i>The parties intend that the Consultant will be an independent contractor.</i>	3.491
Recommendation	<i>recommends, advises, or encourages + that</i>	Allows a party with greater bargaining power to avoid dispute by pointing out something the other party might otherwise miss	<i>The Company recommends that the Participant consult a legal adviser if ...</i>	3.502

3.8 This chapter contains tables with one or more examples of a category of language, with each example followed by variations of that example. Each initial example is identified by two numbers in a set of brackets, the first designating the number of the table and the second designating the number of the example within that table. For example, [3-3] denotes the third example in table 3. Each variation is given the same designation as the related initial example but is distinguished by adding a lowercase letter. For example, [3-3b] denotes the second variation of [3-3].

3.9 In addition, each example and each of its variations is annotated with one of the following symbols to indicate how acceptable it is:

- ✓✓ means this choice is recommended
- ✓ means that this choice, although acceptable, can be improved; that you should use it with caution; or that how acceptable it is depends on the context in which it is used
- ✗ means this choice isn't recommended
- ✗✗ means don't use this choice

GENERAL CONSIDERATIONS

Use the Third Person

- 3.10** In business contracts, use the third person, as in *Acme shall purchase the Shares from Ahmad*. That's standard practice.
- 3.11** Some contracts are in the first and second person, using *we*, *us*, and *our* for one party and *you* and *your* for the other. Using both the first and second person in a contract raises the issue of how one refers to both parties