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# Drafting Community Forestry Agreements

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FROM NEGOTIATION  
TO SIGNATURE - A  
PRACTITIONER'S VIEW

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Kenneth L. Rosenbaum

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## About the Author

Kenneth L. Rosenbaum is an attorney and the principal of Sylvan Environmental Consultants in Falls Church, Virginia USA

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## Introduction

This paper is a guide to designing and drafting community forestry contracts. These legal documents underlie many community forestry development projects.

In forest management projects, governments and businesses can collaborate with communities in several ways, including through consultation, commercial transactions, and recognition of rights.<sup>1</sup> Consultation might involve seeking community opinion or even approval of plans and priorities. Commercial transactions might include hiring local workers, buying local forest products or environmental services, patronizing local businesses, or leasing local land. Recognition of rights might involve honoring traditional forest access, granting communities formal title or rights to use forestland, accepting legally enforceable obligations to manage land for the benefit of the community, or returning some of the income from the land to the community. Many projects embrace two or three kinds of collaboration.

Collaboration with local communities is increasing.<sup>2</sup> Sometimes the goal is to bring local knowledge, skills, and assets to the service of forest stewardship. Sometimes it is to provide traditional or equitable access to forest resources. Sometimes the goal is to promote rural economic development. Sometimes it is simply to make a profit from the forest in the most practical way available.

The principal partners — with the support of donors, lenders, and non-governmental organizations — want to avoid problems. To that end, partners and their supporters often lay out the project in legal documents, such as contracts.<sup>3</sup> Contracts can define the project and protect the rights of all involved. If done well, the process of negotiating the contracts can also help the sides better understand their roles, align their expectations, and promote a smoother implementation of the project.

The rights in a forestry partnership will depend on legal sources besides the agreements of the parties. These sources include the general laws of property and contracts, and of course the forest laws, but they may also include separate legal documents specific to the project. While a main agreement spells out the mutual obligations of the community and the primary partner, there may be other contracts, for example, between the partner and a donor, or between the community and its members. Sometimes the main agreement is linked to a separate forest license, which may create its own set of obligations and privileges. Sometimes the partners create a new legal entity, such as a corporation or a trust, and key aspects of the partners' rights are set out in documents governing the new entity. Sometimes the partners draft a forest management plan, and that plan describes both the expected course of forest management and the obligations of the partners. It is even possible to place obligations in a deed documenting a transfer of the project land.<sup>4</sup>

Agreements between the parties, however, seem to be the most common legal tool. They are the focus of this paper.

<sup>1</sup> For an overview of collaborative forest management, see Jane Carter with Jane Gronow, *Recent Experience in Collaborative Forest Management: A Review Paper* (Center for International Forestry Research (CIFOR) 2005) (CIFOR occasional paper no. 43).

<sup>2</sup> "In the last two decades local peoples and rural communities have assumed increasing prominence in national forest management legislation, regulation, and strategies." Chapter 7 (page 87) of Christy *et al.*, *Forest Law and Sustainable Development* (World Bank Law Justice and Development Series, 2007).

<sup>3</sup> Often, but not always. A study of business-community relationships in Mexico found that about two-thirds had written contracts. Natália G. Vidal, *Forest Company-Community Agreements in Mexico: Identifying Successful Models*, at p. 17 (Forest Trends, 2005). A companion study in Brazil reported that about two-thirds of plantation-owning businesses seeking community involvement about nine-tenths of businesses sourcing non-plantation wood with community involvement had or expected to have written contracts. Natália G. Vidal, *Forest Company-Community Agreements in Brazil: Current Status and Opportunities For Action*, at pp. 26, 29, & 34 (Forest Trends, 2004 & 2005).

<sup>4</sup> For a more complete listing of organizational structures for devolved forest management, including district organizations, village committees, trusts, conservancies, corporations, associations, and individual ownership, see Box 4 in Sheona Shackleton, Bruce Campbell, Eva Wollenberg & David Edmunds, *Devolution and Community-Based Natural Resource Management: Creating Space for Local People to Participate and Benefit?*, ODI Natural Resource Perspectives No. 22 (2002).

## What Is a “Good” Agreement?

What does an advisor have to do to help create a “good” community forestry agreement? The answer depends on your frame of reference. Of the many ways to look at community forestry agreements, here are three common ones:

- From the **policymaker’s frame of reference**, the focus is on the role of the agreement in **meeting larger goals**. These may be economic goals, such as reducing rural poverty or increasing forest revenues. These may be social goals such as strengthening community institutions or promoting equitable access to resources. These may be administrative goals, such as bringing forest use under the rule of law or increasing the effectiveness of governmental institutions. These may be resource management goals, such as advancing sustainable stewardship.
- From the **negotiator’s frame of reference**, the focus is on the **practicality** of the project and the strength of the **partnership**. Is this a good arrangement? Is the agreement workable? Will it be easy to implement? Do the sides have good relations that will carry them through the project’s inevitable ups and downs?
- From the **drafter’s frame of reference**, the focus is on **the document itself**. Is the document legally adequate? Does it create clear rights and duties for the parties? Does it accurately reflect their agreement? This is often the lawyer’s frame of reference, although writing a good agreement requires understanding more than just the law of contracts.

The literature of community forestry deals largely with policy and institutions. An earlier FAO publication covers in depth the policy aspects of government forest contracts and the interconnections between contracts and forest administration.<sup>5</sup>

This paper looks at the frames of reference of the negotiator and the drafter. Part I looks at the process of arriving at agreement. Part II presents some general issues of practicality. Part III looks at the legal side of drafting. Part IV offers thoughts on the advisor’s professional and ethical responsibilities.

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<sup>5</sup> FAO, Governance Principles for Concessions and Contracts in Public Forests, FAO Forestry Paper 139 (2001) (available as a series of web pages at [www.fao.org](http://www.fao.org)).

## Part I: Making the Agreement

This Part looks at two aspects of making community forestry agreements. First, in theory, how do you bring people together to make a good agreement? Second, how can good theoretical practices be applied to specific circumstances?

Theory predicts that the best agreements will result from candid discussions between the sides leading to arrangements carefully shaped to address the project at hand. Limits on staff and resources, along with desires for uniform and easy administration, push parties away from negotiation to standardized arrangements. This Part considers both negotiated and standardized contracts and discusses how to achieve some of the benefits of open negotiation when using model contracts and standardized language.

### *The Paths to Good Agreements*

Negotiation and conflict resolution theories offer several views on what practices lead to a good agreement. What follows is a sampling of these views, with notes on what insights each offers for the person advising forest agencies and communities.

Perhaps the best-known negotiating model is the “Getting to Yes” view developed through the Harvard Negotiation Project. From this **problem-solving viewpoint**, a good agreement is one that serves the sides’ interests and maximizes their overall benefits — a “win-win” outcome.<sup>6</sup>

To get to this good result, the sides need to understand that negotiation has both competitive and collaborative aspects. If the sides see the process only as competitive, they may miss opportunities that advance the interests of both sides.

The advisor can help steer the process away from competition and toward collaboration. The advisor should start by helping the sides identify the issues. An agreement may appear to be simple, but many fine points may be at play. For example, in an agreement setting up an agro-forestry project on a public forest, the center of the agreement may concern planting trees. However, the sides may have issues about what crops the community can plant, what tools and farming practices they can use, whether they can graze livestock on the land, whether they can build structures, whether they can collect secondary products from nearby forests, how harvests schedules will be set, how profits will be split, and so forth.

Next, the advisor must encourage the sides to get away from taking positions (talking about *what* they want) and begin discussing interests (talking about *why* they want things). For example, the forest agency may insist that the community only plant two or three specific crops. The community may insist that it be allowed to plant any crop. If the parties hold to these positions, the negotiations will come to an impasse.

The advisor asks the forest agency why the community must only plant these crops. The agency explains that these are annual crops. The agency is afraid that if the community plants perennial crops, they will never leave the site at the end of the project.

The advisor asks the community why it wants to plant other crops. In part, the community wants to be able to choose crops that its members use or can sell for a good price. In part, it is worried that as the trees grow on the plots, the increasing shade will make it impossible to raise the crops identified by the forest agency. In part, the community resents the agency restricting its traditional practice of planting a varied garden.

<sup>6</sup> See Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (2d Penguin ed. 1991). Numerous books and papers out of the Harvard Negotiation Project embody this view.

Once the issues and interests are clear, the advisor can help the sides come up with options. For example, once the agency understands that the community wants the freedom to plant many crops, the agency might agree to a larger list of annual species. Perhaps the sides can agree on setting aside a plot for perennial plantings, or for traditional crops that cannot tolerate shade. Perhaps the agency is willing to guarantee that if the community lets the agency specify the crops, the agency will give the community a favorable price for the harvest.

The advisor can then help the sides analyse those options and discuss them candidly. If the sides can find an option that serves the interests of both parties, the advisor can help capture that choice in a written agreement.

A different set of recommendations comes from a **power-sharing viewpoint**. In this view, a good agreement is one that comes from a process where the sides deal respectfully and are open and responsive to each other's needs.<sup>7</sup> On some level, they must come to deal as equals.

In too many cases, each side views the other unfavorably. Agencies may view community members as ignorant despoilers of the forest. Community members may view agencies as corrupt bullies.

Also, the sides may come to the table with an imbalance of knowledge and resources. The community may have little understanding of the market for the forest's resources outside of the community or the legal aspects of forging an agreement. The district forester may be new to the region and have no sense of local practices and little skill in dealing with people.

To build mutual respect, the advisor must encourage the sides to communicate and come to see each other as people with very human problems and motivations. On the one hand, that means getting each side to talk. On the other hand, and much more difficult, that means getting each side to listen. The advisor can convene the sides, providing a safe and neutral venue for candid discussions. The advisor can practice active listening, by paying close attention to the words of each side and echoing back the key points in paraphrase or summary fashion. Active listening verifies what was said and helps assure that all persons in the room receive the message.

To empower the parties, they should have equal access to expertise and counsel. To a certain extent —perhaps limited by ethical concerns discussed in Part IV of this paper — the advisor can provide this to both sides. If the advisor lacks the expertise, the advisor can bring in other experts.

From a **viewpoint of expectations**, a good agreement is one where each side, when asked what the agreement is about and what will happen under it, will tell a similar story.<sup>8</sup> Or, to use the words of one community leader, an agreement is good when, "We have finally come to one mind ...."<sup>9</sup>

In a sense, the whole process of negotiation is about each side changing its expectations. The agency may come to the table thinking the community will be happy to agree to almost anything. During the negotiations, the agency learns that the community

<sup>7</sup> This power-sharing viewpoint is based very roughly on the field of transformative mediation pioneered by Robert A. Baruch Bush and Joseph P. Folger. See Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation* (revised ed. 2005).

<sup>8</sup> This viewpoint is a hybrid of two ideas. One is that negotiation leads parties to change their expectations about what they can get in an agreement, and such change is often essential to reaching agreement. See Jeffrey G. Miller and Thomas R. Colosi, *Fundamentals of Negotiation: A Guide for Environmental Professionals* (1989) at 28. See also International Finance Corporation, *Investing in People: Sustaining Communities Through Improved Business Practice*, p. vii (2000) (available at [www.ifc.org](http://www.ifc.org)). The other is inspired by the field of narrative mediation, which sees conflict resolution partially as encouraging parties to build compatible stories of their relationship. See, e.g., John Winslade, *Mediation with a Focus on Discursive Positioning*, 23 *Conflict Resolution Quarterly* 501 (2006).

<sup>9</sup> Lorena Sohappay, quoted in Tom Banse, *Tribes And Feds Celebrate End To Their Salmon/Dam Fights* (Oregon Public Broadcasting news report, May 2, 2008). Available at [news.opb.org](http://news.opb.org).

knows about similar projects in the region, projects where the communities have won significant advantages. The agency begins to lower its expectations of what it can get the community to accept. The community has hopes that the agency will give the community some financial support and finally let the community have the land that it has long considered its own. During the negotiations, the community learns about the legal and budgetary constraints of the agency. The community begins to lower its expectations about what the community can gain from the deal. Only when the sides have similar expectations will they come to a true agreement.

Besides specific expectations about the details of a particular project, the sides must share a broader set of cultural expectations about what it means to make and keep an agreement.<sup>10</sup> Does the community understand the agency's attitude toward deadlines, paperwork, and other requirements that the community might see as trivial? Does the agency understand the community's need to honor traditional notions of land use, dispute resolution, or restitution in case of injury? Do both sides have similar understandings about the possibility of modifying the agreement as problems arise? Do they understand the "polite" way to raise issues? Do both sides place a similar value on honoring their agreements?

As with the two previous viewpoints, a key to adjusting expectations is dialogue. The two sides can educate each other and in the process change each other's expectations. Again, the advisor can play a role by facilitating communication. As the agreement begins to form, the advisor can verify that the sides understand each other by asking them to describe how they see the agreement playing out.

People's recollection of the contents of the agreement — and associated expectations — can change with time. To reduce future conflict, the advisor should encourage the sides to capture the agreement in writing. Further, the writing should be in clear, plain language that both sides can understand.

From a **solutional viewpoint**, a good agreement is one that each party sees as achieving a desired goal.<sup>11</sup> The parties must direct their eyes to the future and make their own choices.

The advisor has two duties. One is to encourage each side to think about what it wants and what an agreement could achieve. The advisor should help the sides to set goals, to plan, and to see the forest project as a possible step towards reaching those goals.

The other duty of the advisor is to exercise restraint. The advisor can shape the process of negotiating an agreement, but the advisor must avoid making substantive decisions for the sides. An outside advisor who makes substantive decisions for an agency or community is undermining self-determination. An advisor who usurps the role of decisionmaker weakens the side's ability to make its own choices and take accountability for its actions. When agreements involve technical points of law or procedure, the advisor may want to offer the side "the standard language" and discourage them from taking the time to understand the details. Time and other pressures may encourage this approach, but a better long-term approach is to help the side develop its own capacity to deal with technical matters. Each side should fully understand the potential agreement and shape it to fit the side's own needs.

From a **relational viewpoint**, a good agreement is one built on a foundation of trust.<sup>12</sup> Some level of watchfulness and skepticism may be appropriate for parties negotiating an agreement, but just as surely, some level of trust is essential. Trust will make the sides

<sup>10</sup> For advice for advisors who deal with cultural differences among groups, see Michelle LeBaron, *Bridging Cultural Conflicts: A New Approach for a Changing World* (2003).

<sup>11</sup> See Fredrike P. Bannick, *Solution-Focused Mediation: The Future with a Difference*, 25 *Conflict Resolution Quarterly* 163 (2007).

<sup>12</sup> This viewpoint is suggested by Miller and Colosi, at 5. See also International Finance Corporation, *Investing in People: Sustaining Communities Through Improved Business Practice*, pp. vii, 15 (2000) (available at [www.ifc.org](http://www.ifc.org)); Natália G. Vidal, *Forest Company-Community Agreements in Mexico: Identifying Successful Models* (Forest Trends, 2005), at 21: "It seems that in order to develop successful agreements, a company has to have the ability to build a relationship with communities ... based on mutual trust." Available at [www.forest-trends.org](http://www.forest-trends.org)

feel safe in entering the agreement. Trust will allow the sides to take risks together. Trust will help the sides work out the inevitable future differences.

Most cultures tolerate lack of candor in negotiations to some degree. People expect the sides to ask for more than they would ultimately accept. In some settings, sides are allowed or even expected to make extravagant statements about the value of a deal, and these are never taken at face value. In some circumstances, plain statements like “this is our best offer” or “this is our final offer” are merely indications that the other side will have to push harder to get movement.

Nonetheless, excessive demands, exaggeration, and posturing can be counterproductive. Who wants a partner that routinely lies or unpredictably changes position?

The advisor can build trust by encouraging good representation and good bargaining. Representation refers to who speaks for each side. Rarely is everyone with a stake in the partnership physically present at the table. The agency sends one or more representatives, and often so does the community. The advisor should help promote accord within each side before the sides meet. The advisor should encourage the representatives to know the bounds of their own authority. If the negotiation is lengthy, the advisor should encourage representatives to keep their sides informed about positions and progress, so there are no surprises. It is disheartening to hear one thing from the representative at the bargaining table and the opposite from group members not at the table.

For good bargaining, the advisor should encourage the sides to be well-prepared and well-behaved. If a side can, it should be ready to back up statements of position with objective reasons. “We cannot give the community a lease on the land because the Forest Law does not give the agency that authority” is more likely to get an understanding reception than “We cannot give the community a lease on the land because the agency doesn’t do that.” The sides should be prepared to hedge, that is, to politely step away from delicate questions, but not to lie. For example, if the community asks, “Is that the largest share of profits you can offer,” a response of “That’s the share that we gave to Community X under its agreement” is an honest reply, even though it does not answer the question asked. The advisor should counsel the sides to be polite and patient. And, in common with some of the viewpoints described above, the advisor should encourage all sides to show their willingness to listen.

The **functional viewpoint** is in some ways the complement of the solutional perspective. Just as the solutional perspective counsels the sides to look forward, the functional view warns the sides to weigh the past and present. A good agreement is one that resolves ongoing problems as well as setting the guidelines for future actions.

The advisor must understand some history: how the sides have related in the past, what problems they have encountered, and what has caused those problems. If the sides have pursued projects together that have failed, the advisor needs to understand those failures. If the sides have disagreed over forest management approaches, the advisor needs to know that. If there have been personal resentments between people on the two sides, those again may be an issue.

The sides may have deep disagreements over basic issues such as who owns the forest. It may be beyond the scope of the project or the power of anyone at the table to resolve those issues now. Perhaps the best the advisor can do in these circumstances is encourage the sides to acknowledge that although they have differences that remain to be resolved, both can gain by working together on the project at hand.

## ***A Common Thread: The Value of Dialogue***

All the views above share a common thread: it is best to shape a partnership through dialogue. Dialogue leads to better outcomes.

Dialogue allows exploration of interests. As negotiation theorists have noted, there are basically three ways for parties to resolve problems: through power, through rights, or through interests.<sup>13</sup>

When parties resolve differences through exercise of power, they are often acting unilaterally. They are doing what they can do, based on the present situation, perhaps without regard to how it helps or hurts others. Suppose that people in a village want to hunt in the local forest. When a forest officer holds onto their hunting license applications and refuses to process them, or when villagers hunt illegally, each side is trying to get its way through exercise of power.

When parties resolve problems through an exercise of rights, they are calling on a legal or moral code that is potentially enforceable by an outside party, such as a high administrative official, a court, a village council, or even a deity. So, if the hunters complain to the forest officer's superior that the officer is seeking a bribe, or if the forest officer arrests the poachers and brings them to court, they are acting based on rights.

When parties resolve problems through interests, they are calling on voluntary action from each other. They may bargain by threatening acts of power or enforcement of rights, but ultimately they must look to what the parties can do for each other. So, if the forest officer and the village hunters sit together and talk about what each one wants, perhaps they can come to a solution that will be acceptable to both.

Each of these approaches has disadvantages. Solutions based on power are potentially the fastest means of action, but they often fail other tests of quality, including fairness and economic efficiency. Solutions based on rights have the potential to be fair, but much depends on whether the underlying rights are themselves fair and whether the system of enforcing the rights is honest and effective. Enforcement of rights can also be slow and costly. Solutions based on interests usually follow a path of consensus, and the outcome tends towards both fairness (if the starting positions of the parties were fair) and efficiency. The problem with interest-based solutions is that they usually require the most time and skill to create.

In a sense, the movement towards community forestry partnerships is a response to failures of approaches that rely on power and rights. Centralized forestry, based on the government's power and rights, is far from certain to serve local interests. Without local support, the central government must struggle to control manifestations of local power, including squatting, poaching, and illegal logging.

Indeed, one study of community forestry partnerships suggests that the more time the parties invest in discussing the project, both in establishing the project and making management decisions, the more successful the project is likely to be. A set of community wildlife projects in Zambia were originally organized and managed regionally, demanding about 100 person-days of work from six regional chiefs and six representative committees. These projects failed to deliver significant results. When the projects were devolved to 45 village committees, with each individual participating in the project being a part of committee meetings, the time commitment for discussions approached 100,000 person days, but the communities' commitment, benefits, and accomplishments rose dramatically.<sup>14</sup>

<sup>13</sup> William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, ch. 1 (1988).

<sup>14</sup> See pp. 33–36 of Brian Child, *Principles, Practice, and Results of CBNRM in Southern Africa*, in *Natural Resources as Community Assets: Lessons from Two Continents* (Martha West Lyman and Brian Child, eds. 2005), (available at [www.sandcountry.net](http://www.sandcountry.net)).

## Agreements in Practice

In practice, community forestry partnership agreements range from highly negotiated to highly constrained. For example, under Liberia's 2006 National Forestry Reform Act, concession holders must negotiate social agreements for sharing forest access and benefits with local communities.<sup>15</sup> Beyond requiring a minimum value of benefits for the communities, the regulations leave the parties free to shape the details of their relationship.<sup>16</sup>

Similarly, Tanzania's Forest Act of 2002 allows a variety of forest interests to negotiate Joint Forest Management agreements.<sup>17</sup> Although the Act lists twelve matters that the agreement must contain (such as the description of the land involved, the names of the parties, and so forth), the Act allows the parties great freedom in shaping their partnership. The government has prepared a handbook that includes guidelines and a model agreement, but these are non-binding.<sup>18</sup>

At the other end of the spectrum is the take-it-or-leave-it deal: one side offers a deal and the other side accepts or declines. Beyond that, there is little negotiation. Lawyers call these contracts of adhesion. So, for example, the Mexican Payment for Environmental Service Program invited communities to apply for payments for keeping land in forest cover. From the applicants, the program selected communities with forests that met criteria that indicated high value for protection of aquifers. The government offered selected communities contracts to conserve the forest cover at preset rates, depending on the type and area of forest.<sup>19</sup>

Using model contracts or creating contracts through open procurement processes such as auctions can produce agreements with little negotiation. In both cases, one side writes the basic contract before it is clear who the specific partner will be. Usually it is the government that writes the model, but a business hoping for projects with several communities could also draw up a model and then seek partners.

So, for example, the Kenyan Forests Act rules permit the Kenyan Forest Service to enter into agreements with local associations allowing non-resident cultivation of forests.<sup>20</sup> The Service has created a "Draft Non-Resident Cultivation Agreement" to use in these circumstances. The draft includes blanks where the sides can fill in the name of the forest association, the land involved, and other project-specific details. However, the major structure of the partnership is already set out in the draft document.

Applying the theories of dealmaking discussed above leads to the conclusion that model contracts will have inherent disadvantages. Using a model will limit bargaining, and bargaining allows parties to discuss, identify, and plan around potential problems; to develop a working relationship with each other; to build trust; and to develop a psychological commitment to the project. Using a model may reduce flexibility and innovation, making it hard to shape projects to meet local circumstances.

Beyond this, using a model or "standard" contract carries a legal risk. The courts tend to resolve any uncertainties about a contract's meaning against the side that wrote the words.<sup>21</sup> When a government uses a model contract, the courts may interpret ambiguous contract language in ways unfavorable to the government.

<sup>15</sup> National Forestry Reform Law of 2006, §5.3(b)(vi) (Liberia).

<sup>16</sup> Forest Development Authority, Regulation 105-07, §34 (Liberia).

<sup>17</sup> Forest Act, 2002 (Act No. 14 of 2002), sec. 16 (Tanzania).

<sup>18</sup> Forestry and Beekeeping Division, Ministry of Natural Resources and Tourism, United Republic of Tanzania, Joint Forest Management Guidelines: For the Establishment of Joint Management Agreements in Protection and Production Forests (Dar es Salaam, April 2007).

<sup>19</sup> See Jennifer Alix-Garcia *et al.*, An Assessment of Mexico's Payment for Environmental Services Program (2005) (available at [are.berkeley.edu](http://are.berkeley.edu)).

<sup>20</sup> The Forests (Participation in Sustainable Forest Management) Rules, 2007, Rules 43–51.

<sup>21</sup> "Doubtful language in a contract should be interpreted most strongly against the drafting party ...." 17A American Jurisprudence 2d (Contracts) §343 (2004).

But in practice, models also offer advantages:

- The government drafts most of the contract once and only once. Each individual contract can be drawn up quickly from the model. This is an efficient use of staff time.
- The uniformity of the contract means fairness: everybody gets the same deal.
- The uniformity of the contract means certainty and predictability. Communities know what kind of commitments they must make and what kind of benefits to expect. Communities can talk to other participating communities and get a reasonable idea of what participation will require. Governments know what will be demanded of them and what they will get. Implementation can be consistent among projects, allowing uniform oversight and easy comparisons in evaluations.
- Uniformity makes it easier for the government to ensure that all contracts are consistent with applicable laws.<sup>22</sup>

These advantages are strong enough to lead many forest agencies to rely on model contracts.

The advisor working on design of a model agreement should keep the disadvantages of using models in mind and try to minimize them. The advisor should encourage the model to be as flexible as possible, leaving room to accommodate local interests. A model must allow project-specific determination of the land involved, but it can also allow the parties to bargain over details such as timeframe and land rental costs. It can allow for lands with high cultural or biological value to be specifically identified and to receive special protection. Even where the model sets general standards, it can allow local variations in details. For example, the model might require a community association to invest a fixed percentage of the proceeds from timber sales in public works projects like roads or schools, but the model could allow the government and community to negotiate which specific projects would receive support.

The advisor should consult with forest-dependent communities and their representatives while writing the model language. The advisor needs to understand the range of local interests. Consulting with interested groups, sharing drafts, and gathering their suggestions will help expose issues and options that the model should cover. The resulting model should be more acceptable to the stakeholders involved.

The same is true of contracts offered through auctions or other procurement processes. Publicly vetting a draft contract before it is offered will help the side offering the project understand who is interested and how the project might be shaped to bring in more bidders or to serve common goals better. A sort of negotiation can take place with the potential bidding pool.

Model drafters should take extra care to draft clearly, in plain language, and to explain the draft to potential partners. Neither side stands to gain if the model does not accurately reflect the sides' basic understandings about the project. The drafter must take special care to avoid ambiguity. If an ambiguous contract ends up before a court, the court may read its own thoughts into the contract.

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<sup>22</sup> This last point is made in FAO (2001) at Section 4.3.7.

## ***In Summary***

In helping sides reach agreement, an advisor should —

- Encourage the sides to see cooperative opportunities in the project.
- Identify issues and options for structuring the project.
- Encourage the sides to talk about their needs, not their demands.
- Encourage sides to show mutual respect and to listen to each other.
- Empower sides by giving them access to information and advice.
- Manage the sides' expectations about the project and try to get them to see the project in the same way.
- Take the project as an opportunity to solve problems for each participant.
- Respect the participants' choices and preserve self-determination on core issues.
- Build trust among the sides and encourage honest bargaining.
- Consider the sides' history of dealings and address lingering problems.
- Encourage the sides to work together, addressing interests, rather than unilaterally exercising power or asking outsiders to enforce rights.

The use of model contracts constrains individual negotiation between project participants. Nevertheless, models offer benefits of economy and uniformity. Where the advisor is helping to create models that will apply to partnerships that have not yet been identified, the advisor should —

- Build flexibility into the models.
- Develop the models through consultation with possible participants and their representatives.
- Draft clearly, and explain the draft to potential participants.

## Part II: Practical Issues That Agreements Should Address

The advisor must think about the practicality of every aspect of an agreement. This effort requires the advisor to think about the project in two ways. First, the advisor must consider how the project can achieve its goals: that is, how things will proceed if all goes according to plan. Second, the advisor must think about what can go wrong. That is, the advisor must “Predict what may happen [and] provide for that contingency ....”<sup>23</sup>

No paper can list every facet of practicality. However, this Part offers several broad aspects concerning the practicality of agreements that advisors should consider. This Part draws upon the general literature on writing agreements<sup>24</sup> as well as specific literature on community forestry partnerships.

### *Capacity to Implement the Agreement*

The sides must have capacity to make the partnership work. The term capacity has two meanings: a specialized legal sense and an ordinary sense. If a side has “capacity” in the legal sense, it means that the law will hold the side to the contract. A court will not enforce a contract against a natural person who is too young or too incompetent to understand the contract, or against a juridical entity that has not met the legal requirements for existence.<sup>25</sup> They lack the legal capacity.

The discussion here is about capacity in the ordinary sense. If a side has capacity in the ordinary sense, the side has the ability to carry out its part of the agreement. If the sides lack time, knowledge, skills, infrastructure, equipment, or capital that the agreement requires, the associated project will fail, despite all good intentions.<sup>26</sup>

The government or business must have the capacity to oversee community actions.<sup>27</sup> Overseeing community actions requires different skills and perhaps even different organization, infrastructure, and equipment than conducting forest management directly. The challenge will not be limited to the forest agency. The forest agency may need support from arms of the finance ministry, the justice ministry, and local government. For example, a contract may prohibit the community from selling timber to a third party before the community pays stumpage fees and other taxes and fees to the central treasury. Does the forest agency have the capacity to readily determine compliance with this requirement? Would it be better to write the requirement more specifically, such as requiring the community to present tax receipts to the local forest officer before removing logs from the forest? Or would this approach open avenues for local tax officials to demand bribes? Questions like these do not always have clear answers, and the design of the contract terms is usually more art than science.

The community may need forest management or business skills. It will have to be a successful steward of the resource, but it will also have to deal with bureaucratic or business requirements of the project. It may be tempting to ask the community to keep detailed and auditable records of its actions, but not particularly practical.

<sup>23</sup> Scott J. Burnham, *Drafting and Analyzing Contracts: A Guide to the Practical Application of Contract Law* (3d ed. 2003), at 2.

<sup>24</sup> Several of the practical points discussed in this Part are identified in the appendix to the following study: Patricia J. Orr, Kirk Emerson, and Dale L. Keyes, *Environmental Conflict Resolution Practice and Performance: An Evaluation Framework*, in 25 *Conflict Resolution Quarterly* 283–301 (2008).

<sup>25</sup> 17A *American Jurisprudence 2d* (Contracts) §28 (2004).

<sup>26</sup> For case studies highlighting capacity issues in Tanzania and Mozambique, see Irmeli Mustalahti, *How to Handle the Stick: Positive Processes and Crucial Barriers in Participatory Forest Management*, 16 *Forests, Trees and Livelihoods* 151-165 (2006).

<sup>27</sup> See FAO (2001), section 5.5.

Community access to capital can be a particularly difficult problem. The community may need money to buy equipment, fuel, professional expertise, and many more essentials, however the project may not produce a steady flow of income, especially at the start. If the community does not own the land, it may not have sufficient collateral to interest an outside lender. The project agreement may have to include a grant, a loan, or a loan guarantee to assure that the project is not starved for cash.

Evaluating capacity is a challenge. The advisor must understand each side's abilities and understand something of forest management, business, local culture, and human nature. In fact, the advisor may not have all this skill and knowledge, but all this skill and knowledge may be collectively present in the minds of the people at the bargaining table. The advisor must tap the knowledge discreetly.

The approach is through asking questions. They can begin with general and gentle inquiries such as—

- Have you ever done a project like this before?
- What kind of problems did you encounter?
- What kind of problems do you expect here?

The advisor can begin to drill down to more specific areas, such as these:

- Finance
  - How much money will you need to carry out the project?
  - Where will that money come from?
  - What about timing and cash flow? Will the money be there when you need it? What will happen if funds are delayed?
  - Do the sides know how to keep financial accounts and records?
  - Would it help to have a business plan?
  - Would it help to have outside financial advice?
- Technical skills
  - What technical skills will the project require, including engineering, construction, forest management, wildlife management, tourist hospitality, marketing, and law enforcement?
  - Do the sides have those skills now?
  - If technical skills need to be transferred from one partner to the other, is the skillful partner able to devote the time and effort to train the other partner?
  - If the sides lack skills, who can supply them?
- Infrastructure & equipment
  - What will the sides need for transportation: roads, vehicles, fuel, etc.?
  - What will the sides need for harvesting and processing?
  - What will the sides need to support tourism?
  - What will the sides need for communication?
  - What will the sides need for offices and administration?
  - Who will maintain the infrastructure and equipment?
- Timing
  - Can the parties meet deadlines for consultation and planning?
  - Can the parties meet deadlines for construction of new facilities?
  - Can the parties respond to unexpected delays?
  - Can the project be completed within the proposed timetable?

## ***Tracking and Verifying Implementation***

In a good agreement, verifying the sides' compliance is easy. The agreement typically includes milestones or indicators that can be measured objectively.<sup>28</sup> The conditions that trigger obligations are clear. So are the actions that the agreement requires the sides to take.

The milestones and indicators must fit the capacities of the sides. If the sides are sophisticated, the agreement can require production of business plans, recordkeeping, inventories, monitoring, auditing, and other measures of a sophisticated nature. If the sides have limited capacities, the steps needed to demonstrate compliance will have to be less demanding.

Sometimes the indicators can be simple but can draw on high technology. For example, some projects aimed at providing environmental services have used satellite photos to verify compliance (maintenance of forest cover) over large areas.<sup>29</sup>

For the community, good indicators of the government's performance are often simple and concrete. Did the community or its members receive the promised payments? Do community members have access to the forest, as promised? If the government promised infrastructure improvements, were those completed? For milestones involving payments, however, it is wise to create a paper record of accounts and receipts to enable audits and independent verification.

If members of the public (or people other than the partners) have an interest in activities under the project, then transparency is also a concern. The advisor must encourage the sides to think about how outsiders might follow the implementation of the agreement.

## ***Communication During the Project***

In any complex project, the sides will need to communicate. They will need to keep each other informed of plans, actions, and problems. They will need to report routine progress. They will need to coordinate joint actions. They will need to negotiate any necessary modifications to the project. And there will simply be times when they need to reassure one another that everything is working well.

The project agreement can spell out how the sides will communicate. It can name points of contact. It can provide for emergency or back-up channels of communication. It can specify that particularly important information, such as requests for payment, must be in writing or otherwise witnessed and recorded. It can call for regular, face-to-face meetings of the sides. It can call for periodic written reports. It can require that the sides discuss or at least give notice of problems before turning to outsiders, such as the courts, for help. It can identify aspects of the project that the sides agree to keep confidential, and it can set up ground rules for sharing information with the press and other outsiders. It can specify the language for official meetings and notices.

The advisor first needs to know each side's preferred style of communication. In hierarchies typical of government agencies and businesses, this may be straightforward. These kinds of organizations are used to delegating responsibility to representatives, and the people who serve in them understand the responsibilities that come with the role of representative. For local communities and associations, the situation may be more complex. These groups may be comfortable designating people with the power to listen on behalf of the group, but not granting people power to speak for the group. Or, they may insist that a

<sup>28</sup> This viewpoint is suggested by a passage in Orr *et al.*, at 296.

<sup>29</sup> The government used such verification in the Mexican Payment for Environmental Services project discussed in Jennifer Alix-Garcia *et al.*, *An Assessment of Mexico's Payment for Environmental Services Program* (2005) (available at [are.berkeley.edu](http://are.berkeley.edu)).

committee must serve as the group's representative, or even that major issues be brought before a meeting of the entire group.

The advisor also needs to take communication infrastructure into account. It may be that the partners are quite sophisticated about communication and have the latest technology at hand. Communication may be inexpensive and rapid. An agreement that requires each to give the other written or electronic notice of problems within 24 hours is quite reasonable. Or it may be that infrastructure is lacking. Communication is slow and may require individuals to physically travel to the nearest communication center. An agreement that calls for instant notice would be impractical.

Regular meetings or reports can bring problems to light and start the sides working on solutions. Having the sides sit down together after the agreement is signed but before any physical work is a good way to begin a pattern of full and open dialogue. The agreement can include a schedule of regular project review meetings.

Not all project agreements need to go into detail about communications. Sometimes local culture and law will adequately ensure that the sides communicate. However, the creator of a project must give some thought to whether local culture and law are adequate.

## ***Getting the Incentives and Parties Right***

In setting up a project, the advisor should be thinking about two related questions. First, are the people with the power to make the project succeed part of the project? Second, do those key people have incentives to work for the project's success?

These questions touch on the motivation for many community forestry partnerships. The central government realizes that it cannot effectively manage the forest or improve rural economies without local involvement. To involve those people, the government comes up with a project that shares benefits with the local community. The project gives the community an incentive to help the government achieve its goals.

Projects may fail if the wrong people are at the bargaining table, or if the benefits are going to the wrong people. The Monarcha Biosphere Reserve in central Mexico gives an example of this. Millions of monarch butterflies from large areas of North America spend the winter in a small area of high-altitude forests in central Mexico. The butterfly habitat is under threat from deforestation. The federal government took several steps to protect this land in the 1980s and 1990s, without key involvement of local communities. The steps ranged from laws prohibiting harm to the butterflies, to creation of a reserve, to expropriation of privately owned lands. None of these brought significant benefits to the people with the power to protect the forests, and none effectively stopped deforestation.<sup>30</sup>

The federal government, working with an NGO, opened up economic opportunities to one of the local communities in the form of tourism and forest nursery work. This increased support for protection of the land in the benefited community, but left dozens of other local communities without significant benefits. Deforestation continued. Not enough of the key people had incentive to protect the reserve.

Then the government and NGOs embarked on an expanding series of initiatives to consult with the key parties about management and to pay the communities for providing environmental services.<sup>31</sup> These initiatives have helped, but deforestation in the reserve continues.<sup>32</sup>

<sup>30</sup> A legal and institutional analysis of the reserve through the mid 1990s is in ch. 5 of Environmental Law Institute, *Legal Aspects of Forest Management in Mexico* (1998) (available at [www.elistore.org](http://www.elistore.org)).

<sup>31</sup> Mónica Missrie and Kristen Nelson, *Direct Payments for Conservation: Lessons from the Monarch Butterfly Conservation Fund* (2005) (available at [www.mbsf.org](http://www.mbsf.org)).

<sup>32</sup> See NASA Earth Observatory, *Deforestation in Monarch Butterfly Reserve*, [earthobservatory.nasa.gov](http://earthobservatory.nasa.gov) (accessed 1 October 2008).

When faced with a situation like this, the advisor needs to think about parties and incentives. Perhaps not enough communities are yet involved. Perhaps the benefits are flowing to the community leadership but not to the people who actually use the forest. Perhaps powerful interests alongside the communities, such as mill owners and lumber dealers, are exerting influence but are not yet at the table. Perhaps the incentives are simply not large enough.

Also, the advisor should be aware if there are other parties who are not part of the present project, but who might be affected or who might affect the project. If a mining company owns mineral rights in the area, or an energy company has a right-of-way for a pipeline, exercise of those rights could affect the success of the project. If another nearby community disagrees over who should enjoy forest rights or income, that will be a problem.

## ***Security of Rights***

One of the great services that a contract can provide is assuring the parties of the security of their rights.<sup>33</sup> This issue is closely tied to issue of creating good incentives. No one wants to invest time and resources into a project only to discover that the expected benefits are not coming. A contract cannot eliminate all risks, but it can help to reduce the risk that legal hurdles would deny a side its expected rewards.

The advisor needs a full understanding of the scope of the sides' existing rights. That requires an understanding of both the general rights granted in law and specific rights granted through property ownership and contract. If the rights are uncertain, the contract can clarify them, at least as far as relations between the contracting parties are concerned.

The advisor needs to make sure that the contract is drafted clearly and that the provisions are enforceable. These topics are discussed further in Part III of this paper.

## ***Anticipating and Managing Conflict***

If things do not go as planned, how will the sides handle the situation? If the sides have an enforceable agreement, they can always go to court. Lawsuits have several disadvantages, however. Going to court is usually slow and expensive. It requires knowledge of the law, and a side without good legal advice is disadvantaged. If the court is corrupt or biased, the result may not be fair. The remedies that a court offers are limited. For example, a court generally will not sit down with the parties and help them renegotiate terms or devise a supplemental agreement. And rarely do the sides come away from a lawsuit in a frame of mind to work together.

So, the advisor should encourage the project to include ways to handle differences short of going to court. A common step is require the sides to give each other notice when problems arise, and to give a reasonable amount of time to correct problems. For example, the agreement might require each side to give the other formal notice of suspected violations of the agreement, with two weeks to correct the violation. For violations that threaten imminent and irreversible harm, the agreement can require quicker corrective action or allow emergency steps.

If the problem persists, the agreement can encourage mediation or conciliation. These use an outside neutral party to foster dialogue aimed at resolving the problem. The neutral does not make a decision about the merits of the sides' arguments, but rather steers the sides towards negotiating their differences.

<sup>33</sup> See J.M. Lindsay, *Creating Legal Space for Community-Based Management: Principles and Dilemmas*, (Food and Agriculture Organization of the United Nations, 1999) (available at [www.fao.org](http://www.fao.org)); Don Gilmour, *Participatory Forestry in Timor-Leste: Discussion of Issues and Options* (Report for FAO Regional Office for Asia and the Pacific, December 2007).

The agreement can require arbitration, which is the use of an outside neutral to listen to the sides' positions, much as a judge would, and decide the case. Where courts are slow, biased, or expensive, private arbitration offers an alternative.<sup>34</sup>

The agreement can also require the sides to use traditional dispute resolution methods rather than modern courts. The advisor should look into whether the community has traditional methods that are timely and fair.

## ***In Summary***

A key task of the project advisor and contract drafter is to anticipate the problems that the project may face and address them in the contract. The drafter should consider the following issues that can lead to problems in projects:

- Is the agreement is too ambitious? Are the demands of the contract beyond the capacity of the parties to implement? Consider —
  - The government or business's capacity to oversee the work of the community.
  - The community's capacity to manage the forest and the organizational aspects of the project.
  - The availability of necessary capital and the means to manage it.
  - The availability of technical skills.
  - The availability of infrastructure and equipment.
  - The timetable of the project.
- How will the sides be able to verify compliance with the agreement?
  - Should the project include intermediate milestones that will indicate that the sides are making good progress?
  - Are there technical means to measure progress?
  - Does the project need to require recordkeeping, such as for financial accounts and receipts? Does it need to provide for audits?
  - Does the project need to be transparent to outside observers?
- Is the project set up to encourage ongoing communication between the sides?
  - Does the contract need to identify means for routine and emergency communication between the sides?
  - Is it clear who may speak for each side, and who should receive important communications? Is it likely that the sides' representatives will actually function effectively as the ears and voice of their sides?
  - Do the sides have good communication infrastructure, and do the communication requirements of the project fit the capacity of the infrastructure?
  - Should the contract call for regular project meetings?
- Does the project include the right parties, and does it create the right incentives?
  - Are the people who can assure success part of the project?
  - Do those people have sufficient reasons to work for the project's success?
- Does the project grant secure rights?
- How will the project participants handle problems and disagreements during the project?
  - Does the contract include agreed-upon ways for the parties to bring up problems with each other?

<sup>34</sup> Perhaps the time has come for forestry agencies and donors to consider building a network of regional entities to promote mediation and arbitration of community forestry disputes. In the 1960s, recognizing that the lack of trusted court venues was discouraging international commercial investment, the World Bank fostered adoption of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The Convention created an international body available to arbitrate commercial disputes. See International Centre for Settlement of Investment Disputes, About ICSID, [icsid.worldbank.org](http://icsid.worldbank.org) (accessed 1 October 2008). Traveling to Washington to have a case heard at the International Centre for Settlement of Investment Disputes is impractical for most community partners. Regional natural resource dispute centers could train and provide local neutrals to assist in mediation, conciliation, and arbitration.

- Should the contract include ways to seek outside help to resolve disputes short of going to court, such as mediation or arbitration?
- Can the contract call for traditional dispute resolution practices short of going to court?

## Part III: Drafting the Agreement

### *General Style*

This section examines some broad issues in forest contract drafting. It assumes that both lawyers and non-lawyers may be involved.

As a starting observation, lawyers should keep in mind that drafting a contract is not litigation.<sup>35</sup> Every partnership involves an element of cooperation. Avoid tricks and seek a true agreement. The written document is only a record of the agreement; actually agreeing is the important thing. “The best contract is one that is thrown in the file after it is signed and never looked at again.”<sup>36</sup>

Non-lawyers should keep in mind that although anyone can make a contract, entering a contract without legal advice is risky. True, the lawyer often ends up being “the grouch at the party”,<sup>37</sup> reminding people of all the things that can go wrong or telling people that their plans violate the law. This dose of reality is actually a blessing. It is far better to sort out the legal issues together before executing the contract than to sort them out with a judge afterwards.

All drafters should keep in mind that the central goal is to capture the parties’ agreement clearly and accurately. Doing so can prevent future conflict and empower the parties by guaranteeing their rights.<sup>38</sup> A well-drafted contract is a strong foundation for a successful project.

The topics below start with matters concerning the overall approach to writing the agreement. They progress to cover some narrower points, including some issues tied to the laws governing contracts and property ownership.

***The level of detail: Fuzzy or fussy?***<sup>39</sup> Contracts can be one-page records of the general points of agreement or thirty-page dissertations on the details of the parties’ relationship. Deciding how detailed the contract should be is often hard. Lawyers tend to err on the side of too much detail. They want the contract to address procedural issues such as notice, breach, communication, and a long list of “boilerplate” matters. They are afraid that leaving any issue unaddressed is an invitation to future conflict. Non-lawyers often err on the side of too little. They are afraid that bringing up too much detail at the start of the project indicates mistrust. They would rather have the parties work out problems as they arise, relying on shared culture and goodwill to fill in the gaps.

Striking the balance between detailed, fussy drafting and the general, fuzzy contract is a matter of art rather than technical skill. Nonetheless, some particular factors stand out for consideration.

One factor is the size of the project, in terms of area, economic impact, and duration. If the project envisions the community planting trees for two weeks, there may be little need for a detailed contract. If the project envisions the community developing a multi-million dollar tourist facility on government land over two decades, then going into some detail might be wise.

<sup>35</sup> Peter Siviglia, *Contracts and Negotiating for the Businessperson (You and Your Lawyer)* (2007) at 43; Tina Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2007) at 3.

<sup>36</sup> Siviglia (2007) at xv. See also Stark (2007) at 4.

<sup>37</sup> Burnham (2003) at 135.

<sup>38</sup> For more on the need for clear, secure, and enforceable rights, see. J.M. Lindsay, *Creating Legal Space for Community-Based Management: Principles and Dilemmas*, (Food and Agriculture Organization of the United Nations, 1999) (available at [www.fao.org](http://www.fao.org)).

<sup>39</sup> For the original discussion that inspired the heading, see Lisabeth Campbell, *Legal Drafting Styles: Fuzzy or Fussy?*, 3 E LAW | Murdoch U. Electronic J. of Law, [www.murdoch.edu.au](http://www.murdoch.edu.au) (1996).

A second factor is the level of risk. If failure of the project is readily foreseeable, or if there are past examples of failures that the sides want to avoid, then the drafter should discuss these possible problems in the contract, even if doing so requires going into details.

A third factor is capacity of the parties. Contracts with detailed requirements can require more effort to carry out, from the perspective of both implementation and verification. Paperwork requirements that make perfect sense for a large business, which is already keeping financial records or making plans, may be burdensome to small communities. Requirements for time-intensive town meetings and consultations, easy for communities, may tax the staff of centralized agencies. Avoid complexity that the parties are not prepared to handle.

A fourth factor is the cultural attitude towards contracting. In many settings, detailed written contracts are rare. In places where the rule of law is weak, personal pledges and unwritten understandings may be more powerful than written words. In societies prone to corruption, a contract full of detailed requirements may become a tool for one side to try to extract bribes from the other. These conditions argue for a simpler, more general contract. On the other hand, if an international donor or large business is backing the project and the backer has an organizational culture of detail and formality, some level of detail may be necessary in all project documents.

**Plain language:** Even for a lengthy and complex project, drafters should strive for simplicity of expression. “[A] person of reasonable intelligence who knows nothing about the [project should] understand the deal after one reading of the contract.”<sup>40</sup>

Where possible, avoid old-fashioned legal phrases and complex scientific terms. “Think like an attorney, but try not to sound like an attorney.”<sup>41</sup> Contracts are supposed to record how sides agree. If the words are too specialized or complex for one side to understand, is the contract really an agreement?

To an extent, drafters can use complex language and then assure true agreement by going over the language with the parties and explaining its meaning. However, such counseling is not always an option. If the drafter is an attorney and one of the parties is the drafter’s client, the drafter may not be able to give the other party candid advice about the wording. With model contracts, the drafter may never have a chance to explain the wording directly to the many parties who will use the model.

Modern authorities encourage plain language in all legal drafting. For some introductory guidance, see the author’s previous paper on legislative drafting and the sources cited there.<sup>42</sup>

If you cannot use plain language, at least follow this rule: never use language that you yourself do not understand.<sup>43</sup> Drafters sometimes borrow wording from older contracts or from published drafting guides. That practice is acceptable, as long as the borrower fully understands what the language does.

**Clear and exact language.** Sentences can unintentionally have more than one interpretation. For example —

- Open-ended passive voice: “The logs shall be measured and graded before being transported.” Who has the obligation to measure and grade the logs? The harvester? The buyer? The forest agency?
- Slippery antecedents: “After the district ranger notifies the community representative, he shall place a record of the communication in the common project files.” Which person is responsible for filing the record?

<sup>40</sup> George W. Kunej, *The Elements of Contract Drafting: With Questions and Clauses for Consideration* (2003) at 45.

<sup>41</sup> *Id.*

<sup>42</sup> Kenneth L. Rosenbaum, *Legislative Drafting: A Practitioner’s View* (FAO Legal Papers Online #64, 2007, available at [www.fao.org/legal](http://www.fao.org/legal)), Part III(B).

<sup>43</sup> Siviglia (2207) at 21.

- Chains of conjunctions: “To take effect, a change to the management plan must have the approval of the community and the district forester or the chief forester.” Does this mean that approval must come from the community and either the district or chief forester, or does this mean that approval must come from either the community and district forester or from the chief forester acting alone?
- More conjunction problems: “The community shall instruct new and inexperienced members in the safe operation of chain saws.” Does this apply to all new members and all inexperienced members, or just to members who are both new and inexperienced?

The list could go on and on. The author’s previous paper on legislative drafting discusses practices aimed at eliminating poor language,<sup>44</sup> as do many contract drafting guides.<sup>45</sup>

**Consistent language.** The drafter should use consistent wording throughout the contract.<sup>46</sup> Courts will assume that when the drafter uses different words, the drafter is referring to different concepts, and when the drafter is using the same word, the drafter is referring to the same concept.

Every contract creates obligations, rights, and conditions. The following is a serviceable and consistent set of words to express these ideas:

- For obligations, use “shall” and “shall not”. For example, “The community shall submit a forest management plan to the government for review and possible approval. The community shall not harvest forest products except in accord with a forest management plan that the government has approved.”
- For conditions, which apply to things or persons other than the main parties, use “must”. “The management plan must describe forest management activities on the contract area for a five-year period.”
- For rights, use “may”. “The community may ask the government to review and approve management plan amendments at any time.”

## Common Legal Issues

Contract law has grown out of the common human practice of exchanging goods and making promises. It reflects real life. Just based on their own experience, most people have a general idea of what a contract should say.

Contract law has also grown out of thousands of years of arguments over broken bargains. Almost everything that could go wrong has gone wrong, in one way or another. The strength of the law and the skill of the lawyer are both based on an understanding of how things may go wrong, how to anticipate problems, and how to resolve the resulting conflicts fairly.

The discussion below is an introduction to selected aspects of contract law. It will not make the reader an expert, but it may help the reader avoid some common drafting oversights.

**Mutuality and intent to be bound.** In common law jurisdictions, to be binding, contracts must create costs or obligations for all sides. These costs or obligations are called “consideration”. The consideration does not have to be equal. For example, the contract could bind to the community to a ten-year project, while giving the government the power to cancel

<sup>44</sup> Rosenbaum (2007), Part III(C).

<sup>45</sup> For a good treatment, see Kenneth A. Adams, *A Manual of Style for Contract Drafting* (American Bar Assoc. 2004) at 115 et seq.

<sup>46</sup> This advice is common to many contract drafting authorities. See, e.g., Burnham (2003) at 251; Stark (2007) at 251; Adams (2004) at 1.

the project on ten days' notice. However, both sides must accept some obligation or give up something of value.

A drafter representing one side may tend to shift the burdens to the other side. That only becomes a legal problem when the shift becomes complete and the drafter's side has no obligations at all. At that point, at common law, the arrangement ceases to be an enforceable contract.

To make an agreement enforceable, the parties must intend to be bound. Some contracts explicitly state that the parties are making a binding agreement. In many jurisdictions, the formality of signing a document labeled as a contract is enough to establish that intent implicitly. However, documents that state that the parties have reached "agreement in principle" suggest that the parties have not yet signed off on the details of a binding agreement. Documents that say that the agreement is a draft are similarly suspect.

**Contracts compared with licenses.** Contracts are binding, enforceable agreements. A license is a grant of permission. A license by itself is often revocable. For example, a person may have a driver's license or a hunter's license. This is an official piece of paper from the government that allows the person to engage in an activity, however the government can revoke it.<sup>47</sup>

Some contracts include the grant of a license. For example, a community might agree to sell permission to enter community land to prospect for minerals. Or a government might give a community permission to collect firewood on a public forest in return for a promise to guard the forest from illegal loggers. These contracts include licenses; the license is part of a contract but is not the contract itself. The license may still be revocable, but revoking the license may breach the contract.

Confusingly, some jurisdictions call public timber sale contracts "licenses". However, even if contracts are called licenses, there are really two separate legal concepts involved: the permission to use the forest and the binding agreement that grants that permission. The contract may even allow the government to revoke the permission under specific circumstances, but not to cancel the remaining obligations under the contract.

Some papers on forest administration use the terms "license" and "contract" interchangeably even though the terms are not legally identical. Be careful when using "license". If in doubt about whether to call something a license or a contract, seek legal advice.

**Remedies.** A drafter needs to think both about how a project will work if things go well, and what should happen if things go wrong. In particular, the drafter needs to understand what might happen if a dispute over the contract comes before a court.

"Remedies" in the legal sense refers to the relief that a court might offer. The common remedies in contract cases include —

- Rescission: an order to dissolve the contract or declare that the contract never existed in the first place.
- Restitution: an order to return something received or pay its value.
- Damages: an order to pay a party the amount it lost when the contract terms were not met.
- Specific Performance: an order to follow the terms of the contract.

Typical criminal remedies, like fines and imprisonment, are not on this list.

To a certain extent, a contract can suggest appropriate remedies to apply. For example, in a situation where it would be difficult to assign a monetary value to an injury, a

<sup>47</sup> "A [fishing] license granted by the state is in no sense a contract or property right, and may be revoked by the sovereignty which granted it at its pleasure and without notice." *State v. Pulsifer*, 129 Me. 423, 152 A. 711 (1930).

contract can offer an agreed-upon value as “liquidated damages”. What is the injury caused when a person kills a protected animal? The sides can agree on an amount in the contract.

A contract cannot ordinarily create a new criminal offense or specify the punishment for an offense. Someone who breaches a contract might incidentally violate a criminal law, such as fraud, but those strictures must appear in the criminal laws themselves. Do not try to use a contract to create a new crime or to declare that one who breaches the contract is guilty of an offense.

**Consistency with existing law and policy.** A contract provision that runs counter to a statute or rule is unenforceable. For example, if the Labor Act prohibits discrimination based on tribal origins and the contract requires one side to hire workers only from the local tribe, the provision may be unenforceable.

Courts may also refuse to enforce a contract provision that runs counter to well-established public policy or that shocks the conscience of the court, even if it violates no specific law. For example, a court might refuse to enforce provisions that create conditions akin to slavery, that encourage child labor, or that shamefully waste forest resources.

Courts are more likely to find a provision shocking if it seems unjustified by the circumstances, if it is hidden away in complex language, or if it benefits the side that has the stronger bargaining power. For the first two reasons, it is good practice to give some background explanation for any harsh provision in the contract, to write it plainly, and to make no attempt to hide it.<sup>48</sup>

**Dealings with outside parties.** Contracts are not regulations. Regulations govern entire classes of people. Contracts can govern the relationship between the parties that enter into the contract, but can seldom do more than that.

A contract cannot create obligations or impose remedies for people who are not either parties to the contract or closely linked to parties. For example, if the contract sets a value on the loss of a protected animal, that value applies to losses caused or allowed by the parties and their members, employees, contractors, and so forth. It does not create new standards for persons unconnected to the contract.

A contract may create benefits for people outside the contract. These people are called “third-party beneficiaries”. For example, a contract could require one side to allow the public to use forest roads built for the project. Whether a court will allow these outsiders to sue to demand these benefits depends on the contract, the benefits, and the local law. If the sides wish third-party beneficiaries to have the right to ask a court to enforce their benefits, the contract should say so.

In limited circumstances, a contract can pass power over a third party from one person to another. This is discussed in two sections below, under property rights and transfers of rights.

**Property rights and transactions.** Permission to use land is not the same as ownership of land. Ownership often includes powers that simple permission does not. For example, if a forest owner gives a neighbor permission to collect firewood, the neighbor cannot necessarily transfer that permission to others, and the neighbor cannot necessarily exclude others from collecting firewood. On the other hand, the owner could give the neighbor a usufructory right to collect the firewood on the forest. Depending on how this right was shaped, the neighbor could transfer the right to others or exclude others from collecting wood. The neighbor would own the right to collect firewood.

In a few cases, a community forestry partnership will want to frame rights and obligations in terms of ownership. For example, if a forest sequesters carbon, one partner may want to “own” that carbon credit and be able to sell it to others. If a business gives

<sup>48</sup> Burnham at 60–61.

management advice to forest landowners in a community in return for long-term preferential standing to buy forest produce from their lands, the business would want that preference to survive even if the land passed by inheritance or sale to a new owner. One way to achieve that is to frame the business's interest as a property right.

In other cases, the landowner will not want to transfer ownership. For example, a government may not want to pass ownership of public forestland into private hands. In cases like this, the owner's intent will simply be to grant permission to use the land, perhaps exclusively, but the owner will not want to give, rent, or sell any kind of property interest.

Property transactions involve laws and formalities that overlap with the laws of contracts. Again, these vary locally. If the parties do not intend to transfer an ownership interest, the contract can state this explicitly, to avoid confusion. If the parties do want to transfer ownership, consult a local lawyer to ensure compliance with local property transaction laws and practices.

**Transferring and assigning other rights and obligations.** People sometimes transfer or assign contract-related rights and obligations that have nothing to do with land ownership. For example, a company might transfer the right to collect a contractual debt to a debt collection agency. A government might hire a construction business to build a school that the government had contractually promised to build for a community.

The general rule is that a party to a contract cannot escape obligations by transferring them. In the previous example, then, the government is still responsible to the community if the school is not built. Incidentally, the construction business would also be responsible to the government and might be directly open to a lawsuit by the community.

Sometimes, however, one side wants a particular person or member of a class to perform the obligation. For example, the government may have a long list of qualifications for a business or community to participate in government forestry contracts. The government does not want to discover that a qualifying company has acted as a front and has assigned all its obligations to an unqualified company.

A drafter should be alert to these concerns. A contract can place limits on transfers and assignments. If one side particularly does not want obligations and rights to be transferable, the contract should say so.

When dealing with business organizations, the drafter must also think about whether control of the organization is of concern. For example, some governments have procurement laws that prohibit the government from awarding contracts to companies and individuals that have been convicted of crimes. A "clean" front organization could win a contract and then either hire a crooked managing director or sell itself to another corporation that would be ineligible to win the contract directly. Technically, the contractual duty stays with the eligible company, but control of the company has shifted. If no law directly prohibits such moves, the drafter may need to prohibit these actions in the contract itself.

**Liability, business organization, and indemnity.** If someone is injured in the course of the project, the law may assign liability for the injury to one or more of the parties. The parties may seek to limit their responsibility for each other's actions, or have one side assume the burden of any liability that grows out of the project. Contracts and the business relationship of the parties can influence how the law assigns liability and who must pay the damages.

A contract cannot block outside liability claims. A contract does not bind people unless they are parties to the contract or closely connected to the parties. So, a disclaimer such as "The parties to this contract are not responsible for any damage to others that may arise from the project activities" is ineffective.

A project can protect its participants from personal liability through creation of an appropriate business entity. For example, a business (or government) could form a new

corporation with a cooperating community. The corporation would carry out the project and be responsible for any liability from the project. The business and community each would own part of the new corporation, but as shareholders, they would not be personally liable for the corporation's debts, beyond their initial investment.

To create a corporation or other entity with limited liability, the parties must follow local registration or incorporation requirements. Doing so will affect taxation and may trigger other legal requirements. If the parties are considering forming a limited liability entity to carry out the project, they need the advice of someone who understands how to do it and what the broader consequences are.

If a drafter ignores the liability issue, rather than shielding the parties from claims of liability, the contract may expand their exposure. In fact, when two parties make a contract, one may become responsible for the other's actions, even though the contract does not discuss liability. This can happen if the parties form a partnership in the legal sense or a principal-and-agent relationship.

This paper has freely used the word "partnership" in a non-legal sense, but "partnership" also has a special legal meaning. Under common law, a partnership is a type of business organization in which every partner is individually and personally responsible for meeting all the obligations of the enterprise. For example, if a government and a community form a legal partnership, and the community runs up debt or causes an injury during the project, the injured person could sue the government for damages.

Because of this danger of liability, the drafter should be careful in using the words "partnership" and "partner" in an agreement. In fact, the drafter may want to state in the contract that the parties are not intending to create a partnership or similar kind of shared-liability business entity.

When one person becomes the agent of another, the principal becomes secondarily responsible for the agent's actions. For example, when an employee carelessly crashes a delivery truck into another vehicle, the employer may end up paying for the damages. Or, if a project agreement appears to make the community the agent of the government, a court might hold the government liable for damage caused by the community.

Local laws typically weigh a series of factors to decide if one side is acting as an agent of the other. If the government makes decisions and the community carries them out, if the government provides the land and the tools, and the role of the community is generally subservient, the law might consider the community to be acting like an agent. A statement in the contract that the two sides do not intend to create a principal-and-agent relationship would be a factor weighing against finding such a relationship, and might protect the government from liability, but it would not be definitive.

Sometimes parties deal with liability concerns through an indemnity clause. In an indemnity clause, one side agrees to defend the other against claims arising out of the project and to pay any successful claims. In effect, one side insures the other against damage claims.

Issues of liability are legally complex. Local laws may limit claims against the government or may otherwise affect the rights of injured outsiders. If a contract includes language on liability, local counsel should write or review the provisions.

**Single documents, side agreements, and the concept of "merger".** The best practice is for the sides to put their entire agreement in writing, in a single document or in a set of documents that refer to one another. There are fewer questions then about what the actual arrangement is, whether the parties made side agreements at the same time, or whether the parties intended the new written agreement to replace any previous agreements on the topic.

When a new agreement encompasses and replaces other agreements on a topic, lawyers call it “merger”. Lawyers commonly add a merger clause to written contracts stating that the single document replaces any earlier agreements. Merger clauses do not prevent the sides from agreeing later to add side agreements or to alter the main contract. They just state that any agreements that existed up to that point are now merged into and replaced by main contract.

## Steps to Writing a Contract

The following outline suggests steps to follow in drafting a contract.<sup>49</sup> This outline is only a rough guide. In practice, the steps overlap and blend. For example, the drafters should investigate the facts and law at the start of the process, but as negotiations proceed there will be new issues to investigate. The drafters may create a task schedule in the beginning, but they will end up revising it as the process proceeds.

- *Investigate the facts.* Interview the sides. Understand how they see the project, what they want to achieve, and how they see themselves working together. Viewing the site is often useful.
- *Investigate the law.* The key forest law is a good place to start. This may specify how you make your contract (e.g., through procurement auction, through application of a model, or through individual negotiation). It may also specify particular points that the contract must cover, or clauses that it must contain. Depending on the context, the drafter may also need to become familiar with government administrative laws, such as the laws governing procurement, and general business laws, such as the laws governing contracting, property, finance, or labor.
- *Organize yourself.* Start keeping documentation that will help you spend your time efficiently and, if necessary, help you pass the work off to another drafter or work together with a team of drafters. That may include keeping—
  - A task schedule.
  - A list of officials, stakeholders, and experts met, with contact information.
  - A list of issues for the agreement to cover.
  - A form-and-style sheet, recording decisions like how to number sections and paragraphs, how to refer to the parties, etc. This will help the document follow a consistent style.
- *Look for examples of previous work.* Studying similar contracts will point out issues to address and ways to handle potential problems. Look for contracts from other projects in the country, from other countries in the region, and from allied fields. (For example, even if the project at hand concerns forest management, a contract on community grazing on grasslands might contain useful ideas.)
- *Negotiate; prepare drafts; seek comment; repeat.* See the discussion below for guidelines on preparing drafts.
- *Prepare the final draft.*
- *Review the draft.* One authority recommends that the drafter should read the contract aloud, then set it aside for a few days and read it again.<sup>50</sup> Another suggests reading it five times: once thinking about theme, goals, and structure; once thinking about rights, duties, and conditions; once thinking about things that might be implied but not fully stated; once thinking about what will happen if one side does not keep the agreement; and once looking for vagueness, ambiguity, missing terms, and poor language.<sup>51</sup> Search for and remove any language that says that the document is not intended to be binding. Look in the headings and the text for words like “draft agreement” or “agreement in principle” that suggest that the parties do not intend this document to be enforced.<sup>52</sup>
- *Execute (i.e., sign) the contract.* At the end of this Part of the paper is a short discussion of issues that may come up during the signing of the contract.

<sup>49</sup> The steps are adapted from Kunej (2003), at 5.

<sup>50</sup> Siviglia (2007), at 19.

<sup>51</sup> Burnham (2003), at 319.

<sup>52</sup> Stark (2007), at 338.

## Contents and Organization of a Contract

In most jurisdictions, how a contract is organized is less important than what the content says. If the contract ever comes before a court, the judge will be more concerned about what the parties intended than about how they organized their paragraphs.

Nonetheless, drafters typically follow some conventions in writing out contracts. These conventions have proved over time to make the contracts easier to draft and easier to understand. The discussion below presents some common topics and a possible outline of organization.

Some forestry laws include requirements for organization or content of forestry agreements. The drafter should research these requirements. They obviously take precedence over the guidelines offered here.

The list below is detailed. As discussed above under drafting style, use your own judgment as to whether the contract at hand needs to cover all the smaller points.

## Introductory Matters

**A title.** Drafters often begin by giving the contract a title. This is not a legal requirement, but having a title allows the parties to refer to the contract easily in future discussions. The title might mention the parties, or the subject matter of the agreement, or the date — anything to connect the title to the agreement at hand. Thus, a contract might be headed, “Agreement for Stewardship of Lands in Siuslaw National Forest” or “Contract with the Community of Mapleton for Joint Forest Management.”

**Parties.** The first substantive point in an agreement is usually the naming of the parties, along with some words indicating that the document is a contract. For example, “This is a contract between the Forest Development Authority of the Republic of Liberia and XYZ Corporation.”

The naming of the parties may be as simple as that, however many drafters take the opportunity to begin addressing other matters. They may include a short name for the parties: “This is an agreement between the Forest Development Authority of the Republic of Liberia (the Authority) and XYZ Corporation (the license holder).” They may insert a representation: “... and XYZ Corporation, a company licensed to do business in Liberia.” They may give addresses and other contact information for the parties and even name the individuals who will represent the parties as they work to implement the agreement.

**Dates.** The introductory material sometimes includes the effective date of the contract, its term, and some rough identification of the land involved. Note that the effective date is not necessarily the date the contract is signed. The parties may want the provisions to take effect at some other point. In a complex agreement, there may be a series of important dates, and the drafter may want to deal with dates and term later in a separate section. For ease of reference, though, it is useful to have the names of the parties, the land involved, and the dates near the front of the contract or at some other standardized, easy-to-find place.

**The recital.** Next, usually, is a recital. Recitals are statements of fact that explain the history and purpose of the contract. These may be familiar to some as the “Whereas” clauses: “Whereas the Government wishes to improve the management of its forests and promote rural development; and whereas the community wishes to gain benefits from the forests around it, now therefore ....” The word “whereas” has no special legal significance, and modern drafters will sometimes simply list a series of facts under the heading “Recitals” or write an opening paragraph explaining the background of the agreement, with no special heading.

The recital is there to orient the reader. If the contract ever goes before a court, the court will use the recital to help understand the intent of the parties.

Ordinarily, the recital is not enforceable. If statements in the recital later prove false, neither party bears responsibility. If a provision is intended to be enforceable, put it in the main body of the contract.

On rare occasions, a court might find that a false statement in the recital is evidence of a problem that voids the agreement: a mutual mistake. If the parties entered the agreement sharing a serious misconception about a fact that underlies the whole agreement, a court might find that the whole agreement is invalid and therefore unenforceable. Such a mistake would have to be shared by all, without fault of any party. If the drafter wants the courts to be able to void a contract based on mutual mistake, the drafter should be sure to include the key assumptions in the recital.<sup>53</sup> However, in the great majority of contracts, the issue of mutual mistake never arises, and the recital simply serves to give background to the reader and to shed light on the parties' intent.

**Declaration of agreement.** The declaration of agreement immediately follows the recital or is the last sentence in it. The formal style of the past would call for something like, "Now, therefore, the parties hereby enter into the following binding agreement." Sometimes the old drafters would also add a statement of consideration, to make it clear that each side was giving something and receiving something: "Now, therefore, for valuable consideration duly received, the parties ..."

Some jurisdictions prefer this old style. In particular, they may require a contract to contain an express statement that the parties intend to be bound.

Many if not most jurisdictions allow much simpler modern language, such as "For those reasons, the parties agree to the following contract." These particular words are not essential. The important thing is to write something that indicates that the parties want to make a legally binding, enforceable agreement.

## Contents and Numbering

**Table of contents.** If the contract is short, there is no real need for a table of contents. If the contract is more than five or six pages long, a table of contents is a convenience to readers. Drafters often let the introductory materials serve as the cover sheet of the contract. In that case, the table of contents is the natural item to follow. If the contract will have a separate cover page, the table of contents could also go after the cover page.

**Articles and sections.** If the contract is short, there is no need to break the contract down into numbered articles, sections, or paragraphs. If the contract is longer than a page or two, a numbering system will help when discussing, revising, and implementing the contract. It is also helpful to give articles or sections headings, such as "Article II: Duties of the Community". For more on the legal significance of tables of contents and headings, see the discussion of interpretive aids, below.

**Pages.** Numbering each page of the document is usually a good idea. Page numbers make it more difficult to cut provisions out or slip new pages in after the document is printed and signed. If this kind of fraud is a concern, the drafter can also format the document to limit blank spaces between contract sections and can ask the parties to initial each page when the contract is executed. If detailed enough, the table of contents can also deter fraudulent alterations to the document.

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<sup>53</sup> See Burnham (2003) at 117.

## Definitions and Interpretive Aids

**Definitions.** Although most of the words in a contract should have the same meaning as they do in the ordinary speech of the parties, drafters almost always give some words special meanings. Sometimes these words are just shortened ways to refer to a particular person, place, or thing. For example, it is easier just to refer to “the community” than to give the full name of the community every time. Sometimes these words have a broad meaning in ordinary speech, but the drafter wants the word to have a clear, restricted meaning in the contract. For example, people might disagree about how big a length of a tree’s trunk must be to qualify as a “log”. The drafter may want people to understand that to be considered a log, the length must be at least 120 centimeters, and the diameter at least 10 centimeters measured inside the bark, on the narrower end.

The way to assign specialized meanings is through definitions. Drafters can add definitions parenthetically throughout the text or can collect them in a separate section. The drafter should make the choice based on clarity; there is no legal difference. In a short contract with few definitions, parentheticals are often easiest. For example —

The Forest Development Authority (Authority) grants the XYZ Corporation (License Holder) a license to harvest timber in the following area...

In further references to these two parties, the contract would use the words “Authority” and “License Holder”. Adding “hereinafter” or “herein” to a definition is unnecessary.

In a long contract that uses the same term over many pages, the reader may have difficulty finding the first use with the parenthetical definition. In that case, writing a separate section containing the definitions is usually better.

The best practices for drafting definitions in contracts are similar to the best practices for drafting definitions in statutes:<sup>54</sup>

- Use definitions only when necessary. If you define a word and later edit the word out of the contract, drop the definition.
- Don’t hide obligations in the definitions section. For example, do not write “Roster means a record of community members, which the community shall update monthly.” Put the requirement about updating the roster in the part of the contract that states the duties of the parties.
- Avoid definitions that take a word far from its ordinary meaning. For example, do not write, “Wood includes logs, slash, leaves, medicinal herbs, mushrooms, honey, and grasses.” For such a broad meaning, use a general term like “forest produce”.
- Use the present tense in definitions. Avoid constructions such as “Wood shall mean ....” Instead use “Wood means ...”, “Wood includes ...”, or a similar construction. Save “shall” to describe duties of parties.
- If a term is used in several places in a contract, define the term in the main definition section. If the term is used only once, define the term where it is used.

**Interpretive aids.** The drafter may include a few guidelines to help in interpreting the contract. These can also be placed towards the end of the contract, just before the signature section, with other standard terms (the “boilerplate”). However, there is a certain logic to placing them with the definitions, which are also meant to help readers interpret the contract.

<sup>54</sup> See Rosenbaum (2007), Part III (E); Adams(2004) at 73–83 (note that Prof. Adams prefers putting definitions at the end of the contract).

Common interpretive clauses include the following:

- An explanation of the weight that readers should give to headings: “Descriptive headings are intended merely to help readers find and refer to parts of the contract. They are not intended to change the meaning of the text.” Without a disclaimer like this, the drafter must take great care in creating headings. Otherwise, a heading can place the text that follows in an unintended context, or could cast doubt on text elsewhere in the contract that could have been placed under a similar heading.
- How to treat references to other documents or laws that might change during the course of the contract (the incorporation by reference issue): “Where this contract refers to laws, regulations, or other official standards, it means the standards in place on the contract’s effective date.” Alternatively, “Where this contract refers to laws, regulations, or other official standards, it means the standards as they may be from time to time amended.”
- A common bit of shorthand: “Where ‘includes’ appears in this contract it means ‘includes but is not limited to’.” This is the common meaning of the word “includes”, but some drafters like to eliminate any doubts on this matter. The drafter could put this clause directly in the definitions section instead of here.

## Describing the Land

Unless the contract is for labor or a supply of goods, land is likely to be central to the agreement. Describing the land early in the agreement helps to set the stage for the duties and obligations that follow.

The best way to describe land is by whatever method is commonly used in local legal practice. This might be a metes and bounds description, a reference to an area identified in an existing survey, or a reference to established units of a public forest system.

Whatever method the contract uses, it must allow precise location of the boundaries on the ground. People have been known to fight over whether a boundary is located a fraction of a meter this way or that.

Maps are sometimes useful. Many people find maps easier to understand than other kinds of land descriptions. However, the scale and precision of the map must allow the parties to locate the exact boundary on the ground.

Some contracts use two methods, such as a written description of the property and a map. Problems arise if the two methods fail to describe exactly the same land. The solution is to state in the contract which description takes precedence in case of conflict. For example, “In case of conflict between the written description and the map, the written description takes precedence.”

In a contract covering a large area that is poorly surveyed, or in a contract covering enough time for boundary reference points to shift or be lost, it may be wise to include a method for adjusting boundaries or resolving boundary disputes. (This paper discusses the general topic of dispute resolution below.)

Unless the contract deals with well-established boundary lines, it is good practice to make one party responsible for locating and marking the boundaries and to bar either party from shifting or destroying boundary marks.

If the land includes a zone that will be set aside for special treatment, the contract can identify the zone along with the initial description of the land, or later along with the special obligations that attach to the zone. If the split is central to the agreement — for example, the land is divided into a central management zone and a buffer zone with different obligations for each — describe the zones early. If the split involves a small special area — for example, a fraction of a hectare set aside to shelter a shrine to the community deities — it

may be clearer to describe the boundaries of the zone in the same section of the contract that sets out the protections for the shrine.

## Representations and Warranties

A contract may contain many kinds of promises. The most obvious are promises of future behavior by the parties: “Party *A* shall mark the trees, and Party *B* shall cut the marked trees and shall not cut the unmarked trees.” These are called obligations or duties, or sometimes covenants. Another class of promises concerns assurances of present or future facts: “The government declares that the land is state forest and will remain state forest during the term of the agreement.”

In common law systems, promises about facts are called representations or warranties. Some common law systems call statements that one side makes to get the other side to agree “representations” and statements that one side absolutely promises to be true “warranties”. Some consider promises about present conditions to be “representations” and promises about future conditions to be “warranties”. The two categories may have different requirements of proof and different remedies if the statements turn out to be false.<sup>55</sup> Under these definitions, a single statement can be both a representation and a warranty.

Not all legal systems draw these kinds of distinctions, but for simplicity, this paper will use the terms “representations” and “warranties”. Although there is no legal requirement to group representations and warranties together in a contract, drafters sometimes place important ones near the beginning of the document. Like the recitals, they help to establish the context of the agreement.

Unlike recitals, representations and warranties are promises attributed to specific parties. If the promised facts fail to be true, and the other side is injured, the injured side might be entitled to remedies for the false representation or breach of warranty.

Here are some examples of representations and warranties:

- “The government represents that the land is part of a National Forest Reserve, owned by the government; that the government made a diligent search to identify claims for easements and customary rights attached to the land; and that all the claims for easements and customary rights that came to light in that search are listed in Schedule I of this contract.”
- “The community association declares that it is duly organized under the Local Communities Act as the lawful association for the residents of Villages A, B, C, and D.”
- “XYZ Co. is properly organized and licensed under the Business Act and will remain so during the term of the agreement.”

Using phrases like “the government warrants” or “the government represents” makes it clear that one side is making a promise, but these are not essential words. A court could infer from the context that a statement is intended as a representation or warranty, as in the last two examples above.

Also, a court could find some facts so basic to the agreement that one side implicitly warrants them. For example, if the government promises to provide the community with a satellite telephone to facilitate communication, there may be an implicit warranty that the telephone will work.

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<sup>55</sup> For example, to get damages for a false representation, the complaining party might have to prove that it justifiably relied on the representation, while to get damages for breach of warranty, the party would only have to prove that the statement was false.

## The Basic Agreement

With the stage set, it is time to lay out the heart of the agreement: what each partner gives or promises to the other, what duties they assume, what powers or rights they gain, and what conditions apply.

The potential variation among projects makes it difficult to suggest a specific approach. One way is to describe the obligations chronologically. Here is an example. This outline is only intended to suggest the order of addressing topics, not the specific words to use:

1. The parties form a management committee.
  - a. Who appoints the members
  - b. How the committee is organized and how it operates
2. The management committee creates a plan.
3. The parties review and approve the management plan.
4. The parties will carry out the management plan together.
  - a. Party A provides the land and equipment.
  - b. Party B provides the labor.
  - c. The parties work together on forest protection and other specified matters.
5. The parties split the benefits of the project.

Of course, the steps in another project would be completely different. However, the basic idea of describing the project as a series of steps would be the same.

Another approach would be to take one party at a time and state its major promises, obligations, and rights:

1. Party A shall —
  - a. Provide land and equipment for the project and to join Party B in forming a management committee.
  - b. Review the committee's plan and may raise objections to it on specified grounds.
  - c. Work with party B on forest protection and specified matters.
  - d. Arrange for the harvest and sale of trees.
  - e. Divide income from the sale according to the following formula.
2. Party B, in turn shall —
  - a. Provide labor for the project.
  - b. [and so forth.]

The goal is a clear and comprehensive description of each side's major commitments and rights. The particular organization of that description is not critical.

### Supporting Obligations

Although the major commitments will vary among projects, some minor issues arise in nearly every cooperative project. These are discussed below. Only the most detailed contracts will cover all these issues. Simple contracts will omit most of them.

**Communication.** As discussed in Part II of this paper, communication is one of the keys to project success. The parties may implicitly understand the need to communicate, but the agreement still can clarify how the parties will handle matters.

A common question is, who speaks for each side? Who is responsible for representing the community to the agency or business? If the agency head signs the agreement, is there a more junior officer who has the authority to act on behalf of the agency? Will these people be named in the agreement? Will the agreement include a way of changing the representatives and informing the other side of the change?

If the contract requires notices or reports, how will they be delivered? To what address? In what language? Must they be in writing? May the parties use traditional mail, courier, telephone, facsimile, or electronic mail? Are the rules different for routine communications and emergency communications? Are the rules different for high priority communications, such as notices of alleged breaches of the contract, or for routine communications, such as a monthly update of the membership list of the community association?

Will the sides meet regularly to discuss progress and problems? Should the first meeting come before any work on the ground begins?

Will the public have access to project information? Do the sides need to identify information that should be kept confidential, such as trade secrets or business plans? Do the sides need to come to an understanding about joint communications with the press? Will there be a project web site?

**Inspection, auditing, and reporting.** Inspection, auditing, and reporting go to the central matter of verification. In simple contracts, the means of verification may be obvious from the nature of the duties. In contracts covering long periods of time, large land areas, or complex duties, the parties may want to agree to specific milestones that they will meet, specific ways to track progress, or regular reports that they will make.

These obligations will vary depending on the project. In a long-term timber management project, the landowner might want the right to inspect the work and inventory the forest being managed by the other party. In a joint commercial enterprise, such as a tourist lodge, the parties might want to agree to annual outside financial audits. In a project requiring compliance with a written plan, one side may want the other to submit periodic progress reports.

As discussed in Part II, any inspection, recordkeeping, or reporting requirements should fit the capacity of the parties to create, keep, and use the information. The agreement might also deal with what records are available to the public.

**Need for parties to comply with other laws.** A business or government may want the contract to require the cooperating community to comply with business, health, safety, labor, environmental, and other applicable laws. For the business, this helps assure that any goods that come out of the forest are legally produced. It also helps defend the business against allegations that the business intentionally engaged in a criminal enterprise or conspiracy to violate the law.

For the government, this gives it an additional option in enforcing these laws. It can enforce them as the sovereign, which is the usual route for the government, or it can enforce them as a party to the contract. The remedies will be different — fines and imprisonment are not contractual remedies — but having the alternative enforcement avenue is useful. In particular, the government forest agency may have no real influence over sovereign enforcement of business, labor, and health laws. The only leverage for the agency to assure compliance with these laws may be the community's promise in the contract.

**Forest protection.** Forest fires, storm damage, insects, disease, trespass, poaching, and illegal logging are some of the risks that forest projects may face. The contract can explain how the sides will cooperate on these matters. For example, it can require the government to take the lead in fire-fighting efforts, but require the community to supply available labor at no charge. It can require the community, with government training, to monitor for insects and disease. It can require one side or the other to put up boundary markers and signs. It can require the community to undertake basic patrols of the forest, while the government maintains an open radio channel and responds to requests for law enforcement assistance.

The contract can set environmental performance standards for ordinary forest management and engineering projects. For example, it could require the sides to follow standards for logging and skidding or for road construction. It can establish areas to be protected from disturbance. The contract does not have to set these standards directly; the contract can require the standards to be set in forest plans adopted by the parties, or the contract could incorporate some external standards by reference.

**Money, payments, and liability.** If the agreement will require one side to make payments during the course of the project, the contract may want to include details about these obligations. These may be payments to the other party or payments such as taxes or rentals owed to third parties.

For some payments, the contract will need to specify the amounts, either with a specific figure or with a formula. The contract can also specify the currency, although most courts will assume that the parties intend to use the national currency if no other is named.

The contract can specify the details of payment. This can include to whom the payment should be made, such as to the other party, to the national treasury, to the community bank account, or to an escrow agent. The details can include the acceptable forms of payment, such as cash, a personal check, a certified check, and so forth. The contract can require paperwork such as receipts and recordkeeping.

The contract can specify the deadline for payment and the consequences for missing the deadline. These can include interest and penalties. It can discuss grace periods or similar provisions for automatically extending deadlines or forgiving penalties or interest.

It can require parties to post bonds. A bond is an item of value, often money, offered up as a guarantee of performance. For example, in a government-community project to open a tourist facility, the contract might require the community to post a bond to guarantee payment of taxes, of wages, or of compensation to injured tourists. In a payment for environmental services contract, a bond could guarantee that the land stay in forest cover and could be forfeit as a kind of liquidated damages if the land is cleared.

The great advantage for the party demanding the bond is that the bond makes enforcement easy. If the contract is breached, the party can tap the bond for damages, often without going to court.

A disadvantage of bonds is that they require access to capital at the beginning of the project. For this reason, they are not common in community development settings.

As mentioned in the discussion of legal issues above, the contract can address issues of liability. It can set liquidated damages for losses that are hard to assign market values, such as loss of young trees, soil erosion, or other environmental harms. It can require one side to carry insurance. It can require one side to indemnify the other.

**Property ownership and transactions.** If the contract includes transfer of ownership rights to land, the property transaction laws may require the contract to include special clauses or may require the parties to execute separate documents such as deeds. If the law requires separate documents, the contract should include either a promise to execute those documents or a representation that the parties have executed the documents.

If one side gives the other possession of property, real or personal, without intent to grant ownership, the contract should be clear on that point. The owner may also want the contract to clearly state that the temporary possessor cannot further transfer the property or pledge it as security for a loan.

The contract can clarify the ownership or use of incidental resources, such as water, sand, or gravel, and the use of (or non-interference with) public resources such as highways or watercourses. If the property owner reserves the right to let other people, not party to the contract, use the property, the contract can discuss what to do if the uses conflict.

**Transfer and assignment of rights and use of contractors.** As discussed above in the review of legal issues, one party may want to limit the other party's ability to transfer or assign responsibilities or benefits under the contract. The contract can place restrictions on these actions. The contract can also place limits on the use of contractors, including requiring consent from the other side before contractors or outside employees are retained.

## Breach and Dispute Resolution

**Breach.** Contracts often set up procedures for dealing with failures to meet the contract's requirements. These help the parties deal amicably with small problems and efficiently with large ones.

The contract can give some guidance on what failures are actionable. Some failures to meet the requirements of a contract are merely annoying or expensive. The injured side should be able to claim damages. Some justify stopping the project and releasing the other side from its obligations under the contract. The contract can indicate what actions are "material breaches" that would allow the other side to stop the project. Some breaches can cause serious and irreparable harm to people, property, or the environment. This kind of breach may justify an emergency response.

The usual way to handle problems is to require one side to give the other side notice of the problem. For ordinary breaches, material or not, the delinquent side then has a time (set in the contract) to repair the breach. If the side repairs the breach, the project continues. If the breach caused damages, the injured side can seek compensation.

If a breach goes unrepaired after notice, the injured side can also seek remedies in court. These remedies might include an order to the delinquent side to perform its obligations. If the breach is material, the side can stop the project. A court will release an injured side from further contractual obligations after a material breach.

For breaches requiring emergency response, the contract generally allows the side to respond without notice. If the emergency breach is material, the side can end the project.

A party can waive any requirement in the contract or decide not to complain about a breach. The general rule is that a waiver does not prevent the party from later demanding compliance with the requirement. The contract may state this expressly.

Courts have varying attitudes towards deadlines in contracts. Most courts will not consider missing a deadline to be a material breach. That means that the court may award damages for missing a deadline, but will not let the other side out of its obligations under the contract. If the sides want a missed deadline to be a material breach, the contract should say so.

In summary, then, the typical breach provisions in a contract include—

- A requirement for the complaining side to give the delinquent side notice of the breach.
- A time limit for the other side to respond.
- An exception from the notice and waiting period for actions requiring emergency response.
- An indication of what kinds of breaches are material.

In addition, a contract may discuss whether deadlines are firm or soft and whether a side can rescind a waiver of an obligation.

**Force majeure.** A contract allocates responsibilities, and it also allocates risks, sometimes implicitly. If the community is responsible for maintaining fences, it bears the risk of animals destroying the fence. If the government is responsible for providing the land, it bears the risk of outsiders pressing claims of ownership.

Some major risks are far beyond the control of either party, and the parties may decide to allow these calamities to excuse breaches of the agreement. For example, what happens if a war breaks out, or a fire destroys the forest, or a flood isolates the region for weeks? Lawyers call such overwhelming forces “force majeure”.

A contract may identify these forces as justifying delays in the completion of the project. The contract may describe what to do in case of such a delay, such as giving notice of the problem to the other side (if possible), extending deadlines, excusing losses, and even extending the term of the contract.

**Dispute resolution.** Sometimes a contract will offer ways for the parties to handle their disagreements short of going to court. The paper discusses some options for dispute resolution in Part II.

If the parties choose to use some of the methods identified in that discussion — such as mediation, arbitration, or traditional dispute resolution methods — the contract can state the procedures that the side can use to enter these processes.

Dispute resolution can apply to very small issues and issues that arise before there is any actual breach. For example, the parties may disagree about the location of a boundary, the wisdom of naming a representative who has a history of bad relations, or the meaning of words in the management plan. Having a fair, fast, and simple way to address these small issues before they become large irritants can save a lot of trouble. The contract can allow the sides to “elevate” issues to someone higher in the government, business, or community to see if the higher official can resolve the difference, or it can provide for informal use of trusted third parties to encourage dialogue, give nonbinding advice, or act as binding arbitrators.

Even if the sides decide to rely on the courts to settle disputes, the contract can include agreement on which court to use and what jurisdiction’s law that court should apply. The contract can also discuss how the sides agree to bear the costs of any dispute resolution effort, including court costs or attorneys fees.

## Termination

**Ending date or term.** If the contract has not already stated an ending date or term for the project, either in the introductory materials or in the main description of the deal, it should state it here. The ending date can be the last date of major operations under the project. Particular rights and obligations can continue past the ending date, such as an obligation to repair improperly constructed improvements or clean up environmental harm, or a right to use project roads.

The contract can also discuss renewal or extension. It can give one side an option to renew the contract under specific terms, or it can allow renewal if both sides agree. Of course, if both sides agree they can adopt an entirely new contract, regardless of what the old contract says.

**Hand-back.** If the agreement gives one side temporary possession of land, what condition must the land be in at the end of the agreement term or when the contract ends through breach? There are really multiple issues here: what state must the land be in, who will judge whether the land is in the proper state, will the side giving up the land get any compensation for improvements, and will the side reclaiming the land get any compensation for restoration or disposal of wastes?

In some long-term agreements, the question of the final state of the land is handled implicitly, through planning. That is, the side holding the land must manage it according to an agreed upon plan, which will more or less determine the state of the land at the end of the planning period.

In others, the agreement itself may set out requirements for the amount and kind of forest cover, status of roads and yarding areas, disposal of wastes, condition of buildings, and so forth. Standards may range from relatively objective to completely subjective (e.g., “to the satisfaction of the government”).

Usually the side reclaiming possession is the initial judge of whether the land meets the required standard. If the standard is subjective, that may be the end of the matter. If the standard is objective, it is possible to name a third party to settle disagreements about the state of the returned land.

If the party occupying the land is likely to build improvements (e.g., buildings, dams, mills, or transportation facilities), the contract may discuss who will own the improvements at the end of the term (it is almost always the reclaiming owner), and whether the side reclaiming possession will owe the other side any compensation for the improvements. If there is no compensation, the temporary occupier may stop maintaining the improvements towards the end of the term. If there is compensation, the temporary occupier may have an incentive to create unnecessary improvements. The contract can discuss what kinds of improvements are covered and how compensation will be set.

Contracts sometimes discuss the issue of restoration of the land at the end of the contract term. The contract may give the temporary occupier a time limit to remove movable items such as vehicles and portable mills, to replant cleared areas, to close temporary roads, to clean up waste dumps, and so forth. If the work is not completed, the contract may allow the side reclaiming possession to complete the work and charge the other side.

## Miscellaneous

“Boilerplate” is a lawyer’s term for standard provisions that have broad application to contracts of many kinds. Boilerplate items can be cut and pasted from contract to contract with very little alteration. If the contract does not already address the following points, and the parties want to go into this level of detail, a “Miscellaneous” article near the end of the contract can hold address these minor points:

- The official language or languages that the parties agree to use: “When the contract requires notices, reports, records, or other writings, these must be in English.”
- The official currency of the contract: “Where the contract refers to monetary amounts, or where it requires payments, these are in Euros.”
- The “merger” clause: “There are no oral provisions to this contract; the whole agreement is in writing. At the time of signing, this document reflects the whole agreement, and it replaces any previous understandings about this project.” Do not use these exact words if there are other agreements linked to the present agreement.
- A modifications clause: “Future modifications or additions to this contract must be in writing.”
- A business organization disclaimer: “The parties do not intend this contract to create any sort of agency, partnership, or other business entity.”
- An explanation of whether deadlines are firm: “Time is of the essence. The contract’s time limits and deadlines are firm unless the parties agree to waive them.”
- A severability clause: “If a court determines that some part of this contract is invalid, the parties want the court to strike only the offending provision and not the entire contract.” This is how courts usually behave anyway, but it does not hurt to include such a clause. If specific parts of the contract are so important that the parties would want the court to throw out the entire contract if those parts are flawed, then this is not an appropriate clause to include by itself. Either do not include a severability clause or indicate exceptions.
- A counterparts clause: “Each party wants to keep an original version of the signed contract. Therefore, the parties are signing two identical documents. If a court is ever asked to admit the text of this contract into evidence, the parties ask the court to

consider either document to be acceptable proof of the contract.” For more on counterparts, see the discussion of contract execution at the end of this Part.

- Choice of law or choice of forum clauses: “The parties intend this contract to operate under the laws of Virginia. The parties may file lawsuits concerning this contract only in the state district or circuit courts sitting in Alexandria or in the federal court of the Northern District of Virginia, and both parties consent to jurisdiction of those courts.”

## Signatures

The last item of the body of the contract is often the signature page. The signature page then acts as an indicator of the end of the main body of the contract and makes it difficult to fraudulently insert additional materials. For a discussion of who should sign the contract, see “Execution of the Contract” below.

## Schedules

If it is necessary to include additional material with the contract, such as maps, management plans, rosters of eligible community members, and so forth, the drafter can include these as schedules after the signature page. The drafter should number the schedules, number their pages, and refer to each schedule in the table of contents and body of the contract. The object is to make fraudulent changes difficult.

## *Execution of the Contract*

Here are some issues that may come up in signing the contract.

**Who should sign?** Most of these contracts are not between individuals, but between legal entities such as an arm of government, a business, or a non-governmental organization. If there is any doubt, have local counsel verify who has authority to enter contracts on behalf of the entity. For a forest agency, the answer may be in the forest law or in a general government administration law. For a business or non-governmental organization, the answer may be in the business laws. For a community organization, the answer may be in the law concerning the creation of local governments or community associations. In any case, research the law and look into the authority of the people who claim to have the power to make the agreement.

**Counterparts.** If a contract ever comes before a court, the court may want to see the original papers that the parties signed, if they are available, rather than a photocopy. This practice goes back many years and is intended to reduce the likelihood of fraud. With computers making manipulation of copies easier than ever, the evidentiary value of the original document has grown stronger.

It can be an advantage, then, to possess the original. For fairness, the parties may decide to execute more than one copy of the contract, so that each signer can have an “original”. In some jurisdictions, these identical originals are called “counterparts”. The written contract can note, in the boilerplate, that the parties are signing multiple originals, and that each is equally valid evidence of the agreement.

Not every contract is executed in counterparts. However, where the parties are legally sophisticated and make a habit of long-term recordkeeping, all may want originals for their records.

**Multiple Languages:** The parties may speak different languages, and each may want to have the contract documents in its own language. Creating documents with exactly the same meaning in two languages is a challenge, offering rewards and risks. If the

documents do have exactly the same meaning, it is a strong sign that the sides are of one mind and that the documents reflect a true mutual understanding. If there are significant differences in the two versions, there is doubt what the agreement means. Worse, a court could take this as evidence that the two sides never really agreed. Of course, if the sides had a serious language barrier, this may be true.

When drafting in multiple languages, drafters commonly include a statement explaining which version should control in case of conflict. For example,

This contract is drafted in two versions, one in English and one in Spanish. In case of conflict, the Spanish version controls.

Even with such a statement, drafters should make a strong effort to assure consistency between the two versions. If the drafter is not fluent in both languages, the drafter should engage a translator with experience working on legal language. In fact, it is good practice to have a second expert compare the drafts rather than to rely on a single drafter or translator.

**Witnesses and notaries.** Witnesses and notaries serve two functions. If there is ever a question of who really signed the contract, a witness or notary can give evidence. And by their presence, witnesses add formality to the occasion, impressing on the signers that they are taking a step with legal consequences. That extra formality may give the sides a little more encouragement to honor the contract.

Nevertheless, witnesses and notaries are not legally essential for most contracts in most jurisdictions. Review the matter with a local attorney and make the choice based on local law and the desire of the parties for formality.

## ***In Summary***

The following style guidelines will contribute to the smooth implementation of the project:

- Draft at a level of detail appropriate to the project and the parties. Find a balance between being too general or too detailed.
- Use plain language that the parties can understand.
- Be clear and exact: guard against ambiguity and vagueness.
- Use terms consistently throughout the contract.

The following legal issues may arise in writing and implementing contracts. The drafter should have some knowledge of them or should work with a lawyer who understands local law.

- Contracts need to show that the parties intend to be bound, and in common law jurisdictions, they need to include mutual obligations or “consideration”.
- Contracts are not licenses, although the term license is often used to include some contracts. In general, a license is a grant of permission and may be revocable.
- Courts apply a limited set of remedies to contract disputes. Contracts are not legislation and cannot require parties that breach the contract to pay fines or go to jail.
- Contracts must be consistent with local law and public policies, or courts will refuse to enforce them.
- Contracts normally only set requirements for the people who make the contracts and the people closely connected with them, for example, as employees. Except in limited ways, contracts cannot create obligations for strangers to the project.
- Projects that involve transfers of property ownership or rights need to be analysed from the perspective of property law.
- Drafters can shape contracts to limit the ability of the parties to transfer rights or obligations to outsiders.

- A contract can affect liability. It can make the parties responsible for each other's actions; it can create a new business entity, possibly with limited liability; and it can require one party to indemnify another.
- The parties should place their entire agreement in writing, in a single contract or a set of related contracts.

The general steps to writing a contract are listed below. In practice, the drafter will need to alter plans and repeat steps to adjust for changing knowledge and circumstance:

- Investigate the facts.
- Investigate the law.
- Organize the drafting.
- Seek existing contracts to use as guides.
- Negotiate and draft.
- Prepare a final draft.
- Review the draft.
- Execute the contract.

A drafter can organize a contract in any way that will make sense to readers. Here is one possible outline. It includes more details than many drafters will choose to cover:

- Introductory material
  - Title
  - Parties
  - Dates
  - Recital of history and purpose
  - Declaration of agreement
- Finding aids
  - Table of contents, using
    - Article and section numbering
    - Page numbering
- Definitions and interpretive aids
  - Definitions
  - Guidelines for interpretation
- Description of the land
- Representations and warranties
- The basic agreement
- Secondary commitments
  - Communication
  - Inspection, auditing, and recordkeeping
  - Compliance with other laws
  - Forest protection
  - Money, payments, and liability
  - Property ownership and transactions
  - Transfer and assignment of rights; subcontracts
- Breach and disputes
  - Breach
  - Force majeure
  - Dispute resolution
- Termination
  - End date
  - Hand-back
- Miscellaneous provisions
- Signatures
- Schedules

In preparing to execute the contract, the drafter should consider the following issues:

- Who should sign the contract.
- Whether the parties want to sign multiple copies or counterparts.
- If the contract is translated into a second language, whether the translation is accurate and whether one version takes precedence in case of conflict.
- Whether to use witness or notaries.

## Part IV: Professionalism and Ethics

When advising people who are negotiating an agreement, a professional may face ethical issues. Ethical issues are not just philosophical concerns. Some advice-giving actions may be against the law. Some actions violate the codes of professional organizations. Some actions simply reduce trust and harm the professional's ability to work with clients. This part discusses three of the most common ethical problems that agreement advisors face.

### ***Giving Legal Advice***

Several times this paper has given readers short versions of the following warning: This paper offers general rules about contracts. The specific rules vary from country to country, and their application will depend on the circumstances at hand. The best way to be sure about the rules and how they apply to a particular case is to seek the opinion of a local lawyer. Readers are encouraged to seek local professional advice.

Now, why give such warnings?

Governments typically require persons who give legal advice to have a local license. Giving people advice about how the law applies to their problems is considered practicing law. Doing this without a license is the unauthorized practice of law.

The requirements for local licenses have good reasons behind them. Laws vary from place to place. An outside advisor often has great expertise in the topic at hand, such as timber sale contracting, but little knowledge of local contract law. An advisor ignorant of local practice can make mistakes that a local lawyer would never make.

For the contract advisor, there are two ways to avoid unauthorized practice of law. The first and best is to work closely with a locally licensed attorney. The local attorney could be a consultant attached to the project or a counterpart in the local government. The local attorney can review the advisor's work and take responsibility for the legal advice.

The second way is to offer *policy advice* and *legal information* rather than *legal advice*. Giving advice on non-legal matters is fine. Pointing out general principles of law that might apply to the matter at hand is fine; this is giving legal information. But, stating how those principles apply to a specific situation is giving legal advice and usually requires a local law license.

In practice, when working on agreements, it is difficult to avoid giving legal advice. Drafting the specific language of a contract can be, in effect, giving advice. Warning about a potential legal pitfall can be giving advice. The line between legal information and legal advice is thin. The safer approach is to work with local counsel or to have local counsel review the contract independently.

### ***Avoiding Conflicts of Interest***

The two sides in a project may have good relations and cooperative attitudes, but they are still different sides. At some point, their interests will differ. One side may want to pay a low price while the other wants to receive a high price. One side may want the freedom to cancel the project on short notice while the other wants the security of knowing that the project will continue for years. Some things that help one side will cost the other. So, an advisor can run into problems when trying to help both sides.

This problem of serving people with different interests is called a conflict of interest. The conflict-of-interest problem has at least three solutions. All of them rely on defining the outside advisor's role and making sure the parties understand the role.

The first approach is to advise only one party and to be completely loyal to the interests of that party. If the agreement is between the government and the community, work with the government or work with the community, but do not give advice to both. Be sure each side understands your role.

The second approach is to seek a “waiver”. The advisor explains to the parties that the advisor is going to try to help them both, that there is a possibility of conflict, and that if a dispute arises the advisor will step back and not support either side. If the parties are satisfied with this — that is, if they waive objection to the advisor’s dual role — the advisor can give advice *until* a possible point of conflict arises. Then the advisor must point out the conflict and advise neither side, urging the parties to seek independent advice.

The third and probably most common approach in technical assistance projects is the “expert opinion” approach. The advisor explains that the role of the advisor is to make a recommendation and to justify that recommendation. The parties can then accept the recommendation or reject it. The advisor is not making decisions or acting as an advocate for either side. If the parties want an advocate or decisionmaker, someone else must play that role.<sup>56</sup>

These may seem like unimportant distinctions. In practice, many advisors do not discuss their role beforehand with the parties. They simply do their job, and everything works out.

The problem comes when a conflict arises and, for example, the community expects their friend the advisor to argue with the government for them. Then the advisor is in a bind. If the advisor refuses to become an advocate, the advisor fails to meet the expectations of the community. If the advisor takes on the role of advocate, the advisor upsets people in the government. Either way, the advisor loses someone’s confidence.

The best practice is for the advisor to anticipate the possibility of conflict and to explain the advisor’s role to everyone early in the process. If everyone understands the advisor’s role, and if the advisor sticks to that role throughout the process, the advisor will preserve credibility and professionalism.

## ***Offering Competent Guidance***

Finally, the advisor has a professional responsibility to be knowledgeable about the subject at hand. This obligation has an external component and an internal component.

The external component is for the advisor to be truthful in describing the advisor’s competence to others. The experienced professional knows it is never good to raise unreasonable expectations about results.

The internal component is for the advisor to self-evaluate, and to arrange for help when the task at hand goes beyond the advisor’s competence. The line between the difficult task and the task beyond the advisor’s competence is seldom clear. Almost every task referred to an outside expert is difficult, or is seen as such by the internal professionals that are faced with it. And every task that the advisor faces has new aspects. If professionals could only work on problems exactly like ones that they had solved before, even the most senior experts would be unemployed.

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<sup>56</sup> It is also possible for the advisor to have a personal stake in the outcome of the project. This automatically raises the possibility of conflict of interest. The advisor must disclose this personal stake to the sides. The advisor can only serve the sides if they all waive objection to the conflict. If the personal stake is large, then for the sake of outside appearances it may be best for the advisor to just step away from the project, even if the sides would waive objections.

If an advisor has doubts about capacity to handle a particular issue, the first step is usually to discuss the matter with colleagues. They may be able to offer an opinion on what the task will require.

Teams of advisors can offer competence even when no single person possesses all the needed expertise. If the advisor cannot handle all the issues likely to arise, the advisor should consider recruiting a team.

Even if budgets or other constraints prevent formation of a team, a colleague can sometimes serve as a backstop. The advisor takes the lead in the project, but if the advisor needs help with an unfamiliar topic, the backstop is available by telephone, email, or other means.

The point is, there are many ways to cross this river of competence. But do not venture into deep water alone if you cannot swim.

## ***In Summary***

Advisors should be aware of professional and ethical issues concerning the giving of advice about agreements.

- To avoid unauthorized practice of law, the advisor should pair with local counsel or should avoid giving advice on how laws apply to specific facts.
- To avoid conflicts of interest, the advisor should make sure the parties understand the advisor's role. The advisor cannot serve as an advocate for both sides of a disagreement.
- To ensure competence, the advisor should be candid in describing abilities and should team with others as necessary to provide expertise.

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