

Clauses can be assigned one of three categories: MP, DP, or NP. Some clauses are fairly long, however, most can be categorized by just reading the first few sentences.

1. **Mandatory Provisions (Label 1/MP):** provisions essential to agreement, if breached, may trigger to legal repercussions

- **Non-transferability / Exclusiveness**

Guidelines:

(1) License .

- a) Contains the term “exclusive” or “non-transferable” or any word that is regarded as a synonym without any additional terms that would contradict or modify its meaning.
- b) Context of the agreement regarding the license does not necessarily suggest that the provision is essential to the agreement. If the provision does contain terms that may suggest that the text is exclusive but has any limitation or provides non-exclusive access to the license after a certain period of time will be labeled as DP not MP.

Example Clauses: Below are several examples that may help distinguish between the MP and DP clauses under the two rules stated above:

- 1) This license grants the licensee an exclusive, non-transferable right to use the software for a limited time period.
=> The provision is a DP because it contains the term “exclusive” but also contains terms that modify or contract its meaning such as “limited”.
- 2) Company A agrees to provide Company B exclusive access to new licenses before they are made available to the market.
=> The provision is a DP since it hints that after a certain period of time, the license will no longer be deemed as exclusive and company A can provide license to other competitors without terminating the agreement.

(2) Manufacture

Guidelines:

- The rules for the license will be applied as well for the manufacture clause. Clauses that explicitly state that a company is prohibited from manufacturing similar products for any distributor for any period of time will be classified as MP. Also, any clauses that prohibit the manufacturer from granting right for manufacture without the distributor’s prior consent will fall under MP. Any form of provision that disallows concurrent agreement during the period of time the contract is in effect will also be classified as MP.

Example Clauses:

1) The manufacturer agrees to promptly notify the distributor of any existing agreements or obligations that may prevent or affect its ability to fulfill its obligations under this contract.

=> This provision is a MP as it hints that any non-compliance to the manufacture clause in the contract can lead to legal action if not accompanied with a prior notice.

2) The manufacturer agrees that it will not manufacture any similar products for any other distributor during the term of this agreement.

=> This provision is a MP as it disallows concurrent agreement.

- **Legal repercussions for non-compliance**

Guidelines:

- a) Preemptively calls for action that can potentially limit the scope of the contract or from reaching the objective of the provision. This means that the provision should anticipate the possibility of a breach or omission and provide a mechanism for limiting the breaching party's right to monopolize the market. The language used in this provision should be clear and unambiguous.
- b) A mandatory provision should entitle a party to damages caused by breach or omission. This means that the provision should provide a clear mechanism for calculating damages and ensuring that the breaching party is held accountable for any losses suffered by the non-breaching party.
- c) A mandatory provision should include a penalty or fees for non-compliance. This means that the provision should impose a specific penalty or fee for any breach or omission, in order to incentivize the breaching party to comply with the agreement. The amount, duration, and scope of the penalty should be comprehensive and direct. The notable difference between DP and MP regarding this would be that MP is more focused on the legal consequences and DP is more focused on the incentivizing compliance of both parties.
- d) Clauses that specify minimum fee/production/payment are classified as MP as well.

Example Clauses:

1) In the event of a breach or omission, Company A must pay a penalty of \$5000 per day (or 5% of their yearly profit) until the breach is cured. This penalty shall not limit Company B's right to seek any other remedies under the law.

=> This provision is an MP since it includes a specific penalty amount and duration of payment while clarifying that other legal action can be taken to ensure the penalty is rightfully received from the breaching party.

2) In the event of a breach, Company A is entitled to recover any damages including but not limited to: consequential damage, attorney and legal fees, and lost profits.

=> This provision is an MP since it includes an exhaustive list of damages incurred from the non-compliance of the contract.

- **No Liability Cap**

Guidelines:

- a) Contains any phrase that establishes an absolute prohibition on the imposition of a liability cap, with legal consequences and obligations for one or both parties.
- b) Phrases that use conditional language such as “unless otherwise agreed” or qualifiers that limit the extent of the liability should be labeled as Discretionary Provision as it does not impose an absolute prohibition on the imposition of liability cap.

Example Phrases:

Without limitation, Under no circumstances, No restrictions

- **Action verbs (“must”) / tone (e.g. under no circumstances)**

Guidelines:

- a) When a clause uses action verbs such as "must", "shall", or "will" in a mandatory context, it indicates that the clause is likely to fall under the MP category. The use of negative language or language that expresses the opposite of an action is also an indicator of MP, such as "under no circumstances", "not permitted", or "prohibited".
- b) Additionally, strong and unequivocal statements that leave no room for interpretation or ambiguity, such as a party having no limitations, no rights, or having rights at any time or without consent, should also be categorized under MP.

Example Phrases:

At no time during or after the Term of this Agreement, In no event, shall not now or in the future; at no time, Without limitation, Under no circumstances, Do not have any right, Right at any time, Exclusive and non-transferable, Without consent, Neither party shall be liable

- **Specificity of clause**

Guidelines:

- Most clauses under this category are highly specific and may include specific dollar values or a specific number of days in which actions must be taken. If clauses mention specific due dates for penalties, specific legal repercussions or damages for breaches, or specific penalties or fees for non-compliance, they are likely to be of the MP category. Exceptions include if there are indications of either the DP or NP category in which that would take precedence and those clauses should be assigned to be either the DP or NP categories.

Example Phrases:

Directly or indirectly, shall not contain any links to any third party sites for the purchase of Competitor's Goods, Party shall pay to the other Party an equivalent of eighteen (18) months gross salary

- **Auditing**

Guidelines:

- For clauses mentioning audits, if they mention that a party has the right to audit at any time or any reasonable time, has the ability to conduct whole and complete inspections, or if they can hire an independent 3rd party to audit, they are most likely of the MP category. However, if a conditional is present such as a cap on how many audits could be completed per year, then the DP category should be assigned instead.

Example Clauses:

1) Company A holds the right to conduct an audit by an independent certified public accounting firm against Company B during the aforementioned time period without the need of prior notice.

2. **Discretionary Provisions (Label 2/DP):** Option to take certain actions by both parties, require additional legal scrutiny, no legal consequences but follow for mutual benefit

- **Irrevocable or Perpetual License**

Guidelines:

- Most clauses involving an irrevocable or perpetual license should be assigned to the DP category. Since most of these clauses will involve contradictory terms to the irrevocable or perpetual terms. These include terms such as non-exclusive, transferable, right to sublicense, or limited, and if present with the irrevocable or perpetual terms, should be assigned the DP category.

Example Clauses:

- 1) worldwide, non-exclusive, royalty-free, perpetual, irrevocable right and license

- a) The sublicensable and transferable terms contradicts the perpetual, irrevocable, and exclusive terms which means should be classified as DP
- 2) exclusive, irrevocable, worldwide, sublicensable (including through multiple tiers), transferrable (without consent) royalty free license
 - a) The non-exclusive term contradicts the perpetual and irrevocable terms which means should be classified as DP

- **Liability Cap**

Guidelines:

- For clauses mentioning a cap, maximum, or limit on liability, they are most likely of the DP category. These clauses often take the form of a certain party's liability not exceeding a certain specified amount. Takes precedence over specificity even if most clauses mentioning a liability cap are highly specific. If the clause also mentions that neither party is liable, the liability cap should take precedence and should be classified as DP.

Example Clauses:

- 1) Cap on amount owed, Neither party's aggregate liability shall exceed, maximum liability of one Party to the other Party, In no event will distributor's total liability for any damages exceed

- **Termination (time window)**

Guidelines:

- For clauses indicating that there is the right to terminate the contract during a specified time window these should be classified as DP.

Example Clauses:

- 1) Option to terminate but specific amount due in fees or for damages if agreement terminated
- 2) If company terminates, company shall pay to a cancellation fee

- **Conditional Clause**

Guidelines:

- Many clauses in this category indicate certain actions or responsibilities are only present if certain conditions are met. Many clauses also have limiting qualifiers to other words that indicate a restriction of an action or responsibility of some sort which examples can be seen below.

Example Phrases:

- 1) Conditionally responsible, partially permitted, only responsible, only upon entry of an order of the Court
- 2) Exclusive right with exception

- **Auditing**

Guidelines:

- Most clauses that mention that an audit could be completed with prior notification or written notice or if the audit is limited in terms of how often it can be conducted should be assigned to the DP category. Exceptions are if a 3rd party is used to audit in which case the clause should be assigned the MP category instead. Takes precedence over even if ambiguous language is present like the words “reasonable” as long as prior notice is required for auditing.
- If the clause includes having “the right for inspection or auditing”, it can override the 3rd party rule and will be classified as DP.
- Prior written notice should only be used for classifying auditing. Prior written notice being classified as DP does not apply to any other clause categories

Example Clauses:

- 1) At reasonable times and upon reasonable notice to inspect and audit, upon reasonable request
 - a) Since audit can be conducted upon reason notice, should be assigned DP category

- **Action verbs (“shall”) / tone (e.g. conditional tone/less)**

Guidelines

- Many clauses in this category have action verbs such as “shall”, “may”, “can” that indicate a particular action is optional and not required. However, many clauses that also fall under the MP and NP category may also have these actions verbs such as those mentioning exclusiveness, legal repercussions, or auditing in which case those should take precedence.

Example Clauses:

- 1) Right but not the obligation, shall have the right to renew, shall have an option to purchase

- **Legal repercussions for non-compliance**

Guidelines:

- For clauses mentioning damages, penalties, or fees for non-compliance or a breach of contract, but the mentioned damages or penalties are either not specific or ambiguous, then they should be assigned the DP category.

3. **Non-Binding Provisions (Label 3/NP):** No or very little legally enforceable obligation, permissive

- **Termination at any time**

Guidelines:

- For clauses indicating that there is possible room to terminate the contract or having the right to terminate the contract at any time, these should be classified as NP

Example Clauses:

- 1) May terminate this Agreement immediately upon written notice to Licensee, Agreement may be amended from time to time
- 2) May terminate this Agreement at any time without cause by providing at least 30 business days prior written notice
- 3) Will have the right to terminate
- 4)

- **No liability**

Guidelines:

- For clauses mentioning that a party will have no liability

Example Clauses/Phrases:

- 1) Neither party shall be liable for any consequential, incidental, indirect, punitive, special, or other similar damages
- 2) In no event, will content provider be liable
- 3) Waive any and all suits, actions, claims, losses, demands, damages, liabilities, costs and reasonable expenses

- **Definition/informative**

Guidelines:

- For clauses without a call to action and are either simply stating a definition or are simplify statements, they should be assigned the NP category

Example Clauses:

- 1) Logo Size: The minimum logo size is 1" or 25mm.', 'In digital formats, the minimum width is 100 pixels at 72 dpi

- **Non-exclusivity**

Guidelines:

- For clauses mentioning non-exclusivity, but as stated earlier if present with irrevocable or perpetual terms, should be assigned the DP category

- **Vague/ambiguous language / tone / action verbs**

Guidelines:

- Most clauses in this category contain fairly ambiguous language such as the words "reasonable" or "good faith." If clauses contain fairly strong statements that mostly resemble that of the MP category but also have at

least one ambiguous term like the ones mentioned above, they should be categorized as the NP category.

Example Phrases:

- 1) Negotiate in good faith, commercially valuable
- 2) Manufacturer agrees that the Customer has the right

- **Auditing**

Guidelines:

- Most clauses that mention that an audit could be conducted at a party's own expense, or if prior consent is required to perform an audit should be assigned the NP category. Exceptions are if a 3rd party is used to audit in which case the clause should be assigned the MP category.

Example Phrases:

- 1) Each of the Parties may, at its own expense, audit the other Party's compliance with this Agreement

- **Option to Exercise**

Guidelines:

- For clauses mentioning that a party will have the decision with no obligation to abide by the agreements should be under the NP category

Example Clauses/Phrases:

- 1) Developer shall have the option, but not the obligation to<omitted>assume at no cost to Developer, any or all of Distributor's third party agreements (including End-User Agreements) relating to the Products and to receive any and all fees therefrom
- 2) Optional prior right, granted a first option