

Translating business terms into clear, precise, and enforceable operative clauses that protect interests, manage risk, and guide the parties' relationship is the core function of effective contract drafting. This guide outlines the mindset, building blocks, and principles required to create legally sound and commercially practical agreements in Bangladesh.

1. The Drafter's Mindset: From Business Deal to Legal Document

Before writing a single clause, a drafter must adopt a forward-looking, transactional mindset. Unlike a litigator who analyzes past events, a transactional lawyer's expertise lies in translating a client's future objectives and commercial terms into specific legal concepts. This requires asking foundational questions about each component of the business deal to determine its correct legal nature. The ultimate goal is to memorialize the deal so accurately and unambiguously that it prevents future misinterpretation, especially given that judicial interpretation in Bangladesh often adheres closely to the written text of the contract.

2. The Building Blocks: Mapping Business Terms to Contract Language

Each part of the business deal must be mapped to a specific category of contract language. This ensures each provision is framed correctly and functions as intended under the law.

- **Representations (Statements of Fact)**
 - **Purpose:** To allocate risk related to a statement of past or present fact upon which a party relies. The party making the statement assumes the risk of its falsity.
 - **Drafting:** Use the combined phrase "**represents and warrants**". This prudent approach maximizes potential remedies, allowing a claim for misrepresentation or fraud under the Contract Act, 1872, or a straightforward contractual claim for breach of warranty. Draft in the present or present perfect tense using the active voice.
 - **Tools:** Adjust risk allocation with qualifiers like "**knowledge**" (e.g., "To the best of the Seller's knowledge...") or "**materiality**" (e.g., "...any material contract..."). For lengthy lists of information, use **schedules** and incorporate them by reference.
- **Covenants (Promises for Future Action)**
 - **Purpose:** To create a binding, enforceable obligation for a party to perform a future action. These are grounded in the concept of reciprocal promises found in Sections 2(f) and 51-58 of the Contract Act, 1872.
 - **Drafting:** The cardinal rule is to use **\$shall\$** to create a mandatory duty. Avoid ambiguous alternatives like "will," "agrees to," or "is responsible for." A well-drafted covenant must precisely address the "**five Ws and one H**": **Who** is obligated, **What** is the action, **When** and **Where** must it be done, **To Whom** is the duty owed, and **How** must it be performed.
 - **Tools:** Clearly define the required **degree of obligation**, which can range from an "Absolute Obligation" to "Best Efforts," "Reasonable Efforts," or "Commercially Reasonable Efforts."
- **Conditions (Triggers for Obligations)**

- **Purpose:** To make one party's obligation dependent on the occurrence of a specific event. These are governed by the rules for "contingent contracts" in Chapter III of the Contract Act, 1872.
- **Drafting:** Conditions are best drafted using an **"if/then" formulation**. The "if" clause describes the contingent event (in the present tense), and the "then" clause states the obligation that is triggered (using \$shall\$). The contingent event must be "collateral" and not solely within the control of the party whose obligation is conditional, as this would make the promise illusory.
- **Discretionary Authority (The Right to Choose)**
 - **Purpose:** To grant a party a choice, right, or permission to act without creating a binding obligation.
 - **Drafting:** Use **\$may\$** to grant this choice or permission. Clearly define the scope of the discretion. While "sole discretion" is a common phrase, be aware that even this is subject to an implied duty of good faith under Bangladeshi law.
- **Declarations (Agreed-upon Rules)**
 - **Purpose:** To establish mutually agreed-upon facts, policies, or rules that govern the contract.
 - **Drafting:** Draft declarations in the **present tense**, as they are intended to be true for the contract's duration. Common declarations include definitions and governing law clauses.

3. Principles of Execution: Ensuring Clarity, Precision, and Unambiguity

The technical execution of the language is as important as the legal structure.

- **A. Use Clear and Modern Language**
 - **Avoid Legalese and Redundancy:** Eliminate archaic words ("hereinafter," "witnesseth") and redundant couplets ("null and void").
 - **Be Concise and Direct:** Use short sentences and the active voice to clearly identify who is responsible for an action.
 - **Use Proper Punctuation:** Correct punctuation is essential for conveying the intended meaning.
 - **Avoid Rhetorical Emphasis:** Words like "whatsoever" or "for the avoidance of doubt" add length but not legal meaning.
- **B. Implement Tools for Precision**
 - **Define Key Terms:** A dedicated "Definitions" section is critical. It acts as a private dictionary, preventing uncertainty that could render an agreement void under Section 29 of the Contract Act, 1872.
 - **Guidelines:** List terms alphabetically, capitalize the defined term (e.g., "Business Day"), and **avoid embedding substantive obligations (covenants, representations, or conditions) within a definition.**

- **Use Consistent Language:** Use the same word for the same concept throughout the agreement. Inconsistent terminology invites unintended interpretations.
 - **Manage Time References Explicitly:** Specify whether dates are inclusive or exclusive, state the time of day and time zone, and prefer "no later than X days after" over "within X days."
 - **Clarify Conjunctions:** Be precise with "and" and "or." If "or" is meant to be inclusive (A or B or both), it may be necessary to state that explicitly. Avoid the ambiguous "and/or."
 - **Minimize Vagueness:** While terms like "reasonable efforts" are sometimes necessary, be as specific as possible. For inherently vague terms like "**Material**" or "**Material Adverse Change**," provide a clear definition, specify the perspective for judgment (e.g., "a reasonable person in the Buyer's position"), and use quantitative thresholds where feasible.
- C. Eliminate Common Ambiguity Traps

Ambiguity exists when a provision has more than one reasonable meaning. The drafter's goal is to write with such precision that judicial canons of construction (like *contra proferentem*, which construes ambiguity against the drafter) are never needed.

- **"Here-" and "There-" words:** Replace ambiguous words like "herein" or "thereof" with specific references like "in this Agreement" or "of this Agreement."
- **"Such":** Avoid using "such" as a pointing word; use "this," "that," "these," or "those" instead.
- **"Including":** To clarify that a list is illustrative and not exhaustive, use the phrase "including without limitation."
- **"Willful":** This term is ambiguous about whether intent applies to the action or its consequences. Use "intentional" or "intentionally" and specify the scope of the intent.

4. The Ultimate Goal: Preventing Disputes and Protecting Interests

A well-drafted contract's primary purpose is to be so clear that it never needs to leave the file drawer. It should function as a practical guide for the parties to manage their relationship and resolve issues without resorting to the courts. This requires anticipating and allocating commercial risks in a way that is legally sound, commercially practical, and protective of your client. As a drafter, this involves fulfilling ethical duties of competence and loyalty, providing candid advice, and ensuring the client understands all risks. When reviewing a counterparty's draft, approach it with professional skepticism to identify unreasonable risk allocations, omissions, and ambiguities, and be prepared to propose clear, well-reasoned revisions.