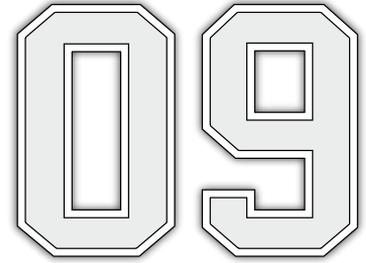


# Contracts



## Introduction

Contracts are part of our everyday lives—we live with them and are constrained by them daily. Parents, children, partners, and friends enter into contracts every day. No business can operate without entering into contracts. Most everyone knows what a simple contract is—it is a “deal” we have agreed to and are expected to abide by. In other words, a contract is an expression of a mutual agreement by two or more parties who intend to be bound by their promises. Contracts may be formed orally or in writing and their terms can be express or implied. Written contracts may be short or long—depending on the nature of the agreement between the parties and the degree of detail the parties wish to include in the document. Because of the multitude of arrangements and fact situations possible, there is no single form of contract that can be used in every situation. So for those who might like the convenience of pulling a template out of a book, there is no such thing—at least, not in this book!

Understanding, creating, and interpreting contracts requires an interesting interplay between two distinct parameters: first, the underlying *legal principles* required to form a valid contract, and second, the unique *fact situations* that form the context within which the legal principles expressed in the contract are to operate. The legal principles that relate to contracts are few in number and easy to understand. In contrast, the fact situations that arise are infinite in number and can often be confusing, complex, and even conflicting. The best advice for understanding a contract, and from a more practical perspective, for drafting one, is to focus first on the legal principles and then to identify how they mesh with the relevant facts in a given situation.

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**BOX 9.1 The Contract in Administrative Law**

Chapter 4, “Administrative Law—Fairness in Decision Making,” explained that sport organizations are private tribunals that are self-governing through a contractual relationship that exists with their members. It further explained that this contractual relationship is expressed in the organization’s governing documents such as its bylaws, policies, rules, and regulations. Although there is certainly some overlap between the principles of administrative law and contract law, we do not intend to suggest that a sport association’s contract with its members is the same as a commercial contract such as those discussed in this chapter. This chapter outlines contract principles that apply primarily to business contracts. When a business contract is breached, there are usually damages that can be quantified in dollar terms. When there are breaches of the association–member contract discussed in chapter 4, the damages may not be financial. It is often said that “the currency of the athlete is competition,” and when an athlete argues that his or her sport association has breached its duty to be fair, the remedy being sought is usually a competitive opportunity—in other words, a declaration that an athlete is eligible to compete, or an order than an athlete may compete by virtue of having been named to a team or restored to a team.

The legal principles serve as a form of “road map”—a steady and constant guide to the interpretation of every contract, despite the bewildering variety of facts that present themselves. A contractual “problem,” whether related to drafting, contract formation, or contract interpretation, usually arises as a result of one, and at most two, fundamental legal principles. Thus, each analysis of a contract must start with a consideration of the legal principles. Because there is no absolute expression of “contract law” that dictates a result or an outcome, solutions to contracting issues are found in the continual interplay between the applicable legal principles and the relevant facts.

In this chapter we will present six legal principles that underlie and are applicable to every contracting situation. We will review a variety of contractual clauses and some unique contracts that are commonly encountered in the sport domain. Sample annotated clauses will illustrate typical issues and problem areas.

## **The Principles of Contract**

### **Offer and Acceptance**

For a contract to be valid there must be a definite offer made and a definite acceptance of that offer communicated in return. In this fashion, the parties, by their respective offer and acceptance, give evidence of their mutual intention to be contractually

bound within the parameters contained in the offer. Because of the principle of mutual “offer and acceptance,” it is simply not possible to form a unilateral legal contract. A personal “contract” or private undertaking may include a well-meaning promise to lose weight, make a charitable donation, or visit a sick friend; but, such intentions (if not fulfilled) are not enforceable by legal action. In contrast, a legal contract is a bargain entered into by at least two parties, with the bargain defined by the scope of the offer made and accepted. It is also required that all parties intend to be legally bound by their promises.

It seems a simple task to show the required offer and acceptance. Mary offers to sell her horse for \$1,000 and Paul happily accepts. Paul pays Mary the purchase price and takes the animal. They have a legally enforceable contract. In this particular situation it can be said that the acceptance corresponds completely and exactly to the offer that was made. A contract is not made in this situation if Paul accepts Mary’s offer but with a few adjustments (a saddle and bridle as well as the horse). This is a fundamental requirement for a valid “offer and acceptance” in contract law. Any acceptance of an offer must be clearly communicated because the acceptance “crystallizes” the exact offer that has been made and creates the binding contract. The principle of “offer and acceptance” serves to define the precise parameters of the contract that is being created.

In a more complex situation, it is not an easy task to formalize the exact parameters of an offer capable of acceptance from, say, several weeks’ worth of discussion, negotiation, earlier drafts, and informal comments. The basic analysis should always be: Is the communication a formal offer? If so, am I clear what it encompasses, and if so, am I accepting it? Very few contract negotiations proceed as smoothly as Mary and Paul’s—usually there is considerable give and take, offer and counter-offer between the two parties to the contract.

Consider the familiar pattern of negotiation between a home seller and a home buyer. The seller offers to sell at \$100,000. The buyer does not accept but makes a counter-offer at \$90,000 and inserts some conditions such as whether he or she can obtain financing, and the need to first sell the buyer’s existing home. The seller replies with a counter-offer to sell at \$98,000 but wants no conditions imposed. In return, the buyer makes an offer to pay \$96,000 and waives his or her earlier conditions. The seller accepts. In this example the seller was the party making the initial offer (that could have been accepted) and yet in the end, the seller is accepting an offer from the buyer. They have a “deal” in which the acceptance corresponds completely and exactly to the latest valid offer that was made.

In the matter of offer and acceptance, it is important to remember these two rules: (1) a counter-offer is not an acceptance and (2) any change in an offer’s terms on receipt of the offer is not an acceptance. The fundamental change made to an

offer by imposing new terms or a counter-offer can result in no acceptance being possible.

Not every proposal is an “offer” capable of being accepted. What is often referred to in ordinary language as “puffery” is an offer that cannot be accepted but is only an *invitation to make an offer*—and perhaps to do business and enter a contract on the basis of that subsequent offer. For example, general comments made casually between friends about the condition of a car, how well it runs, and its value (“I’d pay \$10,000 for that particular model” or “I’d sell this wreck right now for \$100”) are probably not capable of being accepted. These comments indicate only that the speaker is interested in seeing whether a deal is possible—that is, whether a formal offer may be forthcoming.

The distinction between a formal offer and an invitation to make an offer can become an issue in tendering situations when various bidders submit independent bids to an employer to perform some predetermined work. This process needs to be carefully designed so that the bids received by the employer are the actual offers capable of being accepted by the employer—if all preconditions are satisfied. Likewise, when a sport organization sends out requests for proposals or RFPs (which are often very detailed with regard to what is desired) and invites third parties to submit proposals as to how they would provide certain services, manage an event, or play host to an international competition, the RFP from the sport organization must be carefully designed so that it is not itself an offer capable of being accepted. Rather, the various proposals or bids that are received from the interested parties are in fact the offers that may or may not be accepted by the sport organization depending on whether the RFP conditions are fully satisfied. The point is this: Because contract law stipulates that a true offer can be accepted at any time—with the result of creating a legal and binding contract—it is prudent to control very carefully what offers are circulated to outside parties.

## Consideration

The existence of “consideration” in a legal contract is absolutely crucial. Consideration was discussed in some detail in chapter 7 on work relationships. To create a valid and legally enforceable contract in Canada, there must be a “bargain” involving a promise made by one party supported by some “consideration” flowing to the party making the promise. At law, contracts are valid only if the parties to the bargain mutually promise to perform some act or undertake to perform some obligation for the other’s benefit. In this fashion, the contractual promises are “bought” with the other party’s reciprocal promises or with some additional inducement. Consideration is the legal term used to describe the means by which a contracting party’s

promise is bought. The consideration may be nominal but it *must* be present in every case. In addition, the consideration that supports a valid contract must be present *when* the contract is formed. Each side must stand to benefit to some greater or lesser degree at the moment of contract formation.

In British courts, where this legal principle of contract law was formulated, the transfer of a tiny peppercorn from the promisee to the promisor was held to be enough consideration to support a promise made and thus to create a valid contract. Without some element of consideration, no matter how small, the promise is not enforceable and the contract is not valid. In contract law, a gratuitous promise is unenforceable. A gratuitous promise is a promise freely made where only one party benefits (for example, to clean my room, to study three hours on Saturday, or even to donate \$100 to a charity) without the promise being “bought.” The reciprocity required is the need for the presence of some consideration that must be present at the time the contract was formed.

In most commercial contracts there will be consideration found in the mutual promises made by each party and set out in the agreement. For instance, the contract may specify that Sally, the website consultant, promises to do A, B, and C while Tom, the communications director, promises to pay Sally Y. Alternatively, products may be shipped by uniform supplier A and paid for by sport team B. The absolutely fundamental need for consideration to exist, and that it be present in every legal contract at the time the contract was formed, is shown by the inevitable phrases that find their way into most standard contracts. These two examples are typical: “For valuable consideration, the receipt and sufficiency of which is acknowledged, the parties agree as follows” or “In consideration of one dollar paid by each party to the other, the receipt of which is acknowledged, the parties agree as follows.” These clauses, it is hoped, will prevent one party to the contract from ever arguing at a later date that there was no consideration present to support the promises made and that the contract was therefore invalid. What seems like a very odd phrase is, in fact, necessary to support the very existence of the contract.

## Proper Parties

The parties to a contract often seem so obvious that potential problems can be overlooked. The applicable legal principle is that of “privity of contract.” This principle holds that only the parties to a contract will be bound by it. This is consistent with the concept of a contract as a private bargain between two or more willing parties and that their respective mutual promises, which are set out in the contract, are bought with valuable consideration. As a result of this legal principle, if an individual person or a legal entity does not enter the contract, either by expressly signing

the contract or otherwise evidencing an acceptance of it, it may be impossible to enforce the rights or obligations in the contract against that person or entity—despite an assumption that this party would also be bound by the contract's terms. The practical implications of privity of contract for the contract drafter are twofold: first, always bring into the contract all potentially relevant persons and legal entities, and second, correctly identify who these parties actually are.

Because only the parties to a contract are bound by it, it is important to ask: Is there another individual or corporation that should be named as a party, but is not? Who is actually doing the work, and is this person bound contractually? Particular attention should be paid to the spelling of odd names and the proper corporate entities, and the actual form of business association being used (corporation, partnership, joint venture, etc.) should be correctly identified. A party to the contract should question whether the other party has the financial strength to honour its obligations or whether additional parties should be added so that payment will be assured. Could a parent company, a subsidiary division, or a related organization become a party to the contract to guarantee the obligations of the individual signing the contract? Should a director of an organization be forced to sign the contract in his or her personal capacity? This request will inevitably be resisted. The contentious issue of having directors and officers of a corporate party sign a contract in their personal capacity can be critical in a contract with an organization with very limited financial resources.

Another issue relating to privity of contract is whether the party has the proper authority to enter into a legally binding contract. See, in addition, the comments later in this chapter regarding factors that tend to limit contractual validity. For most adults this is not a major issue because any adult individual can sign an otherwise legal contract on his or her own behalf and will be bound by it. However, minors present very special considerations because most contracts are not enforceable against children under the age of 19 or 18, depending on the province or territory and how its laws define age of majority. As well, persons who are mentally handicapped (such as participants in the Special Olympics movement), and persons who are intoxicated or otherwise impaired, do not have the capacity to enter into contracts.

The question of legal authority to enter into a contract on behalf of a corporation or other legal entity is somewhat more difficult to evaluate. It would not be reasonable to have the janitor, parking attendant, or receptionist sign a legal contract that purported to bind a large corporation that employed them for millions of dollars in obligations. These persons simply do not have the power or authority to bind the corporation in this way—and no sensible person could claim to think that they did. But who can sign on behalf of an organization? This raises the related issues of *actual authority* and *ostensible authority*.

Actual authority is the authority that is expressly granted to a person to do certain things on behalf of a corporation. Individuals in accounting are expressly empowered to co-sign cheques up to a certain dollar amount. Vice-presidents are given authority by the board of directors to negotiate mergers and sign corporate documentation or long-term leases. Those with actual authority possess the power and authority to bind the company because this power has been delegated to them—despite what an outsider may believe or think is reasonable in the circumstances.

In contrast, ostensible authority is the perception held by an outsider that a certain person has in fact the “power to act” on behalf of a corporation by reason of that person’s actions, demeanour, or words. The “holding out” of a certain degree of authority to act may be supported by an express grant for this specific power, but often it is not. In the result, a person with no actual authority but who “holds out” or represents that he or she has full power to sign a particular contract may be found to have ostensible authority if it is reasonable for the other contracting party to believe that this person had, in fact, the authority to act for and to bind the corporation. The corporation may be stuck with contractual obligations entered into by an individual who was not authorized to sign. The party who relied on the ostensible authority of this employee may be facing an argument from the corporation that it was not at all reasonable to assume, without checking, that this person had the authority to do what occurred. Either way the situation will be a mess, so be forewarned. All contracting parties should have the actual authority needed to bind the party on whose behalf they purportedly are signing the contract.

## Contract Length and Renewal

For contracts that contemplate a single, discrete transaction, the issues of the contract’s term and a potential renewal or extension are not relevant. These single-transaction contracts may be for the sale of an item, the provision of catering services for a party, or a speaking fee at a convention. The work is done and the contract is over. However, a great many contracts contemplate the provision of work or services over a lengthy period of time. Each party will be intending to grant rights and to perform obligations for a known time period. For all of these contracts it must be specified when the contract commences and when it will end or expire. The duration of the contract is usually a business decision rather than a legal issue. However, there are legal implications regarding a contract’s termination and renewal.

If a contract is for a set term, it will expire on the stated termination date. Nothing further is needed for this to happen. The obligations of the parties defined in the contract will be at an end. If there is potential for the contract to be terminated

by one or both parties before the set termination date, the contract should specify how termination will occur. The contract will typically contain clauses that identify defaulting events that can lead to early termination and will also provide any formal notice requirements and rights to “cure” any default that is alleged. Some contracts state that there must be arbitration prior to an early termination. In any event, if these mandated steps are followed carefully, the contract can be ended earlier than initially anticipated pursuant to its terms. Contract termination is not terribly complex: more troubling issues arise when the contract is intended to be extended beyond its anticipated term.

Some contracts are for a set term but they may be extended once or many times. Precisely how these extensions, or renewal rights, are expressed in the contract can have a critical impact on a party’s long-term options and its flexibility to pursue other contracting opportunities with other parties.

It is certainly possible to provide for no renewal rights in a contract. In this event, the parties may still decide to negotiate with each other to try to reach a subsequent agreement to extend the contract on conditions that are mutually accepted. In such a case, the parties remain free to try to negotiate with each other, or with new partners, at the conclusion of the initial term. This model provides the greatest flexibility, but also the greatest uncertainty.

More typically, contracts feature provisions specifying exactly how and on what terms the contract may be extended involving the initial contracting parties. There are three common scenarios for extending a contract: a right of “first refusal,” an “option to renew,” and a “right to negotiate.” There are significant legal and practical differences among these three scenarios.

### *Right of First Refusal*

If a party has negotiated a right of first refusal in a contract (for example, a sponsor will typically try to insert this into a sponsorship contract), it means that the sponsor has the right to match and to accept any competing offer that the sport organization is prepared to accept at the end of the initial contract term. The critical issue with a right of first refusal is that the competing offer must be a complete and detailed proposal of the intended new contractual relationship. Very few potential new sponsors are interested in investing time and energy to negotiate a sponsorship agreement, knowing that an existing sponsor, who is possibly a competitor, can exercise its right of first refusal and accept any deal that the potential sponsor has just laboriously negotiated with the sport organization. The practical result is that rights of first refusal make it difficult or impossible to switch sponsors—even if the new sponsor is prepared to offer a significantly better arrangement or if the original sponsor’s overall performance is poor.

### *Option for Renewal*

An option is the right to accept, at a later date, terms and conditions that have been previously agreed. An option for renewal allows, for example, the sponsor to accept a renewed contract, on fixed terms, provided the option to renew is exercised within a defined period of time. Typically, the sport organization will want to be notified about six months before the end of the contract's term whether the sponsor is willing to renew on the previously agreed terms. The benefit of this option is that the terms of renewal are fixed and the only question is whether the option will be exercised. If the option is not exercised within the specified time period, the sport organization is then free to negotiate with any other sponsor or potential partner. The difficulty with renewal options is that conditions in the future may not have been accurately predicted when the terms in the option were negotiated—this can either help or hurt the organization, depending on its current negotiating strength and relative financial position.

### *Right to Negotiate*

This right allows the parties a set period of time within which they agree to negotiate exclusively with each other regarding a decision to extend or renew the contract. Such negotiations must be undertaken in good faith. If the parties fail to reach an agreement within the time specified, each party will be free to contract with other parties with no restrictions or penalties. The main difficulty with this scenario is the obligation to negotiate in “good faith” and not simply “go through the motions.” Some courts have taken the view that the promise to negotiate in good faith is too vague to be enforced.

## **The Substantive Content of a Contract**

This legal principle can be stated simply enough: make your bargain and then express it clearly in the contract! Contracts mean precisely what they say—not what the parties later say they might have intended. If the parties do not express their arrangement accurately in the contract, it is the contract wording that will likely be enforced—not what the parties later claim they wished to have happen. It is not easy to capture on paper the entire deal or understanding between the parties. The substantive terms contained in the contract must demonstrate each party's clear intentions with regard to the offer and acceptance bargain they have made and it must specify their respective rights and obligations in sufficient detail. Contracts need not be long or complex—but in every case, no matter how short and simple, they must accurately describe the specific “deal” the parties have reached.

As we have seen, contracts can be created in writing, they can be created orally, or they may even be inferred from a person's conduct. However, it is far better to insist on having all important contracts expressed in writing. This creates certainty and becomes a record of the parties' intentions at the time the contract was formed. Parties who reach an agreement and fully intend to "do a deal" together typically agree on some (or most) major things, ignore much else, and perhaps disagree on a few items.

Unfortunately, parties often start to write up the legal contract before they actually understand or even agree on all aspects of their "agreement." Nothing wastes more time and money than this method of proceeding. It is absolutely essential that there be a fully formed and understood agreement first. Only after all the details are agreed on should the parties consolidate that agreement into a written document.

It is common for successful contracting parties to use a three-step process to formalize any type of complex or contentious deal. First, they verbally negotiate the broad structure of the deal or agreement. They address all the main points such as price, product quality, and delivery dates. If there is no broad agreement at this stage in the negotiations, there will be no need for a formal contract. Second, they actually write down the complete essential agreement in a form of shorthand using "deal points" or a "term sheet" so that the full agreement is fleshed out in more detail and all the implications can be fully understood. This second step should not be in a legal form nor should it use formal or legal language. This step allows the parties to focus on all parts of the deal in ordinary language and to determine whether the arrangement is sensible and conceptually coherent. This is the step where the inevitable kinks are worked out of the arrangement and issues that need to be addressed are inserted. Third, and only then, should the fully prepared and understood arrangement be drawn up as a legal contract.

Since every agreement reached is unique and specific to the parties involved, it stands to reason that each contract expressing an agreement should also be individually tailored to express the specific deal the parties have reached. Nowhere is it more true that *one size does not fit all*. In a perfect world, to continue with tailoring analogies, each contract should be perfectly "made to measure." The use of computers, word processing software and electronic sample precedents is a double-edged sword—they have allowed easy reproduction and sharing of voluminous contract material but at the significant cost of lost accuracy and context in the final product. There is an acute danger present when "cut and paste" drafting is substituted for a real effort to express carefully a unique contractual arrangement. To be sure, there are benefits to using standardized contracts, but those who use them must always be aware of their significant limitations. Sample forms should be used as a guide only—to help to identify topics and issues to include in a contract. Sample forms

never contain the specific details that make a particular deal unique. That challenge remains to the contract drafter.

## Damages

When a contract is broken, the injured party can be compensated for that breach of contract, but the range of relief available is quite limited. Payment of a sum of money in compensation for suffering legal damages is the usual remedy for a breach of contract. The intent of the law is to place the innocent party, through the payment of money, into as near as possible the same situation that party would have been in but for the breach of the contract. The awarding of damages, in the form of an order to pay a certain sum of money, is not intended to punish the party who is in breach but is designed to compensate the injured party for the loss of his or her bargain. The court will order that the party responsible for the breach pay to the other party the reasonably foreseeable losses that arose and flowed from the breach of contract. Of course, in many situations a sum of money (however large) is scant comfort for what has been suffered or lost. It is also hard to accurately quantify the sum of money that fairly represents what has been lost. In every case, damage awards are no more than rough approximations of this “value.”

The relevant legal principle is that the damages suffered and compensated for must be caused by the breach of contract. In most cases the losses a party suffers are clear and it is perfectly obvious what caused them. Damages may be the lost profit from a joint venture, the value of a stock option never issued, or the refusal to pay a commission or bonus mandated in the contract on the occurrence of a triggering event. However, in some cases it is not easy to show that the breach of the contract actually caused the loss that is claimed. The concept of “causation” is used to identify what losses are caused by the breach of a contract. The notion of a “chain of causation” signifies that the causal links must not be broken and that the end result, where the “chain” eventually leads, can be foreseen.

Imagine, for instance, the expanding circles of ripples fanning out from a pebble thrown into a still pond. Near the point of impact it is clear the ripples radiating outward are the direct result of the pebble tossed. On the far side of the pond small waves lapping the bank may or may not have been caused by the thrown pebble—other events or factors may have intervened and influenced the water’s motion that far from the point of impact: wind, a light current, a fish jumping, a small animal drinking at the water’s edge, etc.

In summary, to be compensated by the payment of damage, the loss from a breach of contract must be, first, *caused* by the breach and second, the loss must be *reasonably foreseeable as a result of that breach* of the contract. As the chain of events

**BOX 9.2 The Chain of Causation Can Lead to Strange Places**

Bertha is a cook working at Sharp Ridges Alpine Resort. She is embroiled in a rocky working relationship with Spud, the dishwasher. After a recent fight at lunch, in a fit of spite, she made a big sign that said “Bite me!” and laid it on his dishwasher. Just then, Tommy, a tourist from out of province, drove into Sharp Ridges looking for directions to town. Tommy wears thick glasses and is somewhat visually impaired. He should not be driving at all—except this portion of his trip was out in the countryside on quiet back roads. He wandered beyond the Sharp Ridges office and into the kitchen, not seeing the “Staff Only” sign. As he entered, a gust of wind blew Bertha’s sign from the dishwasher onto a plate of very hot chilli peppers. Tommy saw the plate of peppers and the welcoming sign. Thinking the peppers were a plate of beans, he grabbed a handful. A single bite caused him to gag and splutter, stagger backward, fall, crack his glasses, and bang his head on the floor. He was quickly revived by staff who sent him on his way with the directions he was looking for—feeling a bit woozy, eyes running, and very red in the face. The effect of the chillies returned within two minutes of his leaving. As he left the Sharp Ridges property, the sweat was running down his forehead and into his eyes. He also had a headache. His vision deteriorated. The cracked glasses lens did not help. The police later determined that he drove off the road and into an adjoining field where a fence was ruined, the car was damaged, and Art Frizzell’s corn crop was flattened. In the process Tommy suffered mild whiplash and the car struck a student researching ethanol production as part of a summer research grant. As a result of her injuries, the student missed the first month of university and was not able to join the women’s hockey team—thereby forfeiting her full four-year athletic scholarship to University of Minnesota at Duluth.

Did Bertha cause the damage to the glasses? Did Bertha cause the whiplash? Did Tommy cause the lost scholarship? Who should compensate Farmer Frizzell for his damaged fence and crop? Who or what caused what? What was reasonably foreseeable in this scenario?

resulting from the breach expands ever outward (like the ripples on the pond), it becomes increasingly difficult to maintain that certain losses were directly caused by the breach of the contract. Some events that occur in consequence of a breach of contract are just not within the reasonable foresight of the parties at the time of the breach. Even if there is an intact “chain of causation” leading to the damage claimed, meaning A led to B which led to C and then to D, the second question must still be addressed—were the damages at D foreseeable at the time of the breach? Only damages that are reasonably foreseeable as a result of a breach of the contract causing them may be compensated for.

There are only rare situations in Canada where *punitive damages* are awarded. This form of damage award is reserved for situations when the conduct of a breaching

party is considered particularly outrageous and intentional. The intent of punitive damage is simple—to punish the wrongdoer and to send a strong message to future wrongdoers that this type of intentional conduct will not be accepted by the courts. Punitive damages, if they are awarded, are given in addition to any other damages intended to compensate a victim for direct losses flowing from the breach.

In our legal system an order for *specific performance* is also rather rare. Specific performance is an order of a court, or other decision maker, that despite the breach, the contract will be performed according to its terms. Canadian courts are generally reluctant to force contracting parties together to perform a bargain that has been breached. In many situations, the bargain expressed in the contract may no longer be workable or manageable, and the litigating parties are not likely to be happy to be ordered to continue to work and cooperate together. Orders for specific performance are rare because the courts do not want to assume the ongoing task of supervising the performance of private contractual arrangements. This is why the payment of money damages, despite its limitations, is by far the most common remedy awarded for a breach of a contract.

## Several Factors May Limit Contractual Liability

### *Minors*

The age of majority is defined in provincial/territorial legislation as either 18 or 19. Youth below that age are considered minors and at law are not responsible for certain contracts that they may enter into. Contracts that are primarily for the benefit of the minor are more likely to be considered valid and enforced despite their execution by a minor. Such contracts may be agreements to participate in an athletic

### **BOX 9.3** Professional Contracts and “Restrictive Covenants”

When there is a breach of contract between a professional athlete and a sports team, the financial damages to the team are difficult to assess and usually not what the team is looking for. As well, in such situations the courts are unlikely to order specific performance on the part of the athlete, nor would the team necessarily want this. However, such contracts often feature a specialized clause known as a “restrictive covenant,” or a promise *not* to do something—in this case a promise not to play for any other team for a specified period of time, which usually corresponds to the term of the breached contract. The courts are typically prepared to enforce the restrictive covenant so that, although the athlete does not have to play for the team in question, he or she cannot play for any other team. (Restrictive covenants are discussed further below.)

or entertainment event or contracts in the nature of employment agreements. Athlete agreements are primarily for the benefit of the athlete but certain clauses may be resisted if they impose onerous obligations on the minor. Caution must be exercised in every case where a minor alone signs any contract that is intended to have legal effect (see *Toronto Marlboro Major Junior 'A' Hockey Club v. Tonelli*).

### *Duress or Undue Influence*

Contracts must be freely entered into if they are to be valid. Contracts are expressions of a person's intent to "deal" with another person. The "bargain" between the contracting parties must be mutual and the parties must mutually intend to be bound. If there is evidence of threats, force, or undue influence on a contracting party imposed by, or through, the other party to the contract, this improper conduct may be enough to invalidate the contract. The negative pressure to enter the contract must come from the opposite party because it is quite common for individuals to enter contractual bargains in rather dire straits—they may be under significant hardships or unfortunate influences, but of their own making.

### *Mistake*

In some very limited situations, an honest mistake may serve to invalidate a contract. If there is a misunderstanding or misapprehension that goes to the root of the contract, it may be possible to claim that, if the true facts were known, the party would not have entered into the contract. The mistake could be made with regard to the subject matter of the contract (thinking it was red wine and not rum in the cask), a mistake as to title of an item sold (both parties may have believed Bill owned the horse that was for sale but in fact Mary did), or a mistake as to the quality of the product bought (a party paid for real pearls when they were actually cultured). In all cases of an alleged mistake where the mistaken party seeks to reject the contract, the law is technical and complex—far better to be certain of the true facts in advance.

### *Misrepresentation*

A person who has been induced to enter into a contract because of a factual misrepresentation may be able to have the contract set aside and perhaps claim damages for the loss of the bargain. There is a general duty to inform the contracting parties of all material facts (as opposed to opinions) that might reasonably influence a contracting decision. An opinion may be that a car is attractive or it is reliable. The subject matter of the opinion is difficult to substantiate and it is also subjective. However, the fact that the car was in an accident needs to be disclosed. Misrepresentation, if it can be proven, may be innocent, fraudulent, or negligent, and the potential remedy varies in each case.

### *Illegality*

On the basis of public policy, contracts for an illegal purpose are not valid. It is obviously not proper to go to court to enforce a contract between two drug traffickers who have a dispute about their transportation arrangements to import heroin into Canada and the payments owing to each other and to third parties. Contracts (otherwise valid) for any purpose that is illegal will not be enforced.

## **Particular Contracts**

### **Releases and Waivers**

Organizers of sport events, and participants in sport, sign waivers and releases every day. These are very specialized contracts that have only one narrow purpose—to confirm that the person signing the document will not make a claim against some identified group of people or organizations in the event an injury or damage occurs. Whether it is called a release or a waiver, the person signing the document is releasing any claims he or she may have, or waiving any right to start an action against named parties in certain defined and usually limited situations. The legal effect of signing a release or a waiver is obviously significant. If the person signing such a document is seriously injured or is killed at the event covered by the document, then the release or waiver, if upheld at a subsequent trial, will prevent any claim being made against the person or entity that caused the injury or death. The injured victim, or the deceased victim's family, is often left with no source to provide compensation for the injury or death.

As a result of the significant legal consequences that result if a release or waiver is deemed to be valid, the courts tend to scrutinize these contracts very closely to be sure they represent a truly informed bargain—an honest intention to give up important legal rights made by a person who was fully aware of the contract and of the consequences. Some waivers and releases are struck down, but it is not correct to say that “they are not worth the paper they are written on.” People involved in sports sign waivers often, and it is a very common perception that they are worthless. However, this is not accurate: waivers *are* upheld by the courts. In principle, they are perfectly valid contracts if they are prepared and executed carefully; but they will always be closely reviewed to be sure all the formal contracting requirements are satisfied.

The key to understanding and drafting these documents is to clearly identify three things: (1) precisely who is being released; (2) for injury or loss, at what event or in what situation; and (3) caused by what and on the basis of what legal claims. If each of these three questions cannot be clearly answered there is a good chance

the release or waiver will be struck down. It is understandable that a court will be worried if these fundamental issues are not clearly articulated and easily understood, because the person signing will not have understood the nature and scope of the legal rights being granted away. Appendix 9.1 gives a sample annotated form of release that identifies each of these three elements.

The three most common problems arising from releases and waivers, and the issues that regularly cause them to fail, are these: (1) the actual words used or the layout of the document; (2) the manner and timing of the presentation of the document, and (3) how it is signed and by whom. These three issues are addressed below. Our guidance in this section is drawn from an abundance of case law relating to waivers used in sport and recreation settings (see *Dyck v. Manitoba Snowmobile Association*, *Crocker v. Sundance Northwest Resorts Ltd.*, *Delaney v. Cascade River Holidays Ltd.*, *Karroll v. Silver Star Mountain Resort*, and *Blomberg v. Blackcomb Skiing Enterprises Ltd.*).

### *Words and Layout*

The document must be clear, concise, and grammatically correct. It must say what it means. Those who are using waivers should try to have the content all contained on one page and should avoid using a tiny font. It is advisable to not combine the waiver or release with other information in the same document (for example, registration information or medical information). If information is combined, it will not be clear whether the signature at the bottom refers to the release or to the other issues. If the intent is to seek to have a released party's *negligence* waived, as well as all other conduct and causes of injury, including the inherent physical risks of the sport, then the word "negligence" must be expressly stated—generally in upper-case and bold letters so that it is brought to the attention of the person signing the waiver.

### *Presentation*

The waiver or release should be provided to the person signing it well in advance of the activity. The sooner it can be delivered for a full and leisurely review by the person signing the better. Many commercial adventure-tour companies print the form of release they wish signed in the advertising brochure so it comes to the attention of the potential client as soon as possible—although it still must be presented to the client and signed by the client. In any event, the terms in the release must come to the attention of the person who is signing to accept its content. There must be time to review and reflect on it. Handing a client or participant a waiver to sign at the last moment before embarking on an activity, or once the participant has already travelled a great distance to attend the event, is not sufficient. Should this occur, the practical result is that the person is compelled to sign the waiver, thus it cannot

be said that he or she entered into the bargain voluntarily and in an informed manner.

### *Signing*

Despite the best wording, layout, presentation, and timing, the validity of a waiver can be undermined at the moment it is being signed. Often, a participant will ask questions at this time regarding what the document actually means. Although tempting, it is not advisable to interpret, explain, or summarize the document. The best response when queried by a participant is to say that the document means exactly what it says. Never dismiss or “explain away” the waiver with comments like these: “it’s just a legal paper the lawyers fuss with—nothing to worry about” or “it’s just a formality.” The waiver is a formal and powerful legal document and an important risk management strategy. Sport organizers using waivers must make every effort to convey that impression and the seriousness of the contract when it is actually being signed.

As mentioned earlier under the discussion of factors that may limit contractual liability, minors are not bound by contracts, particularly those contracts that are not fully for their benefit. Any waiver or release involves the person signing giving up an important legal right (the right to seek legal redress for injuries), and the fact of doing so will never be construed as being to the benefit of a participant who is a minor. Furthermore, although parents and guardians can execute a limited number of contracts that are to the benefit of their children, a waiver of liability for negligence is not such a contract. It is unlikely that a waiver or release signed by a minor, or by the minor’s parent or guardian, will be upheld by a court.

### **Indemnities**

To indemnify means to “restore to its original condition.” An indemnity is a legal term that means a party is making a promise to pay. An indemnification clause means that Bob agrees to compensate Carol, and perhaps others, for all claims, damages, or losses that Carol and others may suffer as a result of certain activities that relate to Bob and/or to the agreement Carol has made with Bob. Deciding whether to enter into an indemnification agreement is all about *managing risk*—identifying it, determining how to allocate it, and deciding who will be responsible for any resulting financial losses. Indemnities are very common in contracts, but are often written in such a complex manner that an ordinary person does not fully appreciate their meaning.

As such, an indemnity should be entered into by Bob only if there is little likelihood that those events that will trigger the obligation to pay will come to pass, and

Bob has money available to make the promised payment if the need arises. Few contracting parties appreciate that an indemnity agreement or clause represents a huge potential liability. Indemnities often form part of the standard clauses in contracts that no one really pays much attention to. Organizations should be very careful about entering into any form of indemnification in the contracts they sign. If the level of risk is unknown (as is often the case), such a clause has the potential to cost an organization a great deal of money. This is often referred to as a “contingent liability,” or the liability that could arise if a certain event occurs. The best strategy is to avoid indemnities if avoidance is possible.

Much like a waiver or release, an indemnity contains three basic elements: (1) who is promising to pay; (2) who receives the benefit of the promise and may be paid; and (3) what events will trigger the payment. Appendix 9.1 provides annotated sample indemnity clauses that identify each element. The first two points are generally easy to define and constrain. The last point is most critical, and how it is worded can significantly narrow the scope of the contingent liability that an indemnity represents. Far too often the events that trigger a payment are too broadly stated. Depending on the fact situation underlying the contract, try to narrow and confine the causes of the losses that will have to be indemnified against. It is also possible to place a cap or a maximum limit on any indemnity payment.

In many agreements, mutual indemnities are inserted as a matter of course. The practice is justified on the basis that both parties are then in the same position, so they can hardly complain. Even so, try to resist this practice. It is rare that both parties are at the same risk of an event occurring that will trigger the demand to pay. Inevitably, the likelihood of both parties suffering the same measure of damages from the events defined in the indemnity is small. For example, because it is the sponsor who is greatly broadening the use and exposure of an organization’s assets, the sponsor tends to face a greater risk of being sued and perhaps suffering significant losses. If the sponsor is sued, and has received an indemnification from the organization, the organization will be responsible for the sponsor’s damages. A mutual indemnity with identical terms will not fairly balance and allocate the risks inherent in this situation.

If signing an indemnity is mandatory, and it often is, every reasonable effort to limit the scope of the “promise to pay” should be made. It is important that the indemnity is consistent with the agreement and with what the grantor of the indemnity has promised to do. Many indemnity clauses are “cut and pasted” from other agreements and have no reference to the particular situation described in the contract. An indemnity should be provided only against events that can be controlled and thus guarded against, and this is typically no more than a promise not to breach the agreement within which the indemnity is found. If the scope of a

triggering event is dependent on either the conduct of a third party or some other external factor, making this promise to pay should be strongly resisted.

Remember that an indemnity is just a promise to pay. As such, it may be worthless if the triggering event occurs and the grantor of the indemnity, in fact, has no funds to pay it. The person seeking to be paid pursuant to an indemnity must, on his or her own initiative, take the steps required to collect on the promise and enforce the indemnity agreement. Those who might be seeking to rely on an indemnity should consider seeking some form of financial security to bolster the bare promise to pay that an indemnity represents. This can be done by inserting other grantors into the indemnity (such as a parent company or an affiliate) or, more aggressively, insisting on a mortgage, a registered security interest, or a personal guarantee from someone with sufficient funds to secure the payment.

Finally, indemnities may also give rise to insurance-related problems. Executing a contract with an indemnification clause means that the organization or person who is granting the indemnity is taking on an unknown liability, which may constitute a “material change” in the insurer’s risk. Such a risk should be reported so that the insurers can confirm that the limits of the insurance policy are sufficient to cover any potential claim that might arise out of the indemnity.

## Restrictive Covenants

A “covenant” is a promise. Restrictive covenants comprise a class of contracts that limit, or restrict, the rights of an individual, typically an employee, to engage in certain conduct. Historically, restrictive covenants have been used in property transactions to prevent the purchasers of property from later doing certain things—including selling their property for undesirable uses or to undesirable purchasers. The most common restrictive covenants in the sport domain are in the employment area, and include non-competition agreements, non-solicitation agreements, and confidentiality agreements. Their scope, or how broadly they are drafted, will have an effect on whether they will be enforced. A restrictive covenant that has an excessively broad scope, imposing unreasonable restrictions or prohibitions, will likely be struck down by the courts. The key to writing a restrictive covenant clause is to strike a balance between protecting the legitimate business interests of one party with the right of the other party to continue to work and earn a living in a field for which he or she is trained or has experience. Restrictive covenants may not be used to completely eliminate competition, but they can be used to protect against improper competition so long as the restrictions are reasonable and are constrained to a limited geographic area and for a limited period of time. The biggest danger with restrictive covenants is that the restrictions tend to overreach—if

the restrictions are unreasonable, and are not directly tied to a legitimate interest demanding protection, the covenants will likely fail.

In terms of non-competition agreements, the geographic area where the restrictive covenant applies must be reasonable and should be linked to the previous sphere of activity for an employee. For instance, an employee who worked exclusively in one neighbourhood should not have a geographic restriction imposed covering all of a province or even an entire city. The duration of any restrictions imposed also must be reasonable. The duration should be linked to the degree of influence the employee has over his or her former customers, and to an estimate of the length of time that influence might last. Another factor to be considered might be the period of time necessary for the employer to hire and train a replacement employee. A restrictive covenant with no area or time restrictions applied to it may be interpreted as being unlimited in scope and will likely not survive any scrutiny by a court.

The party seeking to rely on a restrictive covenant must show that there is a legitimate business interest that needs protection. The overriding principle with restrictive covenants is that an employee should not be unreasonably restricted in the practice of his trade. Canadian courts will refuse to enforce these clauses if they are considered to be in restraint of trade. All such agreements will be enforceable only to the extent that they are reasonably necessary to protect a legitimate interest of the employer. The less restrictive the obligation, the more likely the clause will be upheld. For non-competition agreements to be valid there must be a realistic danger existing to the business from the ongoing activities of a former employee. This might be the case if the departing employee was a key person or because the employee's specific expertise or extensive public or industry contacts were the principal force behind the enterprise. In every case, the restrictions imposed must focus on the particular threat posed by a particular employee to the business's commercial interests and must not result in a general bar from employment in that field in every capacity.

The restrictions imposed must go no farther than absolutely necessary to address the legitimate threat identified. There is real danger in a "one-size-fits-all" use of precedents or templates when creating restrictive covenants. Each relationship and each business interest is unique and these must be considered on a case-by-case basis. To make a non-competition covenant seem more reasonable, one option to consider might be to have the covenant effective only if the employee resigns or is terminated for just cause. A court may be more likely persuaded to find a restrictive covenant reasonable if the employee has freely left his employment to actively pursue a new opportunity at the employer's expense. In contrast, it may be considered unreasonable for an employer to impose severe restrictions on an employee's future livelihood when that employer has just terminated the employee's employment without cause.

Non-solicitation agreements restrict an employee from soliciting the suppliers, customers, or employees of the employer while employed and for a period of time after the employee has left his or her employment. Non-solicitation agreements should not be inserted solely to prevent the otherwise voluntary departure of employees. Non-solicitation agreements that prohibit a departing employee from soliciting the customers of a business are often a less restrictive way to protect a legitimate business interest of the employer than a non-competition clause. These should be encouraged.

The Ontario Court of Appeal in the case of *Lyons v. Multari* reviewed the non-compete restrictions imposed on a departing employee. The employee was a dental surgeon. The restriction was as follows: “*Protection covenant—3 years—5 miles.*” The court confirmed that the factors to evaluate as to the reasonableness of the restrictions were whether there was a proprietary interest of the employer worthy of protection, was the scope of the restrictions too broad (as to location and time), and whether the covenant restricted competition generally. The court found that the non-competition clause was too broad and was not actually needed to protect the employer given the role of the employee at the clinic and his relationship with the clinic’s patients. The court stated that because the least restrictive method of protecting a business interest was desired, in this particular case prohibiting the direct solicitation of patients of the clinic would adequately protect the legitimate interests of the clinic; but apart from this, it was the court’s view that the departing dentist could continue to practise dentistry with no other restrictions. Many subsequent court decisions have reiterated the principle that in the face of a legitimate proprietary interest demanding protection, only the least restrictive covenant addressing this interest will be upheld.

In the course of employment, employees often gain access to information of the employer, or of the employer’s clients or customers, that is private and confidential. If employers wish to protect this information, they can obtain a covenant whereby the employee agrees not to pass the information on to any third party during or after the term of employment. The information must be unique and particular to the business that is caught within the scope of such an agreement. This could be trade secrets, customer lists, supplier pricing lists, intellectual property, or business or marketing plans. Some agreements define separately *business information* and *confidential information* and impose different levels of protection on each class of information. Information that is in the public domain and that is readily available from other sources is not confidential and should not be included within the scope of this covenant.

The greatest danger with confidentiality agreements, in terms of interpretation and compliance, is being able to identify precisely what information is caught

within the scope of the restrictive covenant. Some confidentiality agreements state that information to be included must be expressly marked “Confidential.” This provides certainty but is difficult to adhere to consistently over time. Other versions of confidentiality agreements simply say that general business information is caught or that information relating to a particular project or service provided to a party is all deemed confidential. Some agreements actually say that all confidential information of the association is deemed “confidential”—this of course is no help at all! Those drafting such restrictive covenants should strive to make crystal clear what information is included and what information is excluded from the scope of a confidentiality agreement. One party will inevitably seek to have the inclusions as wide as possible, and the party making the promise will try to narrow the scope of the promise. Once the nature and extent of the information that is covered is understood, it becomes a rather simple matter of managing the flow and access to that information for the required time period.

Other concerns with these sorts of promises include how to allow for limited disclosure of the confidential information for work-related purposes. Often the confidential information is used daily to perform usual work functions (for example, a membership database), and so all staff with access to this information may be required to sign similar covenants to ensure the complete protection of the information received. In some work situations an organization does not want to receive information because it could taint a project—for instance, proprietary software development must not include any third-party materials—and so the control of this sort of information flowing *into* a company is critical. A document that is conceptually similar to a confidentiality agreement is a *non-disclosure agreement* and this form of agreement can be used to prevent the flow of particularly sensitive information both in and out of an organization.

One final point must be stressed. Will the employer be able to detect a breach of the employee’s covenant not to disclose certain information and, if so, will the employer be in a position to enforce the clause? All restrictive covenants imposed in a contract or agreement must be self-enforced, and so obtaining a promise without a mechanism to check compliance and insist on enforcement will be meaningless.

Appendix 9.1 provides annotated samples of each type of restrictive covenant discussed above.

## Multiparty Hosting Agreements

This form of contract is often used in connection with sport-event management and sponsorship-selling arrangements. “Hosting contracts” are typically multiparty agreements where an event owner (typically a sport governing or sanctioning

body) decides to allow one or more other parties the right to host the event, manage the operation of the event, use certain intellectual property of the owner, and perhaps sell various sponsorship properties to that event. This basic contract structure is used for all major international sporting events, including the Olympic Games, the Commonwealth Games, and sport-specific world championships. There is in every instance a grant of rights flowing downward, as in a chain, commencing with the owner of the various commercial and athletic properties.

The starting point for this grant of rights is of course the owner of the event (whether the International Olympic Committee [IOC], an international federation, a national federation, or a scholastic sports body). As owner, the organization decides how best to exploit and generate revenue from this asset that they own. Typically, the first-level grant is made down to a local organizer or organizing committee who is charged with actually presenting the event—subject always to a great many conditions imposed by the owner. That local organizer is, in fact, usually a group or a committee and is the “host.” The host has responsibility for presenting the event on behalf of the owner. The host then typically enters into a wide variety of further contracts with managers, service providers, and suppliers who each have specific roles and responsibilities. This concept is not dissimilar to the comments on licensing found in chapter 8. As in a licensing arrangement, where it was stressed that a licensor of intellectual property must grant a licence only to a licensee covering what he or she actually owns or controls, the same principles apply in a multiparty contractual arrangement.

The unique feature of all such vertically structured hosting agreements is the “flow-through” nature of the rights that are granted. Gaps or breaks in this chain of rights being granted can be hugely problematic because mistakes that are made continue to flow to other parties down that line of contracts. Great care is required to be sure that each tier is operating on a permitted basis. What this means, in practice, is that A, as the owner of the event and the owner of all rights associated with the event, starts the process with the complete bundle of rights associated with the event. A decides, perhaps through a bidding process, that B will be the event host. A may retain some rights to exploit itself (perhaps media broadcasting or the right to sell sponsorships in a certain product class) and then grants the majority of the rights associated with the event along to B, the host of the event. In the grant from A to B there are inevitably many restrictions and conditions that A will impose on B—and also on anyone with whom B decides to contract to fulfill the obligations of B contained in this initial, top-level grant. It is critical for B to assess and ensure that whatever rights it may subsequently grant onward to its managers, service providers, suppliers, sponsors, or contractors are actually received from A, and are consistent with what A is allowing B to do. Any recipient of rights from B will be

constrained precisely by what B is permitted to do or is prohibited from doing by A. This same analysis continues down the chain to any potential grants made to C and even onward to D.

Appendix 9.1 gives two examples of this style of multiparty contracts. Sample #6, with just the recitals included, is intended to show the variety of relationships that are possible and the contracts involved in hosting a major international event. Sample #7, the Major Cup contract example, is taken from an actual event arrangement to demonstrate how the host must be aware to ensure that the rights it grants downward (in the example provided, to the manager) have been received by the host and are permitted in the initial grant to the host.

Despite the unique “flow-through” of commercial rights, these hosting contracts are otherwise rather usual—there must be consideration, a clear expression of the deal reached, and, of course, the correct parties named. The trick is to track very closely what is being received, and thus what can be passed along, to be sure no contractual promises are made that are not allowed or that cannot be kept.

## Typical Contract Clauses

The following clauses, because they create certainty and also provide flexibility, are often included in contracts.

### Arbitration Clause

Any private agreement that allows the parties to settle disputes through arbitration or mediation will be quicker and more cost effective than litigating the dispute in court. The topic of alternative dispute resolution is discussed in chapter 10. Here is a sample arbitration clause:

In the event that a dispute between the parties remains unresolved, then the parties may agree that the dispute be arbitrated and, in that event, this section of this Agreement shall be considered “an arbitration agreement” and the arbitration shall be an arbitration conducted under the *Arbitration Act*, 1991, SO 1991, c. 17, as amended (“the Act”). The parties hereto further agree that the arbitral tribunal shall consist of a single arbitrator. A request for arbitration shall be invoked as follows: one of the parties hereto shall file a photocopy of this section of the Agreement with the Arbitration and Mediation Institute of Ontario (“AMIO”) together with a written request (with a copy of same to the other party hereto) that AMIO provide to the parties from AMIO’s membership a list of three proposed arbitrators, each of whom is experienced in [*insert the nature of dispute*] arbitration. In the event that the parties are unable to

agree on one of the three proposed, then AMIO shall select a further fourth arbitrator as the appropriate arbitrator and AMIO's selection is binding upon the parties.

The arbitration shall be heard at such time and place as selected by the arbitrator in consultation with the parties. In the event that the parties are unable to mutually agree on a time and place, then the arbitrator's decision as to the time and place of the arbitration is final and binding on the parties and not appealable by any party hereunder. The conduct of the arbitration shall be pursuant to the provisions of the Act, although the arbitrator may, with the consent of the parties, dispense with any requirement of the Act, save and except that no party shall be deemed to have contracted out of the provisions of section 3 of the Act.

The parties agree that the arbitrator shall have full discretion, as if he were a judge, to award to a successful party interest on any monetary award together with the successful party's costs of the arbitration and, in determining the costs that a successful party is to be awarded, the arbitrator shall, after issuing his Award, receive and consider any offers of settlement and compromise exchanged between the parties in exercising his discretion as to any award of costs and the scale of costs. Any Award issued by the Arbitrator shall be final, conclusive, binding, and non-appealable.

## Severability Clause

This provision allows one part or a single section of a contract to be struck down without the entire contract becoming invalid. For example, if one section of a non-competition clause were to be struck down because the geographic scope was deemed to be too broad, the remaining parts of the clause and the rest of the contract would survive. Including a severability clause is a good idea in any contract, because it will protect the remainder of the contract if some small part of it is invalid, for whatever reason. And even if only one part of a clause is struck down, the remaining parts of that clause will be saved, provided the substance of the clause remaining has not been radically changed. Here is a sample:

Every provision of this Agreement is severable. If any term or provision herein is held to be illegal, invalid, or unenforceable for any reason whatsoever, such illegality, invalidity, or unenforceability shall not affect the validity of the remainder of this Agreement or any other provision.

## Governing Law

This clause specifies which law will apply to a dispute or the interpretation of the contract, as in Canada, each Canadian province or territory and the federal government controls a separate legal jurisdiction. This is an important clause to include

when, for example, a national organization with a head office in British Columbia hires an employee residing in Nova Scotia to work for it in both Ontario and Manitoba. In the Canadian sport system, it is typical to have activities subject to a contract carried out in more than one jurisdiction. Note in particular that in Quebec the provincial *Civil Code* (based on the *Napoleonic Code*) is significantly different than the common law applicable in the remaining provinces. Here is a sample:

This Agreement shall be governed by and construed in accordance with the substantive laws of Ontario, Canada. Any dispute arising under this Agreement shall be resolved through the courts of Ontario, Canada and the federal and provincial laws applicable thereto.

## Entire Agreement

This clause prevents one party from attempting to rely on verbal representations or “side deals” not expressed in the formal written contract. Even though many issues may have been discussed and discarded in the course of negotiating the contract, only the terms contained in the final written agreement should be binding on the parties. For example, in the process of negotiating a sponsorship deal, many issues are raised, discussed, and discarded. The final written document should fully and completely express all the terms and conditions agreed by the parties. An entire agreement clause in a contract will make it difficult for a party to allege that the real contract or understanding is part oral and part written. It is good practice to have a single agreement capture every aspect of a contractual relationship. Here is a sample:

This Agreement constitutes the entire agreement between the Parties with respect to their contractual relationship. As of the date of execution of this Agreement, any and all previous agreements, written or oral, express or implied between the Parties or on their behalf relating to the subject matter of this contract are terminated or cancelled and each of the Parties forever releases and discharges the other of and from all manner of actions, causes of action, claims, or demands whatsoever under or in respect of any such earlier agreements.

## Independent Legal Advice

No contract should be forced on an unwilling or intentionally naive party. A party must understand the full legal implications of the contract if the contract is to be binding on that party. This may be an issue particularly for the types of contracts that typically enforce unequal bargaining power among the various parties—for

example, employment contracts, financing arrangements, and athlete agreements. Courts want to see that the contracting party against whom the bargain is being enforced was given the opportunity to have the implications of signing the contract explained by a lawyer. It is advised that sport managers encourage this type of legal review because it protects all parties to the contract. Alternatively, the party signing a contract can expressly waive the opportunity to review the contract with a lawyer, while acknowledging that he or she was given the chance to do so. Here is a sample:

The Employee confirms that it has been recommended to the Employee that she consult a solicitor and obtain independent legal advice prior to the execution of this contract. The Employee confirms that she has obtained independent legal advice or has voluntarily declined to seek independent legal advice despite being given every opportunity to do so. The Employee confirms that she has signed this Agreement voluntarily and with full understanding of the nature and consequences of the Agreement.

## Waiver

This type of clause creates flexibility for both parties without either party losing rights that have been negotiated for and are included in the contract. In essence, a waiver establishes that a party does not have to enforce strict compliance, in every instance, with a particular term or condition in the contract. However, a waiver used once or twice does not preclude that party from insisting on strict compliance with a particular term or condition at any time in the future. Here is a sample:

The failure at any time of A or B to demand strict performance by the other of any of the terms, covenants, or conditions set forth herein shall not be construed as continuing a waiver or relinquishment thereof, and either party may, at any time, demand strict and complete performance by the other party of such terms, covenants, and conditions.

Note that the use of the term “waiver” here is not the same as in a “waiver of liability” or “release of liability,” discussed earlier.

## Assignment

Some contracts contain provisions that prohibit the parties from assigning their particular interest in the contract to others. This is common in independent contractor agreements. If the party’s relationship with a particular sponsor or contractor is largely dependent on trust and personal contact, the organization should ensure

that the contract cannot be assigned to someone else.<sup>1</sup> Failure to do this may result in the contract being assigned to a new contractor or to an entity or sponsor with whom the organization has no interest in being associated, or worse, a sponsor the organization cannot be associated with because of other contractual commitments. This particular problem can be dealt with by including a clause in the contract that states that the contract cannot be assigned without mutual consent, and that consent will not be given if any other contractual relationship will be jeopardized by the assignment. Here is a sample:

This Agreement and the rights and obligations of A hereunder are personal to A and shall not be assigned or delegated by A. The rights granted to Y by A hereunder are personal to Y and shall not be assigned, delegated, or passed through by Y without A's prior approval, which approval shall not be unreasonably withheld.

## Force Majeure

These clauses describe events that are beyond the reasonable power of a party to control. If the events listed in the clause do, in fact, occur, and if as a result certain obligations remain unperformed, the party who fails to perform is not deemed to be in breach of the contract. Here is a sample:

None of the parties shall be in breach of this Agreement if the performance by that party of any of its obligations hereunder is prevented or pre-empted because of acts of God, civil or military authority, acts of public enemy, war, accidents, fires, explosions, earthquakes, floods, the elements, strikes, labour disputes, or any cause beyond the party's reasonable control. However, in no event shall any act or omission by or on the part of any party, or any inability on the part of any party hereunder to pay any amount owing hereunder, constitute or be deemed to be considered any event beyond the reasonable control of such party.

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1 Of course, exactly the opposite can be found in many professional athlete contracts where a clause is inserted expressly to allow a team to trade, or assign, a player to another team.

## Appendix 9.1: Sample Contract Precedents

This appendix contains examples of excerpts from various actual contracts. These examples are not templates—they are for illustrative purposes only. We do not recommend that readers cut and paste these examples into their own contracts. In all the examples set out here, text in *italics* is annotation provided by the authors, and does not form part of the contract excerpt.

### Sample #1: Waiver and Release

In consideration of [ABC] agreeing to allow me to participate in [*Insert here the event activities including any pre-event or post-event activities where appropriate*] (all of which are hereafter “the Event Activities”), and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, I hereby agree as follows:

TO WAIVE ANY AND ALL CLAIMS that I have or may have in the future against ABC, its Directors, Officers, employees, agents, volunteers, independent contractors, subcontractors, and representatives (all of whom are hereinafter referred to as the Releasees) [*This sets out precisely who is being released.*]

and to RELEASE THE RELEASEES from any and all liability for any loss, damage, expense, or injury, including death, that I may suffer or that my next of kin may suffer as a result of my participation in the Event Activities, [*This defines at what event or activity.*]

due to any cause whatsoever, including NEGLIGENCE, BREACH OF CONTRACT, BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE INCLUDING ANY DUTY OF CARE UNDER THE *OCCUPIERS LIABILITY ACT* ON THE PART OF THE RELEASEES AND FURTHER, INCLUDING FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD AND PROTECT ME FROM THE RISKS, DANGERS, AND HAZARDS OF THE EVENT ACTIVITIES. [*This sets out the cause of the claim.*]

I further agree to hold harmless and to indemnify the Releasees from any and all liability for any property damage or personal injury to myself or to any third party resulting from my participation in the Event Activities. [*This is a positive promise to pay rather than a release, which is a promise not to sue.*]

I agree that this Agreement shall be binding upon my heirs, next of kin, executors, administrators, and assigns in the event of my death. I agree that this agreement shall be governed and interpreted in accordance with the laws of the Province of [*insert*] and any litigation involving the parties to this Agreement shall be brought in [*insert*]. In entering into this Agreement I am not relying on any oral or written representation or statements made by the Releasees with respect to the safety of the Event Activities. I further acknowledge that I have read, understand, and agree to be bound by the terms of this waiver and release and that I am signing it voluntarily without duress or undue influence.

## Sample #2: Indemnification

### Version 1

The undersigned, ABC Inc. [*This is who will be responsible for paying*] hereby agrees to be solely responsible for and to indemnify and save harmless XYZ [*Insert who or what company and, if a company, its respective Directors, Officers, shareholders, employees, and agents*] (“XYZ Parties”) from and against any claims, demands, losses (but not anticipated profits), causes of action, or damages, including reasonable lawyers’ fees (collectively, “Claims”) arising out of or in any way relating to [*Insert here precisely what the promise to pay relates to. Try to limit this as much as possible, for example: all ABC Inc.’s advertising and promotions in connection with the Agreement dated; the conduct of ABC Inc. at a certain event; breach of a certain Agreement by ABC Inc.*]

### Version 2

Supplier shall indemnify and hold ABC harmless from and against any and all claims, liabilities, losses, and expenses (including reasonable attorney fees) arising out of any third-party claim or action arising from: (i) any statements and/or representations made by Supplier or its employees with respect to the Products or (ii) any acts or omissions of any Resellers appointed by Supplier pursuant to this Agreement or (iii) any breach of this Agreement by the Supplier.

## Sample #3: Confidential Information

Employee acknowledges that ABC possesses and will possess in the future certain “Trade Secrets,” which include the following (whether any or all are in tangible, intangible, magnetic, digital, or other form or media whatsoever, and whether or not identified as confidential): [*This example does not require that the information be specifically marked confidential.*]

[*Insert exactly what is to be treated as confidential—examples are given below.*]

- a. all computer programs (source and object code); software design, maintenance, and user documentation; data; product and system designs and specifications; screen displays; operation methods and processes; equipment designs and specifications; product and/or service information; all concepts, methods, techniques, formats, patterns, compilations, programs, devices, designs, technology, equipment, formulas, algorithms, processes, packaging, testing, information, data, systems, operations, ideas, research, improvements, inventions, discoveries, and know-how;
- b. information relating to ABC’s customers, accounts, suppliers, distributors, marketing activities or plans, business plans, distribution, pricing, financial matters, financial statements, and product and service performance, reliability, and other test or benchmark results (Trade Secrets listed in this subsection (b) are hereinafter also referred to as “Business Information”);
- c. information generally regarded as confidential in the industry or business in which ABC is engaged, which are or shall be owned, developed, used by, related to, or

arise from ABC, its businesses, activities, investigations, work of its employees or agents, utilization of equipment, supplies, facilities, or information, now or in the future, whether or not published, patented, copyrighted, registered, or suitable therefore; and

- d. any information, item, or material that is revealed to ABC by third parties under any confidentiality agreement, understanding, or duty.

Exceptions: Notwithstanding the foregoing, the term “Trade Secret” does not include information that is

- a. generally known to or readily ascertainable by the public through proper means;
- b. properly and lawfully obtained from a completely independent source; or
- c. required to be disclosed by court order or applicable law (provided that ABC shall be given notice and an opportunity to obtain a protective order against such disclosure).

Restrictions: Employee acknowledges and agrees that all rights to Trade Secrets are and shall remain the sole property of and in the control of ABC or its licensors. Employee agrees not to use or disclose any Trade Secrets, other than Business Information, at any time in the future, except as necessary to perform his/her duties for ABC. Employee also agrees not to use or disclose any Business Information until five (5) years after the termination of his/her employment, except as necessary to perform his/her duties for ABC. Notwithstanding the foregoing, Employee agrees not to use or disclose any information received by ABC from a third party for the period required by any confidentiality agreement, understanding, or duty between ABC and the relevant third party.

## Sample #4: Non-Competition

*[This example is from a contract for a highly specialized software engineer.]*

For a period of one (1) year following termination of Employee’s employment with ABC, Employee will not become employed by, consult with, or become involved in any way with any Competing Business of ABC. “Competing Business” means: (1) any business which develops, markets, or sells [*Define business; widgets or records management software, etc.*] or services that compete with those developed, marketed, or sold by ABC during Employee’s employment and/or for one (1) year after the termination of Employee’s employment; and (2) includes, without limitation, [*List specific competitors*] and such other competitors as ABC identifies from time to time in its business planning documentation as its direct competitors. [*Note there is no geographic area limitation since work in this field is done worldwide. The focus is on who specifically not to work for—all other employers are acceptable.*]

Employee acknowledges that the terms of this Agreement are reasonable under the circumstances in that they represent the least restriction on Employee’s future employment and ability to earn a living that are consistent with protection of ABC’s Employee Inventions and Trade Secrets.

## Sample #5: Non-Solicitation

During Employee's employment and for one (1) year afterwards, Employee will not solicit or recruit any other individual who is an employee of ABC [*This is the promise to not solicit employees*] or who has been an employee of ABC at any time during the period of one (1) year after the termination of Employee's employment, to perform services for another employer. During Employee's employment and for one (1) year afterwards, Employee will not influence or attempt to influence customers of ABC either directly or indirectly, to divert their business away from ABC. [*This is the promise not to solicit the customers of the business.*]

## Sample #6: Hosting Agreement Recitals

AGREEMENT made as of the date:

AMONG:

Her Majesty the Queen in Right of Canada  
(hereinafter called "Canada"),  
as represented by the Minister of Canadian Heritage  
(hereinafter called "the Federal Minister"),

- and -

The Minister of Municipal Affairs, Sport and Recreation and the Minister of  
Canadian Intergovernmental Affairs and Native Affairs for and on behalf of  
the Government of Quebec  
(hereinafter called "Quebec"),

- and -

The City of Montreal a legal entity under public law  
(hereinafter called "the City"),

- and -

The Société des internationaux du sport de Montréal, a legal non-profit entity,  
(hereinafter called the "SISM")

- and -

The Aquatic Federation of Canada,  
(hereinafter called "the AFC"),

- and -

The XIth FINA World Championships—Montreal 2005 Organizing Com-  
mittee, a legal non-profit entity  
(hereinafter called "the Organizing Committee").

Whereas:

The Fédération internationale de natation (FINA) is the sporting organization that governs all international competitions in synchronized swimming, open water swimming, swimming, diving, and water polo and, as rights holder, has entrusted the AFC and SISM with the rights to hold the XI FINA World Championships (Championships);

The AFC is the member representing FINA in Canada;

Following the selection of Montreal by FINA as the host of the Championships in 2005, the AFC, SISM, and FINA have concluded the Host City Agreement, which sets out the nature of the undertakings and obligations of each Party and establishes the terms and conditions under which these Championships will be held, including the constitution of an Organizing Committee;

The Organizing Committee is an integral part of this Agreement and is empowered by the AFC and SISM to organize the Championships at Jean Drapeau Park in Montreal in July 2005, comprising the planning, preparation, financing, and staging of these Championships;

The Parties to this Agreement recognize that the Championships will be an event of international importance that will be a source of pride to the sport community and the general public;

Canada, Quebec, and the City have already made commitments to support the organization of these Championships;

The City shall undertake facilities projects to renovate the Pavillon des Baigneurs and the construction/reconstruction of three permanent outdoor swimming pools at the Île Sainte Hélène Aquatic Complex for the purpose of holding the Championships;

To this end, the City will receive a financial contribution from the Government of Quebec as part of the Quebec municipalities infrastructures program, and has concluded a memorandum of agreement in this regard;

The holding of the Championships will leave a legacy for the sport community and the general public, including the permanent facilities built or renovated for the Championships, as well as the equipment and technical, electronic, and computer material required to hold future international and national competitions in synchronized swimming, swimming, diving, and water polo;

FINA has authorized the Organizing Committee, SISM, and the AFC to sign this Agreement, as set out in Annex 11;

This Agreement has been approved by the Government of Quebec as per decrees ... dated... .;

The Parties to this Agreement wish to record the conditions governing their respective contributions to the organization of the Championships and establish the general conditions of their cooperation.

NOW THEREFORE, each Party agrees as follows:

## Sample #7: Hosting Agreement

### MAJOR CUP AGREEMENT

BETWEEN:

ABC  
(hereinafter—“Manager”)  
- and -  
XYZ ATHLETICS  
(hereinafter—“Host”)

WHEREAS the Host has been granted the right to host the Major Cup in 2007, to be played at a site acceptable to the owner of the Major Cup (“Owner”), acceptable to the Host and subject to the negotiation by Manager of an acceptable facility rental agreement;

AND WHEREAS Manager wishes to manage the Major Cup on behalf of the Host and Owner in 2007;

AND WHEREAS the parties wish to enter into an agreement regarding their respective rights and obligations associated with the management of the Major Cup for 2007;

NOW THEREFORE this Agreement witnesses that in consideration of the mutual covenants and agreements herein contained, and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties hereto covenant and agree as follows:

#### **RIGHT TO MANAGE**

1. The Host has agreed with Owner, the owner of the event, and the owner of all intellectual property associated with the Major Cup to host the Major Cup in 2007. [*This refers to the initial grant from Owner to Host.*]
2. Host hereby exclusively grants to Manager, for so long as this Agreement remains in effect, the right to manage, on its behalf and on behalf of the Owner, the Major Cup and any property specifically affiliated with the Major Cup in 2007 listed in this Agreement. This grant of rights to Manager is conditional on the obligations contained herein being satisfied and on the agreement between Host and Owner not being terminated. [*This clause passes along to the Manager the obligations the Host undertook when it accepted the rights as Host.*]
3. Manager will work with Host to develop a working committee, including a chairperson, for the 2007 Major Cup. The purpose of this working committee will be to assist Manager and the Host to ensure the management and operation of the Major Cup is consistent with the terms and conditions contained in this Agreement and in the agreement between Host and Owner. [*It is critical to be sure all that the Manager does is consistent with the initial grant to the Host.*] However, Manager will be responsible for day-to-day operational decisions regarding the management of the Major Cup.

### OTHER AGREEMENTS BINDING ON MANAGER

1. Manager agrees that the following agreements plus attachments and addendums, all of which are attached hereto, form part of the Agreement:
  - a. The Agreement between Host and Owner dated X (the “Owner Agreement”). [*In this way the obligations imposed on the Host by the Owner are passed along to the Manager.*]
2. Manager hereby agrees to adopt, assume, and be bound by all of Host’s restrictions, financial obligations, and covenants contained in Section 1 and Schedule “A” of the Owner Agreement, with the exception of Sections 1.3 and 1.9. [*This will vary in each case because the Host may decide to remain responsible for some of the rights it received from the Owner but decide to pass on to the Manager the balance of these responsibilities.*] Manager further agrees to strictly follow all of the requirements to obtain consents, permissions, or approvals from Owner and other parties as specified in the Owner Agreement and all attachments. The Host, as provided in the Owner Agreement, is specifically relying on Manager to satisfy the Host’s commitments in the Owner agreement as aforesaid, and failure to do so shall be considered a breach of this Agreement.
3. All benefits accruing to Host pursuant to Section 2 of the Owner Agreement shall, when and if received, be passed on to Manager by Host. [*This generally will refer to the right to sell sponsorships and raise money, granted by Owner to the Host—which the Host is passing along to the Manager.*]

### INTELLECTUAL PROPERTY RIGHTS

1. The following are the *only* Properties, owned by Owner, that may be utilized by Manager for the purpose of marketing, licensed merchandise, and sponsorship sales pursuant to this Agreement: [*These are all that were provided to the Host by the Owner.*]
  - The word mark [*insert*]
  - The word mark [*insert*]
  - The word mark [*insert*]
  - The Major Cup trade-marked logo

All licensed merchandise revenues generated using the word marks and logos listed above shall accrue to Manager for the duration of the term of this Agreement. Manager confirms that no TV broadcasting rights to the Major Cup are being granted to Manager by Owner or Host. [*The Owner did not grant these TV rights to the Host so the Host cannot pass them along to the Manager.*] However, obligations directly associated with Owner’s TV broadcast rights for the major Cup are being imposed on Manager in this Agreement.

2. The following are the *only* Properties, owned by Host, that may be utilized by Manager for the purpose of marketing and sponsorship sales pursuant to this Agreement: [*Host needs to define which of its intellectual property may be used by the Manager.*]
  - The Host trade-marked logo
  - The word mark “Host Athletics.”
  
3. Host hereby grants to Manager, for so long as this Agreement remains in effect, a royalty-free, Canada-wide, non-exclusive licence to use the Owner Properties and the Host Properties to fulfill its marketing and sponsorship obligations in this Agreement. The grant of licence to Manager is expressly made subject to the following restrictions and conditions: [*The actual assets that may be used by the Manager have been defined in paragraphs 1 and 2—this is where any restrictions on the use of the assets can be inserted.*]
  - a. All use of the Owner Properties and the Host Properties shall be consistent in all respects with the Owner Agreement, including Schedule “A” and the Owner Guidelines contained in the Owner’s Operations Manual. [*This specifies restrictions on use.*]
  - b. All use of Owner’s word mark and logo, all Major Cup sponsors’ promotional materials, and the Event Title Sponsorship shall be consented to and/or approved by Owner. [*The consent of the Owner for some use is demanded.*]
  - c. All use of the participating teams’ logos or other intellectual property shall be consented to by the respective teams.
  - d. The Owner’s word mark and logo must always be used in conjunction with the name, year, and location of the Major Cup.
  - e. Manager’s use of the Owner’s word mark and logo, the Owner Properties, and the Host Properties shall: [*These are standard trade-mark controls and restrictions.*]
    - be in accordance with their respective trade-mark registrations, if any, including limiting all use to the wares and services with which the trade-mark may be properly associated.
    - be consistent with public morality and business practices which do not compromise or reflect unfavourably on the good name or good will of the Owner or Host.
    - be a faithful and accurate reproduction of the various Properties in accordance with the graphic standards established by the Host and the Owner from time to time.
    - not use any unapproved form of the Properties, adopt a confusingly similar trade-mark or merge any Properties with any trade name or other marks, or use the Properties as part of a trade, business, or corporate name or style.
    - subject to the right of the Host and Owner to monitor and inspect the use being made of the Properties to control the character and quality of the wares and services with which the trademarks may be properly associated.

## REFERENCES

*Blomberg v. Blackcomb Skiing Enterprises Ltd.* (1992), 64 BCLR (2d) 51 (SC), where an operator took reasonable steps to bring the content of a waiver to the attention of the plaintiff, who chose not to read it.

*Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 SCR 1186, where a waiver was not upheld: the injured party was intoxicated when executing the waiver.

*Delaney v. Cascade River Holidays Ltd.* (1989), 44 BCLR (2d), 24 CCLT 6 (BCCA), where a waiver was upheld, although the court was concerned with the timing of the presentation of the waiver for execution.

*Dyck v. Manitoba Snowmobile Association*, [1985] 1 SCR 589, where a waiver was upheld; the injured party acknowledged not actually reading the waiver.

*Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 BCLR (2d) 16 (SC), where the court held that the content of a standard-form waiver need not be brought specifically to a party's attention.

*Lyons v. Multari* (2000), 50 OR (3rd) 526 (CA).

*Toronto Marlboro Major Junior "A" Hockey Club v. Tonelli* (1975), 11 OR (2d) 664 (HCJ).

