The Art of Decision Making

The average American’s day is filled with decisions, starting with whether to get the “greenie” or the “Veetee” at Starbucks® and ending with “what’s for dinner?”

In between those two, there are many others with much higher stakes. Do you pour money into an under-performing product line because market research shows a competitive advantage, or do you pull the plug and cut dozens of jobs? Do you take a hard line in contract negotiations and possibly lose a deal, or agree to a compromise that includes only most of what you want?

In each of those cases—and in dozens more you could come up with on your own—either option is a clear winner, and both carry the potential for powerful risks and rewards.

“I’m rarely confronted with black-and-white choices,” says Meredith Mouer, a partner in the Corporate/Securities section of Andrews Kurth and co-chair of the firm’s Women’s Initiative Team. “One of the most challenging parts of my job is when I’m faced with varying degrees of gray. Sometimes—after weighing all the options and considering the risks—you just have to recommend to your client the option that offers the least downside and best aligns with their strategy and needs.”

Women hold key decision-making roles more than ever today. Not only are they steadily rising to powerful positions in the world of business, but they’re also making strides in government. Today, nine states have female governors, the highest number ever. In addition, for the first time in our nation’s history, a woman is one of the leading candidates for president.

“Standing in the middle of the road is very dangerous; you get knocked down by the traffic from both sides.”

— Margaret Thatcher

What’s the secret to making sound, effective decisions? Clearly, decision-making methods are as varied as decisions themselves. This article includes a sampling of expert advice on the matter, from a 19th century Italian gardenier to former Hewlett-Packard CEO Carly Fiorina. A trip to your local bookstore will reveal even more perspectives on the issue. Only you know which method is right for you.

Whatever your decision-making style, it behooves any woman with her eye on the corner office to develop a sound, efficient system for making decisions. Before you can make any decision, you have to know what your goal is. In a contract negotiation, for example, your company’s short-term interests may trump its long-term interests, or vice versa. Knowing your priorities will help you evaluate alternatives.

You must also define the problem you’re attempting to solve. Don’t be quick to accept the conventional wisdom. If company revenue is down, the easiest analysis may be that the economy is slow. However, probing questions such as “when did revenue start to fall?” and “are some of our competitors still doing well?” will unearth alternative theories and help define the problem.

Once the problem has been defined, come up with as many alternative solutions as you can. Analyze the various options for the resources they will require, the risk of downside, cost and benefits.

In “Making Decisions,” Robert Heller suggests plotting the various alternatives on a matrix like the one above. A solution that offers a low likelihood of a mildly negative impact is clearly a better choice than one with a high likelihood of a highly negative impact. If it’s very unlikely that an event may occur, a high risk of negative impact may be acceptable.

Once a decision is made, your job isn’t over, advises Peter Drucker, the godfather of management gurus and author of 1967’s “The Effective Decision.” How the decision is implemented and evaluated is also crucial to its success. All players should have clear assignments and responsibilities.

Afterward, it’s important to get feedback from those affected by the decision, whether it’s on the shop floor or the one-on-one customer level. Drucker says this direct exposure to reality often forms the basis of the next major decision.

Another decision-making tool comes from 19th century Italian economist and gardenier Vilfredo Pareto, who observed the unequal distribution of wealth among Italians, where 20 percent of the people controlled 80 percent of the economy. His formula has evolved in business management to describe the benefits of focusing on the 20 percent of anything that is responsible for 80 percent of the results. Ken Lawenson, author of “Successful Decision Making,” says the “80/20 rule” applies to decision making because, in some cases, making a change to one key aspect of your business can generate far more benefits than if you make several smaller changes at once.

For example, a company experiencing customer service problems might consider hiring more staff, hiring a new manager, better training or changing their product line. After weighing the relative effectiveness of each option against its costs, the company can make the following chart on page 2.

Once the scores are tallied, you can discard the outliers and decide between the two options that come out the same: hire more staff and provide better training. Although hiring more staff might look like the most obvious solution, the cost is higher than providing better training. By changing one area of the company, Lawenson observes, the benefits can increase exponentially.

Having a deliberate process to make decisions doesn’t immunize the decision maker from criticism, as former Hewlett-Packard CEO Carly Fiorina knows. When HP merged with Compaq in 2002, the merger was harshly criticized by members of the Hewlett and Packard families. Fiorina, however, stood by her decision.

For more information please contact Courtney Culver at 214.659.4689 or courtneyculver@andrewskurth.com

Welcome to Straightline, the newest Andrews Kurth quarterly publication for women, by women. We will give you the bottom line on women’s issues, be on the front line for timely substantive legal topics and serve as the hotline for firm news. We’ll introduce you to fresh faces at Andrews Kurth, provide a pipeline of topical legal updates, and promise to initiate some fun features, facts and resources along the way. So join us for what promises to be Straight Talk on women’s issues. No lawyer-speak. No double talk. Just the most direct line between you and our women lawyers.
**Sidelines: What’s New**

After 10 years of serving as the firm’s Managing Partner, on July 1, 2007, Howard Ayers became Chairman of the firm, and Bob Jewell began a three-year term as Managing Partner. To enable Bob to continue practicing law, an Executive Committee has been created to work at the direction of or in the absence of the Managing Partner. Members of the Executive Committee are Bob Jewell (Chair), Howard Ayers, Paul Shrestha, Mark Solomon and Rex VanMiddlesworth. Also effective July 1, Tom Perich will serve as Houston Managing Partner, Sherman Proctor as DC Managing Partner and Mark Solomon as Dallas Managing Partner.

**Firm Announces 2007-2008 Policy Committee**

We are pleased to announce the election of the 2007-2008 Policy Committee. The Policy Committee serves as the principal governing body of the law firm and is composed of partners elected by the general partnership.

Members of the committee for the 2007-2008 term are:

- Jeff Dodd Houston
- Tom Ford Houston - New Member
- Bob Jewell Houston - Managing Partner
- Tom Kline Washington, DC
- Terri Lacy Austin, Houston - New Member
- Gene Locke Houston
- Mike O’Leary Houston
- Tom Perich Houston
- Robin Russell Houston
- Dennis Ryan Dallas
- Pat Sargent Dallas
- John Sheby Houston
- Paul Silverstein New York
- Maury Smith Houston
- Tom Taylor Houston
- Tim Unger Beijing, Houston - New Member
- Rex VanMiddlesworth Austin
- Kathleen Wu Dallas

**Out and About**

Gail Morel has been selected to serve on the Development Committee for DirectWomen, a national program initiated by the American Bar Association to promote service by experienced women lawyers on the boards of directors of U.S. companies. Gail is the only representative from Texas currently holding a leadership position in DirectWomen.

Elizabeth Campbell, Partner and Chief Diversity Officer, presented “Recruiting and Retaining” at the 2007 Big Brothers Big Sisters Annual Banquet in Phoenix on June 27, 2007.

On July 13, 2007, Laura Tesman was a presenter at the University of Houston Health Law Seminar on “Risk Management Issues for Health Care Providers—Avoiding Risks Before Liability Becomes An Issue.”

Shae Wilson presented on July 13, 2007, at the University of Houston CLE Advanced Evidence & Discovery Seminar on “Demonstrative Evidence and Courtroom Technology on a Reasonable Budget.”

**Decisions Continued from page 1**

“We had undertaken a very deliberative, thorough decision-making process,” Fociosa told the online publication “Knowledge@Wharton” in an October 2006 interview. “We had reviewed every alternative; we had looked at every risk. It was the right move for the company. Once you’ve made a decision that you are confident in using a decision-making process that is sound, you can’t change your mind just because people disagree with you.”

Donald Trump, the controversial real estate magnate, offers this advice: “Listen to your gut, no matter how good something sounds on paper. I’m a great believer in asking an opinion for every person before I make a decision,” he says.

Generally, PD exists to enhance the professional lives of the lawyers at the firm by strategically working closely with firm management, our Women’s Initiative Team, Attorney Employment and Recruiting leaders, and our dedicated Diversity and Inclusion teams. Andrews Kurth is fortunate to have Amy Stakeley & Hancock as the firm’s Director of Professional Development. Ms. Hancock leads a full-time staff and works with the firm’s management to identify opportunities and implements programs for attorneys in the firm’s nine offices.

“We top-rated firms, attorney development and training has become the cornerstone of successful recruiting, development and retention programs,” says Ms. Hancock, who has a J.D. from The University of Texas School of Law. “The commitment of the firm’s leadership, combined with the strong support of professional development, recruiting, diversity and associate committees, is successfully enabling us to collaboratively build one of the strongest professional development programs in the industry.”

Bob Jewell, Managing Partner of Andrews Kurth, says “With her professional experience and recognition as a national speaker on attorney professional development, Amy provides the perfect experience, knowledge and vision to the firm. Her leadership further demonstrates our commitment to professional development and has allowed us to better focus on the needs of our attorneys and better serve our clients.”

**Spotlight: Amy Hancock**

What does Attorney Professional Development mean for Andrews Kurth? For our diverse and dynamic lawyer workforce, Professional Development (PD) focuses on personal and professional training opportunities. These include legal practice skill-building and coaching programs to enhance substantive legal skills, understanding of legal/ethics issues, matters of business and legal professionalism, client relationship and practice management skills, business development, interpersonal communications, networking and marketing skills, understanding of law firm economics, and sustaining work-life balance.

“Most people disagree with you.”

“I ask I ask I ask, until I begin to get a gut feeling about something. And that’s when I make a decision.”

As Fociosa and Trump illustrate, decisions are only as sound as the process by which they are made. If good information is gathered, and the right opinions taken into account, it’s easier to stand by a decision, even under criticism. And almost every important opinion will receive criticism.

Not every decision can be as mundane as “Veeti” or (grandma), but nobody ever earned a promotion, or made a career, out of getting coffee.

**Top of the Line: To Give or to Get**

The season of gift giving is upon us. And we all know that as YOU GIVE, YOU GET. Below are some of our favorite goodies to give this year, many sold by WOMEN-OWNED COMPANIES we like to support.

**Charity Navigator: Your Guide to Intelligent Gift Giving**

Want to make a donation in someone’s name, but overwhelmed by the possibilities? Use Charity Navigator to evaluate America’s largest charities.

www.charitynavigator.org

**Malibu Velvet Baby Shoes**

Give them as a unique gift for the first- and second-time mothers.

www.toosdesigns.com

**Phaidon Travel Books**

The fast-track guide for the smart traveler. 80 pocket-sized city guides in various bright colors.

www.phaidon.com/travel

**Ellie & Ollie Cookies**

Amazingly delicious cookies packaged in a sleek brown box. The Key Lime Crackers and Chocolate Lollies are personal favorites. Perfect as a hostess gift to take to a holiday party.

ellieandollie.com

**Foods For Life**

Incorporating these foods into your diet can help stave off disease and contribute to optimal health.

**SuperFoods Rx**

Source: Dr. Stephen G. Gundry, M.D., M.S.

**Ellie & Ollie Cookies**

Amazingly delicious cookies packaged in a sleek brown box. The Key Lime Crackers and Chocolate Lollies are personal favorites. Perfect as a hostess gift to take to a holiday party.

ellieandollie.com

**Superdeluxe NYC**

Write in style with the latte x hand screen printed pen cap.

superdeluxenyc.com

**The Asparagus Bag**

Modern design with a conscience. Buy groceries in style while helping the environment. American Forests plants a tree for every order placed.

getskn.com

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Foods For Life

Power Up With These 14 SuperFoods

Whether you're in your 20s or your 60s—or somewhere in between—you probably want two things out of life: to live for a long time and to be in good health during that long life. After all, we have a world to conquer, and we can't very well do that from a hospital bed.

Anybody who's watched their parents or grandparents struggle with aging has left, in addition to sympathy for their loved ones, a determination to do what they can while they're still youngish to stay in good health.

Although genes play a role in determining when you'll call it quits, lifestyle plays a bigger role. And it plays an even bigger role in determining just how vigorous, healthy, and, let's be honest, attractive those years will be.

The two biggest components of lifestyle are—yes, you guessed it—nutrition and exercise. Things like social support systems, lifelong learning, and spirituality also factor into the equation, but you can't beat good nutrition and lots of activity for staying young, healthy, and sharp well into your old age.

We all know that healthy foods—specifically a primarily plant-based diet that includes fish, soy, and the right kinds of fat—are good for you. But certain healthy foods are actually such anti-aging, nutritional powerhouses that they have the ability to help prevent some of the scourges of aging, such as cancer, diabetes, heart disease, and dementia.

The big three, according to “SuperFoods Rx,” are blueberries, spinach, and salmon, specifically Alaskan wild salmon. For a complete list of the 14 SuperFoods, see the box below. The SuperFoods list contains foods rich in fiber, anti-aging vitamins and minerals, and phytonutrients, naturally occurring substances that combat inflammation, prevent cellular mutation, and prevent cancer cell proliferation.

Blueberries contain more disease-fighting antioxidants than any other fruit or vegetable. And they're among the easiest healthy foods to incorporate into your diet. They're widely available in the frozen food section, and can be used in smoothies, on cereal, or eaten as is. In many parts of the country, blueberry farms offer public picking times when guests can make a day of it and pick enough blueberries to freeze and last for a year.

Spinach also packs a nutritional punch. A healthy consumption of spinach can help prevent age-related macular degeneration, a leading cause of blindness in the elderly, cardiovascular disease, and cancer. The pre-sagged variety can be found in most produce sections and is easily incorporated into soups or salads. Frozen spinach can also be tossed into smoothies, dips, or even scrambled eggs.

Salmon, specifically Alaskan wild salmon, contains high levels of Omega-3 fatty acids, which reduce the risk of coronary artery disease, control high blood pressure, prevent cancer and age-related macular degeneration, and relieve depression. Atlantic salmon, which is typically farmed-raised, may not have the same levels of Omega-3s.

Granted, fresh Alaskan wild salmon is expensive and hard to find. But canned Alaskan wild salmon is practically ubiquitous, and can be used the same ways tuna can: in casseroles, on sandwiches, and in salads (try a Salad Nicoise made with salmon instead of ‘tuna’).

The other part of the anti-aging equation is activity: lots and lots of activity. Not until the last 100 years or so have humans spent so much time on the couch. The combination of cars, air conditioning, and our good friend television, has helped to usher in an unprecedented era of obesity, death, and the laundry list of diseases associated with those two conditions.

Sir Isaac Newton said it best when he wrote the Law of Inertia: “Unless acted upon, a body at rest stays at rest, and a body in motion stays in motion.” Unless you get off the couch, you’ll stay on the couch. And if you can manage to get off the couch on a regular basis and work up a sweat while you’re up, you won’t be relegated to the couch (or the bed) for a good portion of the last third of your life.

Regular, sweat-inducing exercise ideally, 45 minutes, 6 days a week; promotes positive brain chemistry, burns fat, heightens the immune system, helps keep the arteries clean, and improves sleep. Along with a healthy blueberry/salmon/wild salmon-containing diet, frequent activity is the prescription for a young body and a sharp mind.

And don’t forget strength training. Primarily seen as a “man’s thing,” two to three days of weekly strength training should be incorporated by all women looking to maintain healthy bones. In other words, all women. Strength training increases muscle mass, which helps to maintain bone density. If you think of muscles as rubber bands connecting bones, when muscles are tighter and stronger, they literally compress the bones, making them denser.

Aging is a natural process. Decay isn’t. Left to our own devices—chained to our desks, eating fast food, and doing little, if any, meaningful activity—our bodies will decay, regardless of our genetics.

It’s never too late, or too early, to adopt healthy habits—actions that can keep us active and sharp into our fifties and 60s.

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SuperFoods

Incorporating these foods into your diet can help slow off disease and contribute to a healthy, energetic life:

- Beans
- Blueberries
- Broccoli
- Oats
- Oranges
- Pumpkin
- Spinach
- Tea
- Tomatoes
- Turkey
- Walnuts
- Wild salmon
- Yogurt


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Motivational Reading:

Fresh Faces

With much excitement, we welcome the following eight lateral and 12 first-year women lawyers to the Andrews Kurth team.

Kara Allenbaum-Price (Dallas) has joined our Corporate Compliance, Investigations and Defense (CCID) group as an Associate. She received a J.D. from Texas Tech University School of Law in 2003. She received a Bachelor of Journalism, with Honors, from The University of Texas in 1998.

Heather A. Batts (Washington, DC) has joined our Corporate/Securities section as an Associate. Her practice focuses on securities, M&A, financing and restructuring deals. She received a J.D. from The American University, Washington College of Law in 2003. She received a B.S. and a B.A. from Carnegie Mellon University in 2000.

Angel S. Hall (Houston) has joined our Corporate/Securities section as an Associate. She received a J.D., cum laude, from Texas Southern University in 2003. She received a B.A. from Old Dominion University in 2002.

Jennifer R. Jones (Dallas) has joined our Corporate/Securities section as an Associate. Her practice focuses on corporate and securities, real estate and real estate-based finance. She received a J.D. from SMU Dedman School of Law in 2004, a M.A. from The Pennsylvania State University in 2001, and a B.A. from The University of Texas in 1997.

Estella “Stelz” V. Parvazpour (Houston) has joined our Corporate/Securities section as an Associate. Her practice focuses on corporate and securities matters and related issues. She received a J.D. from the University of Houston Law Center in 2006, and a B.A. from Princeton University in 1998.

Nara Porto (Dallas) has joined our Corporate/Securities section as a Senior Attorney. Her practice focuses on tax, corporate and finance matters, with an emphasis on Brazilian companies. She received a LL.M., from SMU Dedman School of Law in 2002 and a Bachelor of Law from Pontificia Universidade Catolica de Sao Paulo in 1999.

Ashley Todd (Dallas) has joined our Business Transactions section as an Associate. She has a broad based real estate and real estate-based finance practice. She received her J.D., magna cum laude, from Mississippi College School of Law in 1999 and her B.A. from the University of Arkansas in 1995.

Kelly A. Ultis (Houston) has joined our Executive Compensation/Employee Benefits section as an Associate. She received a J.D., magna cum laude, from the University of Houston Law Center in 2003, a M.A. from Texas Woman’s University in 2001, and a B.A. from Southwestern University in 1998.

Team WIT

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Kasia M. Benson: South Texas School of Law
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Sara Jennifer Broach: Vanderbilt University Law School
Start date: September 4, 2007; Section: Litigation

Nory Callaway: Texas Tech School of Law
Start date: September 4, 2007; Section: Business Transactions

Ashley J. Martens: The University of Oklahoma College of Law
Start date: September 4, 2007; Section: Business Transactions

Jennifer L. Trousdale: SMU Dedman School of Law
Start date: September 4, 2007; Section: Litigation

Houston
Eric Foster: The University of Texas School of Law
Start date: October 1, 2007; Section: Corporate/Securities

Courtney Glaser: Vanderbilt University Law School
Start date: September 24, 2007; Section: Litigation

Laura Liddell: Vanderbilt University Law School
Start date: September 24, 2007; Section: Litigation

New York
Taryn Singer: New York Law School
Start date: September 24, 2007; Section: Litigation
We love Dr. Lois Frankel’s newest book, *See Jane Lead*, and couldn’t wait to share the following leadership insights.

“For centuries women have made superb leaders—but they haven’t always been given credit for their accomplishments nor have they been so bold as to call themselves leaders,” says Frankel. “Yet through nature and nurture they have honed the quintessential skills needed to make a difference in the workplace and community.” Whether you lead a work team, a volunteer organization, or even just a project, here are seven tips to help you step confidently and courageously into your leadership zone.

1. Articulate your leadership vision. Write down what you want people to say about you when you leave a room. Fill in the blank: “She’s a leader who ___________.“ Be as specific as possible. Include what you want to do, how you want to do it and what people will get out of doing it with you. Then act in ways to make it a reality.

2. Be strategic. If it’s a problem you’re solving or a change in direction you want to undertake, develop your overarching strategy for addressing the challenge before diving in. Avoid the tendency to approach everything with a high sense of urgency or to jump to action before thinking through a situation. Strategy takes time.

3. Resist perfectionism. We’ve all heard the saying, “A woman has to work twice as hard to be considered half as good.” Don’t let it guide your actions. Thinking that you have to be perfect causes your strategic thinking and willingness to take risks to be constricted. The balance of strategic thinking and tactical implementation is by nature imperfect—and always a risk.

4. Get to the point. Women have the tendency to use far more words than needed when influencing. The fewer the words the stronger the message. Keep in mind the maxim “Short sounds confident.” Begin your communications with the one statement you would want others to remember if you had only enough time to say that. Rather than continue speaking, ask “Do you have any questions?” or “Have I made myself clear?”

5. Volunteer to make formal and informal presentations. If you want to become really good at influencing others, seize every opportunity to go outside your comfort zone and speak before large and small groups. Also consider joining Toastmasters International.

6. Solicit 360-degree feedback. There really is no better way to have the mirror held up to you than to ask others to share their thoughts. Ask three simple questions will yield a wealth of information—usually about behaviors related to emotional intelligence: What do I do well that I should continue doing? What can I do more of to be even more effective? What can I do less of to be even more effective? With any kind of feedback or survey, be prepared to take action.

7. Balance your natural leadership skills with new behaviors. Women are good at influencing with the least muscle necessary, building collaborative teams, and bringing out the best in people through coaching. Combine those with more direct and assertive communication, deliberate decision making, and an increased understanding of the political landscape of your company culture and you’ll be the leader you were destined to become.
Drafting Agreements with a Litigator’s Eye: A Practical Guide, Part II

By Andrews Kurth Lawyers Lynne M. Fischman Uniman, Lynn E. Judell and Joseph A. Patella

Our inaugural issue of Straightline highlighted some common drafting mistakes in Part I of this article. This issue, we expose some of the more salient and frequently overlooked provisions of agreements as Part II.

Choice of Law
Choice of law provisions can be useful in providing certainty. They are generally enforced by courts and arbitrators, as long as the selection of the law is rationally related to the transaction.

A choice of law provision can have crucial implications. For example, choice of California law would be unwise for an employer in an employment agreement that contains non-compete provisions, since such provisions are effectively unenforceable in California.

Integration and "No Representation" Clauses
Many courts will enforce properly worded integration clauses and hold that the introduction of parol evidence to vary or alter the terms of the writing. This may not be true for arbitrators. The most frequently litigated exceptions to this rule occur when the agreement is ambiguous or when a party alleges that it was fraudulently induced to enter into the agreement.

It is also advisable to insert a “No Representation” clause making clear that neither party relied on any representations outside the agreement. This clause will typically preclude a dissatisfied party from arguing that he was fraudulently induced into entering into the written agreement.

It is important to use an integration clause only after you have confirmed that all relevant terms from previous agreements are included in the current agreement. In addition, any side agreements should be incorporated by reference into the agreement that contains the integration clause.

Choice of Dispute Resolution: Arbitration
While current conventional wisdom favors arbitration as a cheap and quick alternative, arbitration is no panacea. Judges are willing to grant discretionary motions, but arbitrators almost never grant these types of motions because they do not emphasize achieving an equitable result rather than the result that would be required by the strict application of the law.

Discovery is limited in arbitration. There is also no meaningful appeal from an arbitrator’s decision. Historically it has been thought—and many still maintain today—that arbitration is less expensive and faster than litigation. This may hold true for short, simple cases. For cases of greater complexity, however, arbitration can be as expensive as traditional litigation and more time-consuming.

Arbitration clauses permit the parties to fashion many aspects of the arbitration process including the number of arbitrators, the requisite background and experience of the arbitrator(s) and discovery methods, and more substantive provisions such as no interest, no punitive damages and attorneys’ fees.

Mediation
Mediation is generally not binding. It serves the useful purpose of focusing the parties on the issues in dispute and on reaching a resolution of those issues. It is also helpful to get a third party’s view on the strengths and weaknesses of the case. However, inserting a provision requiring mediation before proceeding with litigation is rarely a good idea. Mediation can be expensive, especially when using a private dispute resolution organization. However, some courts will offer mediation services free of charge or even require it.

Mediators view success as the consummation of a settlement—any settlement. As a result, mediation may favor the more intransigent party.

State or Federal Court
The court system remains an effective forum for dispute resolution. The rules of the courts are clear and well-developed, full discovery is permitted, application of the law is the norm, busy judges are used to dealing with meritorious cases and adverse rulings may be appealed.

Overall, non-jury trials are faster than jury trials and less expensive and substantially reduce the likelihood of run-away damage awards.

When drafting agreements, consider clarity, fairness, implications, goals and precedents.

Consent to Personal Jurisdiction and Venue
Parties to a contract may agree in advance to submit themselves and/or the controversy to the jurisdiction of a given court. The parties cannot consent to confer subject matter jurisdiction on a federal court—the court either does or does not have subject matter jurisdiction based on diversity of citizenship or federal question.

There are two general types of venue or forum selection provisions. A mandatory forum selection clause grants exclusive jurisdiction to a selected forum; a permissive forum selection clause only reflects the parties’ consent to resolve disputes in a certain forum, but does not require that disputes be resolved in that forum. The rules in federal and state court are somewhat different. New York state courts, for example, will enforce a forum selection clause that reasonably conveys the parties’ intention to select an exclusive forum. In contrast, the Second Circuit requires that the contract contain “exclusive language” that makes clear that the forum selected is mandatory rather than permissive. There are no magic words—but specific language of exclusion must be used. If a forum selection clause is permissive, it is still subject to challenge on forum non conveniens, venue and transfer grounds.

Liquidated Damages
By agreeing to a liquidated damages provision, parties agree to forgo their actual damages in favor of a fixed approximation ex ante of those damages. These provisions are generally enforceable if the damages are difficult to calculate and the approximation is reasonable. The provision will not be enforced if it is viewed as a penalty to the breaching party.

It is important to consider that a liquidated provision may simplify the litigation process, as the amount of damages may no longer be an issue.

Attorneys’ Fees Provisions
Courts usually enforce unconscionable contractual provisions that provide for the recovery of reasonable attorneys’ fees. It is important to use the phrase “attorneys’ fees” explicitly (as opposed to simply “costs” or “fees.”)