Boilerplate Clauses

by Practical Law Corporate & Securities and Practical Law Commercial Transactions
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A selection of boilerplate clauses for corporate and commercial agreements. These Standard Clauses have integrated notes with important explanations and drafting and negotiating tips.

Drafting Note: Read This Before Using Document

Boilerplate clauses are contractual provisions that are included in most corporate and commercial agreements, often towards the end of an agreement. These clauses are for the most part non-controversial and do not relate to the substantive parts of the agreement, but are necessary for the effective enforcement of each party's rights under them. For example, they include matters such as the choice of governing law, mechanics for providing notices, and requirements that any amendments be in a writing signed by both parties.

Many of these clauses tend to be standardized so parties usually do not spend much time negotiating them. However, boilerplate clauses can have significant practical implications for the parties. For example, they may include provisions that restrict rights of **assignment** or define events of **force majeure** that can excuse performance of the agreement. It is important to understand how these clauses affect the operative terms of the agreement and construct them so there will not be any conflicts or unintended consequences.

This document contains precedent boilerplate clauses, together with explanations of their purpose and some drafting and negotiating tips. Parties should tailor these clauses for the relevant agreement. These clauses are included in no particular order and parties can add them to the agreement as appropriate.

Not all of the boilerplate clauses included in this document may be relevant or appropriate for every particular agreement.

Assumptions Used in These Standard Clauses

These Standard Clauses assume that:

- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any transaction takes place in a foreign jurisdiction, these terms may need to be modified to comply with applicable laws in the relevant foreign jurisdictions.
- **These terms are being used in a business-to-business transaction.** These Standard Clauses should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **These terms are not industry-specific.** These Standard Clauses do not account for any industry-specific laws, rules, or regulations that may apply in certain transactions. Some of these Standard Clauses may not be enforceable, either because of applicable state law, industry-specific regulations, or other rules and regulations applicable to the parties.

Parties should check all applicable laws and regulations to ensure all of these Standard clauses included in the agreement are enforceable as drafted.

- **Capitalized terms are defined elsewhere in the agreement.** Certain terms are capitalized but not defined in these Standard Clauses because they are defined elsewhere in the agreement (for example, Agreement, Business Day, Closing, and Transaction Documents).

Bracketed Items

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices to be selected, added, or deleted at the drafting party's discretion.
END DRAFTING NOTE

1. Expenses.

All costs and expenses incurred in connection with this Agreement [and each other agreement, document, and instrument contemplated by this Agreement/and each Transaction Document] and the transactions contemplated hereby [and thereby] shall be paid by the party incurring such costs and expenses[, whether or not the Closing shall have occurred].

Drafting Note: Expenses

In the absence of a specific agreement to the contrary, the costs and expenses of negotiating, drafting, and performing an agreement must be paid by the party that incurred the costs. However, parties may want to include a clause addressing costs and expenses to prevent the possibility of one party arguing that the other had agreed to pay some or all of its costs. If there are specific costs and expenses the parties want to ensure are covered by this clause (such as fees and disbursements of counsel, financial advisors, and accountants), these should be specified as being included in the costs and expenses.

When drafting and negotiating the expenses clause, consider whether there are any costs and expenses of one party that should be shared with or wholly paid by the other. For example, in an M&A transaction, although the buyer is responsible for paying the filing fees for the pre-merger notification required by the **Hart-Scott-Rodino Antitrust Improvements Act of 1976**, the seller may agree to share the costs.

For more explanations and drafting and negotiating tips regarding expenses clauses, see Standard Clauses, General Contract Clauses: Transaction Costs.
END DRAFTING NOTE

2. Attorneys' Fees.

In the event that any party institutes any legal suit, action, or proceeding[, including arbitration,] against the other party [to enforce the covenants contained in this Agreement (or obtain any other remedy in respect of any breach of this Agreement)/arising out of [or relating to] this Agreement], the prevailing party in the suit, action or proceeding shall be entitled to receive, in addition to all other damages to which it may be entitled, the costs incurred by such party in conducting the suit, action, or proceeding, including [reasonable/actual] attorneys' fees and expenses and court costs.

Drafting Note: Attorneys' Fees

This attorneys' fees provision specifies that the prevailing party in a lawsuit gets reimbursed for its costs and expenses, including attorneys' fees and court costs. Most countries operate under a "loser pays" system (that is, the losing party in a lawsuit pays the prevailing party's expenses (including attorneys' fees) and court costs). However, while the US federal courts and courts in most states routinely award the prevailing party reimbursement of its costs:

- What constitutes costs varies by state and generally does not include attorneys' fees, except under limited circumstances.
- Attorneys' fees are not recoverable unless:
    - an applicable statute provides for this type of award; or
    - the parties contractually agree otherwise.

Therefore, the parties should state the prevailing party's entitlement to an award of attorneys' fees and specify all reimbursable costs in the contract.

The party who is more likely to bring a suit (for example, the buyer in an acquisition agreement) may want to include a provision entitling the prevailing party to reimbursement of its attorneys' fees. Conversely, the party who is more likely to be defending a lawsuit (for example, the seller in an acquisition agreement) may prefer to exclude this right because that may deter the other party from bringing small claims.

If included, parties should also consider whether the:

- Clause should cover only those claims brought to enforce the terms of the agreement or should also cover any claim that may be related to the agreement (for example, a tort claim).
- Prevailing party should be entitled to its "actual" fees and costs or only "reasonable" fees and costs (in some jurisdictions, the amounts of these awards may be limited by statute or otherwise may be within the judge's discretion).

Provisions related to attorneys' fees are sometimes included in remedies provisions, like indemnification provisions (see Standard Clause, General Contract Clauses: Indemnification and Practice Note, Risk Allocation in Commercial Contracts: Contractual Remedies as Risk Allocation Tools).

For more explanations and drafting and negotiating tips regarding attorneys' fees clauses, see Standard Clauses, General Contract Clauses: Litigation Costs and Expenses.
END DRAFTING NOTE

3. Further Assurances.

Each of the parties hereto shall[, and shall cause their respective Affiliates to,] execute and deliver such additional documents, instruments, conveyances, and assurances and take such further actions as may be [reasonably] required to carry out the provisions hereof [and each of the other Transaction Documents] and give effect to the transactions contemplated hereby [and thereby].

Drafting Note: Further Assurances

A further assurances clause:

- Seeks to cover any omissions in the agreement that may not be noticed or are unanticipated when it is signed and that, if unremedied, would change the way the agreement was intended to work. If, for example, an agreement purporting to transfer a seller's entire business to a buyer does not pass title to a particular asset, the further assurances clause can be invoked after closing to perfect title.
- Deals with a situation where there is a delay between the signing of the principal transaction document and the closing. In the case of a sale of a business, the assignment or **novation** of contracts with customers are often dealt with after the signing of the principal agreement. A further assurances clause ensures the seller's cooperation in assigning or novating these contracts. While a general obligation to carry out these acts may be implied by the common law, it is preferable to rely on an express provision.

When the parties can identify certain documents, acts, or situations in which they will need cooperation from the other party, it is preferable to have a separate section or agreement that states each party's rights and obligations in detail.

When negotiating and drafting the further assurances clause, consider:

- Whether the clause should be reciprocal.
- Whether the further assurance obligation should be absolute or subject to reasonable efforts.
- Whether the further assurance obligation should be at the other party's request (or reasonable request), or should be limited to matters that are necessary (or reasonably necessary) to give the other party the full benefit of the agreement.
- Whether the obligation should require documents to be delivered, or actions to be taken, promptly or within a specified time limit.
- Who should bear the expense of performing the further assurance obligation.
- Whether a (revocable or irrevocable) power of attorney authorizing one party to execute any documents, or take any actions that the other party fails or refuses to take, is to be incorporated. If this clause is included, the parties should ensure the formalities required by applicable law for the execution of a valid power of attorney are complied with when executing the agreement itself.

For more explanations and drafting and negotiating tips regarding further assurances clauses, see Standard Clauses, General Contract Clauses: Further Assurances.
END DRAFTING NOTE

4. Public Announcements.

Unless otherwise required by applicable law [or stock exchange requirements] (based upon the reasonable advice of counsel), no party to this Agreement shall make any public announcements in respect of this Agreement or the transactions contemplated hereby or otherwise communicate with any news media without the prior written consent of the other party [(which consent shall not be unreasonably withheld, conditioned, or delayed)], and the parties shall cooperate as to the timing and contents of any such announcement.

Drafting Note: Public Announcements

Parties to a transaction will often be concerned about controlling the dissemination of information about the transaction. This is particularly the case for public companies that are subject to additional disclosure requirements when they enter into an acquisition, divestiture or other significant transaction (see Practice Notes, Periodic Reporting and Disclosure Obligations: Overview, Complying with Regulation FD (Fair Disclosure) and Disclosing Nonpublic Information). The public announcements clause (also known as a publicity clause) ensures that a transaction is publicized in an appropriate form, and in an agreed manner, by preventing each party from issuing press releases or other public announcements about it without the other's prior consent.

In corporate transactions where there may be a delay between signing and closing, publicity clauses are usually included in the principal transaction document and so take effect on signing. Confidentiality agreements are generally entered into at the outset of the transaction to prevent leaks of information in the run-up to signing.

The publicity clause should be considered alongside any confidentiality obligation in the principal transaction document or separate confidentiality agreement to avoid possible conflicts (for examples of a confidentiality agreement and confidentiality provision, see Confidentiality and Nondisclosure Agreements Toolkit, Standard Documents, Confidentiality Agreement: Mergers and Acquisitions and Stock Purchase Agreement (Pro-Buyer Long Form): Section 5.06).

It is typical to provide exceptions to the publicity clause, including disclosures made to comply with the requirements of:

- A court, a governmental or administrative authority, or the law. This is unnecessary to the extent that other legal obligations would prevail over private contractual terms. Any private contractual agreement would be invalid to the extent that it required a breach of the law in order to be performed, but this exception is often included to avoid argument on a non-point or to calm any fears or doubts in the parties' minds.
- Any securities exchange on which a party's shares are listed.

If the parties have agreed in advance on the form of announcement for the transaction, parties may want to set out the agreed wording in a schedule to the principal transaction document.

For more explanations and drafting and negotiating tips regarding public announcements clauses, see Standard Clauses, General Contract Clauses: Public Announcements.
END DRAFTING NOTE

5. Notices (Long-Form).

All notices, requests, consents, claims, demands, waivers, and other communications hereunder (each, a "**Notice**")

shall be in writing and shall be deemed to have been given (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile [or email] (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next Business Day if sent after normal business hours of the recipient; or (d) on the [third/[NUMBER]] day after the date mailed, by certified or registered mail (in each case, return receipt requested, postage pre-paid). Notices must be sent to the respective parties at the following addresses (or at such other address for a party as shall be specified in a Notice given in accordance with this Section [NUMBER]):

If to Party 1:	[PARTY 1 ADDRESS] Facsimile:[FAX NUMBER] [Email: [EMAIL ADDRESS]] Attention:[TITLE OF OFFICER TO RECEIVE NOTICES]
with a copy to:	[PARTY 1 LAW FIRM] Facsimile:[FAX NUMBER] [Email: [EMAIL ADDRESS]] Attention:[ATTORNEY NAME]
If to Party 2:	[PARTY 2 ADDRESS] Facsimile:[FAX NUMBER] [Email: [EMAIL ADDRESS]] Attention:[TITLE OF OFFICER TO RECEIVE NOTICES]
with a copy to:	[PARTY 2 LAW FIRM] Facsimile:[FAX NUMBER] [Email: [EMAIL ADDRESS]] Attention:[ATTORNEY NAME]

Drafting Note: Notices (Long-Form)

The notice clause provides a mechanism intended to:
- Ensure that notices given under the agreement are delivered to the appropriate person or party.
- Determine how notices are to be delivered.
- Determine when notices are deemed to have been given and/or received.

Some companies may have policies against receiving notices by email because it is not always possible to track with certainty when an email has been received and there may be a greater risk of an email being intercepted by a third party, arriving late or not at all, or being inadvertently deleted or overlooked by the intended recipient. In this case, delete the bracketed language regarding email delivery and email addresses.

For more explanations and drafting and negotiating tips regarding notices clauses, see Standard Clauses, General Contract Clauses: Notice.
END DRAFTING NOTE

6. Notices (Short-Form).

All notices, requests, consents, claims, demands, waivers, and other communications hereunder (each, a "**Notice**") shall be in writing and addressed to the parties at the addresses set forth on the first page of this Agreement (or to such other address that may be designated by the receiving party from time to time in accordance with this Section). All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid), facsimile [or email] (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage pre-paid). Except as otherwise provided in this Agreement, a Notice is effective only (a) upon receipt by the receiving party, and (b) if the party giving the Notice has complied with the requirements of this Section.

Drafting Note: Notices (Short-Form)

For some agreements, parties may prefer to use a short form notices clause. This short form clause provides that notice is effective only on actual receipt. For discussion about the notices clause, see Section 5.

For more explanations and drafting and negotiating tips regarding notices clauses, see Standard Clauses, General Contract Clauses: Notice.
END DRAFTING NOTE

7. Interpretation.

For purposes of this Agreement, (a) the words "include," "includes," and "including" are deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto," and "hereunder" refer to this Agreement as a whole. Unless the context otherwise requires, references herein: (x) to sections, schedules, and exhibits mean the sections of, and schedules and exhibits attached to, this Agreement; (y) to an agreement, instrument, or other document means such agreement, instrument, or other document as amended, supplemented, and modified from time to time to the extent permitted by the provisions thereof; and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The schedules and exhibits referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

Drafting Note: Interpretation

The interpretation clause deals with the general interpretation of an agreement and certain terms and expressions used in it. Its main purpose is to reduce repetition within the body of the document, making it shorter and easier to read. Subclause (x) should be tailored to fit the structure of the agreement. For example, if the agreement contains articles, disclosure schedules, annexes, or riders, these should be included.

The interpretation rules contained in the above example are not exhaustive. There may be other rules of interpretation that may be suitable for the individual agreement. For example:

> "Whenever the singular is used herein, the same shall include the plural, and whenever the plural is used herein, the same shall include the singular, where appropriate."
>
> "Whenever the masculine is used herein, the same shall include the feminine, and whenever the feminine is used herein, the same shall include the masculine, where appropriate."
>
> "The term "ordinary course of business" or any similar phrase shall be deemed to be followed by the words "consistent with past practice."

The third sentence of this clause is important for the drafting party because courts often interpret ambiguous terms in an agreement in favor of the non-drafting party (referred to as the rule of *contra proferentem*). Even if an interpretation clause is not included in the agreement, the drafting party may want to include this sentence as a separate provision. If one party has more sophistication or bargaining power, it may also want to include language that both parties have been represented by legal counsel. For example:

> "This Agreement is the result of negotiations between, and has been reviewed by, the parties and their respective legal counsel."

END DRAFTING NOTE

8. Headings.

The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

Drafting Note: Headings

Headings may be provided for sections, articles, clauses, exhibits, and schedules to make them easier to identify and locate. The headings clause makes it clear that the wording of these headings is not intended to limit the scope of the sections, articles, clauses, exhibits, or schedules that they identify, or to have any other effect on their interpretation (and prevents a party from arguing otherwise). However, if this clause is omitted from the agreement, the courts will likely still treat headings in the same way (that is, they are for convenience only and do not affect the interpretation of the agreement).

For more explanations and drafting and negotiating tips regarding headings clauses, see Standard Clauses, General Contract Clauses: Headings.
END DRAFTING NOTE

9. Severability.

If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. [Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.]

Drafting Note: Severability

The purpose of the severability clause is to make it clear that, if one or more terms or provisions are held to be invalid, illegal, or unenforceable, the parties intend the agreement as a whole to survive by severing the invalid, illegal, or unenforceable terms or provisions from the agreement. Parties may want to consider adding a provision that allows the courts to amend the invalid, illegal, or unenforceable provision as an alternative to the parties negotiating in good faith to modify the agreement. However, this type of provision is not enforceable in some jurisdictions and parties should consider the possibility that the court's decision may not be more favorable than what the parties can negotiate between themselves.

For a shorter severability clause, consider deleting the last sentence of the clause.

For more explanations and drafting and negotiating tips regarding severability clauses, see Standard Clauses, General Contract Clauses: Severability.
END DRAFTING NOTE

10. Entire Agreement.

This Agreement[, together with [the [NAME OF OTHER DOCUMENTS]/any other documents incorporated herein by reference] and all related exhibits and schedules,] constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein [and therein], and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter. [In the event of any inconsistency between the statements in the body of this Agreement, [NAME OF OTHER DOCUMENTS] and the related exhibits and schedules (other than an exception expressly set forth as such in the schedules), the statements in the body of this Agreement shall control.]

Drafting Note: Entire Agreement

The entire agreement clause (also known as the merger or integration clause) is used to prevent the parties from being liable for any understandings, agreements, or **representations and warranties** other than those expressly set out in the agreement. The parties generally want to ensure that all of their obligations are recorded in one written agreement. The party making representations and warranties wants to ensure that it cannot subsequently be found liable for representations and warranties that are not included in the written agreement.

Some parties may prefer to exclude representations and warranties from the merger clause. For example, in a stock acquisition, a buyer generally prefers to exclude representations and warranties from the merger clause to preserve its right to bring a claim based on **Rule 10b-5** of the **Securities Exchange Act of 1934, as amended**, for alleged misrepresentations outside the stock purchase agreement. For a discussion of 10b-5 claims, see Standard Document, Stock Purchase Agreement (Pro-Buyer Long Form): Drafting Note, Full Disclosure.

If ancillary documents or side letters are prepared in connection with the contemplated transaction and the parties do not want the agreement to supersede those documents, the parties should include the bracketed language so those documents are included as part of what makes up the parties' entire agreement. In corporate transactions, there is usually a defined term, such as "Transaction Documents", that includes the agreement and any ancillary documents prepared in connection with the contemplated transaction.

The second sentence should be included to ensure the agreement controls if there are any inconsistencies between the agreement and any other document. A party that wants one of the other documents to control or wants to specify an order of precedence among all of them should amend the second sentence accordingly. Including this sentence is useful when there are multiple agreements relating to the same or overlapping subject matter. However, it is no substitute for reviewing the documents in question and ensuring no conflicts exist.

If an agreement is to supersede an older agreement between the parties, consider referring to it by name for certainty. Consider also providing for the release and discharge of the older agreement, either by way of a clause in the agreement

or by a separate release.

If an entire agreement clause is included, parties should ensure that every understanding, agreement, representation, or warranty is spelled out in the agreement (or in any ancillary documents or side letters included in the clause). Otherwise, a party could be barred from bringing a claim based on understandings, agreements, representations, or warranties not expressly included.

For more explanations and drafting and negotiating tips regarding entire agreement clauses, see Standard Clauses, General Contract Clauses: Entire Agreement.
END DRAFTING NOTE

11. Amendment and Modification.

This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by each party hereto.

Drafting Note: Amendment and Modification

Typically most agreements contain a clause requiring all amendments, modifications, and supplements to be in writing and be signed by all parties to the agreement. The amendment and modification clause serves to preclude a party from arguing that there is an oral agreement to modify any of the agreement's terms or conditions.

This clause is sometimes combined with the waiver clause (see Section 12).

For more explanations and drafting and negotiating tips regarding amendment clauses, see Standard Clauses, General Contract Clauses: Amendments.
END DRAFTING NOTE

12. Waiver.

No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. No waiver by any party shall operate or be construed as a waiver in respect of any failure, breach, or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

Drafting Note: Waiver

Most agreements include a waiver clause providing that:

- All waivers must be in a writing signed by the waiving party.
- Waiver of one provision does not operate as a waiver of any other provision.
- Failure to exercise or delay in exercising any right or remedy does not constitute a waiver.
- Single or partial exercise of any right or remedy does not preclude further exercise of the right or remedy or exercise of another right or remedy.

The waiver clause prevents a non-compliant party from arguing that the other party waived its rights under an agreement because it excused the non-compliance on an earlier occasion or otherwise failed to or delayed the exercise of its rights.

The waiver clause can be combined with the amendment and modification clause (see Section 11) or the cumulative remedies clause (see Section 13).

For more explanations and drafting and negotiating tips regarding waiver clauses, see Standard Clauses, General Contract Clauses: Waivers.
END DRAFTING NOTE

13. Cumulative Remedies.

The rights and remedies under this Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise[, except to the extent expressly provided in Section [NUMBER] to the contrary].

Drafting Note: Cumulative Remedies

The purpose of a cumulative remedies clause is to state the parties' intention that the rights and remedies set out in the agreement are in addition to any rights provided by law or equity, and not in substitution for them. The extent to which express terms preclude implied terms without a cumulative remedies clause is not entirely clear and may vary among jurisdictions. Without the clause, there may be a presumption (which may be supported by an entire agreement clause (see Section 10)) that the parties have expressed all the terms intended to govern their relationship in the agreement itself and that, in doing so, they intended to displace any rights and remedies provided by law that are not specified in the agreement. The more comprehensive an agreement, the more likely it is that the courts will reach this conclusion. Accordingly, where the parties wish to preserve the rights and remedies available to them under law and equity, it is advisable to include this clause.

If there is a particular legal or equitable remedy that a party wants or needs, the party should set that out specifically in the agreement rather than relying on the cumulative remedies clause. For example, if a party wants to ensure that it can compel **specific performance**, the party should include a provision specifically providing for this remedy (see Section

14 and Section 15).

This clause must be considered alongside any provisions in the agreement dealing with remedies or with the exclusion or limitation of liability to avoid possible conflicts. In particular, if the agreement does include provisions that are intended to be the exclusive remedy for a particular breach, these provisions should be specifically excluded from this clause. Alternatively, if the parties do intend to generally exclude rights and remedies outside those set forth in the agreement, the parties should replace this clause with an exclusive remedy clause (for an example of an exclusive remedy clause in a purchase agreement, see Stock Purchase Agreement (Pro-Buyer Long Form): Section 8.09).

The cumulative remedies clause is sometimes combined with the waiver clause (see Section 12).

For more explanations and drafting and negotiating tips regarding cumulative remedies clauses, see Standard Clauses, General Contract Clauses: Cumulative Remedies (with Exclusive Remedies Carve-Out).
END DRAFTING NOTE

14. Equitable Remedies (Long-Form).

Each party hereto acknowledges that a breach or threatened breach by such party of any of its obligations under [this Agreement/Section [NUMBER]] would give rise to irreparable harm to the other [party/parties] for which monetary damages would not be an adequate remedy and hereby agrees that in the event of a breach or a threatened breach by such party of any such obligations, [the other party/each of the other parties] hereto shall, in addition to any and all other rights and remedies that may be available to [it/them] in respect of such breach, be entitled to equitable relief, including a temporary restraining order, an injunction, specific performance, and any other relief that may be available from a court of competent jurisdiction (without any requirement to post bond).

Drafting Note: Equitable Remedies (Long-Form)

The equitable remedies clause may also be referred to as a specific performance or equitable relief clause.

In certain agreements, it may be important to one party that another party actually performs its obligations under the agreement (or certain sections of the agreement) or is enjoined from taking certain actions, rather than simply being liable for damages on default. For example, one party to the agreement may prefer to prevent or mitigate a disclosure of confidential information by the other party in breach of that party's confidentiality obligations by means of an injunction, rather than relying on damages for breach of the agreement. The equitable remedies clause aims to persuade a court to exercise its discretion in the non-defaulting party's favor by granting an injunction or ordering specific performance.

The parties should ensure that this clause does not conflict with any other section of the agreement (for example, certain provisions may set out an exclusive remedy for a certain type of breach (see Stock Purchase Agreement (Pro-Buyer Long Form): Section 8.09)).

For a short form equitable remedies clause, see Section 15.

For more explanations and drafting and negotiating tips regarding equitable remedies clauses, see Standard Clauses, General Contract Clauses: Equitable Remedies.
END DRAFTING NOTE

15. Equitable Remedies (Short-Form).

The parties agree that irreparable damage would occur if any provision of this Agreement were not performed in accordance with the terms hereof and that the parties shall be entitled to equitable relief, including injunctive relief or specific performance of the terms hereof, in addition to any other remedy to which they are entitled at law or in equity.

Drafting Note: Equitable Remedies (Short-Form)

For some agreements, the parties may prefer to use a short form equitable remedies clause. For discussion about the equitable remedies clause, see Section 14.

For more explanations and drafting and negotiating tips regarding equitable remedies clauses, see Standard Clauses, General Contract Clauses: Equitable Remedies.
END DRAFTING NOTE

16. Assignment.

Neither party may assign any of its rights [or delegate any of its obligations] hereunder without the prior written consent of the other party[, which consent shall not be unreasonably withheld, conditioned, or delayed]. [Any purported assignment [or delegation] in violation of this Section shall be null and void.] No assignment [or delegation] shall relieve the assigning [or delegating] party of any of its obligations hereunder.

Drafting Note: Assignment

Assignment clauses are included in agreements to restrict the parties' ability to assign their rights under the agreement, often by requiring the non-assigning party's prior written consent. Include the bracketed language at the end of the first sentence if a party wants to ensure the other party cannot withhold, condition, or delay its consent unreasonably. Assignment clauses also often deal with the parties' ability to delegate their obligations.

Include the second sentence if the parties want to render any assignment in violation of the section ineffective. Without this sentence, the non-assigning party may only have a breach of contract claim.

If one or both of the parties want to specify exceptions to the prohibition on assignments, they can agree on it beforehand and include a proviso at the end of the first sentence setting out those exceptions. For example, the parties may want to permit assignments to:

- **Affiliates** or **subsidiaries** of one or both of the parties.
- A successor (by **merger** or operation of law) or purchaser of all or substantially all of the business of one or both of the parties.
- Lenders of a party as **collateral** security.

Additionally, an assignment clause will not be effective to prevent the change of control of a party or, in some jurisdictions and for some types of contracts, an assignment or transfer by merger or operation of law unless the contract specifically prohibits these actions. The parties therefore may want to add an express prohibition. For example:

> "Neither party may assign, transfer, or delegate any of or all of its rights or obligations under this Agreement, voluntarily or involuntarily, including by [Change of Control], merger (whether or not such party is the surviving corporation), operation of law, or any other manner, without the prior written consent of the other party."

The term "change of control" can be defined in several ways. For example, it can be defined as a sale of more than 50% of a party's stock, a sale of substantially all the assets of a party or a change in a majority of a party's board members.

The assignment clause is often combined with the successors and assigns clause (see Section 17).

For more explanations and drafting and negotiating tips regarding assignment clauses, see Standard Clauses, General Contract Clauses: Assignment and Delegation.
END DRAFTING NOTE

17. Successors and Assigns.

This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective [permitted] successors and [permitted] assigns.

Drafting Note: Successors and Assigns

The successors and assigns clause is often combined with the assignment clause, especially if there are contractual restrictions on the assignment of the agreement (see Section 16).

If there are restrictions on assignment of the agreement, include the bracketed term "permitted" before the term "assigns". If changes of control or assignments or transfers by operation of law are included in the restrictions on assignment, include the bracketed term "permitted" before the term "successors".

For more explanations and drafting and negotiating tips regarding successors and assigns clauses, see Standard Clauses, General Contract Clauses: Successors and Assigns.

END DRAFTING NOTE

18. No Third-Party Beneficiaries.

This Agreement is for the sole benefit of the parties hereto and their respective [successors] and [permitted] assigns and nothing herein, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

Drafting Note: No Third-Party Beneficiaries

In general, the parties must expressly provide that an agreement is made for the benefit of a non-signatory third party to allow a third party to have rights under an agreement. However, many agreements contain clauses that specifically state the agreement does not provide third-party rights to preclude any third-party claims to enforce the terms of the agreement.

If the parties want certain third parties to benefit from the agreement, the parties should specify these exceptions in the agreement. For example, in most private M&A transactions, as well as many other commercial transactions, the parties generally include an exception for the buyer's and seller's affiliates and representatives who are included as **indemnified** parties, so that these affiliates and representatives can bring a claim to enforce the indemnification provisions in the agreement.

For more explanations and drafting and negotiating tips regarding no third-party beneficiaries clauses, see Standard Clauses, General Contract Clauses: Third-Party Beneficiaries.
END DRAFTING NOTE

19. Governing Law.

[This Agreement/All matters arising out of or relating to this Agreement] shall be governed by and construed in accordance with the internal laws of the State of [RELEVANT STATE] without giving effect to any choice or conflict of law provision or rule (whether of the State of [RELEVANT STATE] or any other jurisdiction).

Drafting Note: Governing Law

The governing law clause permits the parties to select the state law that governs the agreement. If the parties want to expand the provision to also apply to other claims (such as tort claims) arising out of or related to the agreement, include

the alternative language suggested. The second part of the sentence regarding not giving effect to conflict of law rules ensures that the chosen state's conflict of law rules do not cause the application of another state's laws.

In general, parties should choose the law of a state that has a relationship to the parties or the transaction (or there should be some other reasonable basis for the choice), otherwise the governing law provision may be unenforceable. For example, they could pick a state in which the parties are located or where the agreement will be performed. For the most part, courts will enforce the parties' choice of law. However, in certain instances, a court may apply another state's laws if:

- Applying the chosen state's laws would be contrary to a fundamental policy of another state that has a greater interest in a particular issue
- The other state's law would have been applied in the absence of a governing law provision.

For corporate transactions, many parties choose New York as the governing law because it has well-established contract law. *Section 5-1401 of the New York General Obligations Law* permits parties to choose New York as the governing law if the contract amount exceeds $250,000, regardless of whether the parties or the transaction have a relationship with the state. If the parties choose New York law as governing law, they do not need to include the second part of the sentence regarding not giving effect to conflict of law rules. In *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, the Court of Appeals held that language excluding New York's conflict of law rules is not necessary when there is an express choice of New York law in the contract pursuant to Section 5-1401 (*No. 08669, 2012 WL 6571286 (N.Y. Dec. 18, 2012)*).

When deciding on the governing law, parties may also want to consider other factors, such as:

- Which state law their attorney is most familiar with.
- Which state has more favorable substantive laws applicable to the matters covered by the agreement.
- How developed the law is in the state being considered.

An agreement does not have to specify the laws of only one state. It can designate certain matters be governed by one state's laws, while other matters are governed by another state's laws. This can be an issue in agreements that contain certain matters that must be governed by a particular state's law, while the parties want the agreement in general to be governed by another state's laws. For example, in a stockholders agreement, the parties may want New York law to govern, but certain matters may be subject to the corporate laws of the state in which the company is incorporated. In this case, the governing law clause can be amended as follows:

> The laws of the State of [RELEVANT STATE] shall govern all issues concerning [DESCRIPTION OF RELEVANT SUBJECT MATTER]. All other provisions of this Agreement shall be governed by and construed in accordance with the internal laws of the State of [RELEVANT STATE] without giving effect to any choice or conflict of law provision or rule (whether of the State of [RELEVANT STATE] or any other jurisdiction) that would cause the application of Laws of any jurisdiction other than those of the State of [RELEVANT STATE].

The governing law clause is often combined with the submission to jurisdiction clause (see Section 20) and the waiver of jury trial clause (see Section 21).

For more explanations and drafting and negotiating tips regarding governing law clauses, see Standard Clauses, General Contract Clauses: Choice of Law.

Arbitration and Alternative Dispute Resolution

The parties may also want to consider whether arbitration, mediation, or other form of alternative dispute resolution would be more appropriate to resolve contractual disputes, particularly if the subject matter of the agreement is technical or the agreement has an international element. For more information on drafting arbitration and other alternative dispute resolution agreements, including sample clauses, see US Arbitration Toolkit.
END DRAFTING NOTE

20. Submission to Jurisdiction.

Any legal suit, action, or proceeding arising out of or [based upon/relating to] this Agreement[, the other Transaction Documents] or the transactions contemplated hereby or [thereby] [shall/may] be instituted in the federal courts of the United States of America or the courts of the State of [RELEVANT STATE] in each case located in the City of [RELEVANT CITY] and County of [RELEVANT COUNTY], and each party irrevocably submits to the [non-]exclusive jurisdiction of such courts in any such suit, action, or proceeding. [Service of process, summons, notice, or other document by [certified] mail [in accordance with Section [NUMBER]/to such party's address set forth herein] shall be effective service of process for any suit, action, or other proceeding brought in any such court. The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action, or proceeding in such courts and irrevocably waive and agree not to plead or claim in any such court that any such suit, action, or proceeding brought in any such court has been brought in an inconvenient forum.]

Drafting Note: Submission to Jurisdiction

The submission to jurisdiction clause (also known as the jurisdiction clause, forum selection, or venue clause) permits the parties to select the forum in which a claim can be brought. This clause relates to judicial proceedings. Parties may also specify arbitration or other alternative dispute resolution proceedings in this clause (see Drafting Note, Arbitration and Alternative Dispute Resolution). The forum may be a particular court in a jurisdiction agreed upon by the parties, or alternatively or in addition to litigation, may be an arbitral institution. Assuming court resolution, most agreements allow for claims to be brought in both federal (assuming that the federal court has subject matter jurisdiction over the particular claim) and state courts, provided that both parties submit to the personal jurisdiction of these courts and include a waiver of any objections to the venue. This clause works with the governing law clause to provide some certainty as to how the agreement may get interpreted or a dispute resolved. The designated forum does not have to be in the state whose laws govern the agreement.

When choosing the forum, parties should consider:
- Which forum is most convenient for parties and witnesses.
- Whether a particular forum has specific procedural advantages.

Most agreements provide for exclusive jurisdiction in one location, but the parties can include exclusive jurisdiction in multiple locations or non-exclusive jurisdiction. For a sample submission to jurisdiction clause that manifests contract parties' desires to have the forum be determined by changeable or mutable facts, see Standard Clause, General Contract Clauses: Choice of Forum (Floating: Reciprocal).

In general, submission to jurisdiction clauses are enforceable unless there is a strong showing by the party opposing enforcement that it is:
- Unreasonable and unjust.
- A result of fraud or overreaching.

Also, although most states do enforce submission to jurisdiction clauses, there are a few that regard these clauses to be against public policy and, thereby, void. The parties should review all applicable laws and regulations to determine if this clause is enforceable.

The submission to jurisdiction clause is often combined with the governing law clause (see Section 19) and the waiver of jury trial clause (see Section 21).

For a shorter submission to jurisdiction clause, consider deleting the last two sentences of the clause.

For more explanations and drafting and negotiating tips regarding submission to jurisdiction clauses, see Standard Clauses, General Contract Clauses: Choice of Forum.
END DRAFTING NOTE

21. Waiver of Jury Trial.

EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT [OR THE OTHER TRANSACTION DOCUMENTS] IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT[, THE OTHER TRANSACTION DOCUMENTS] OR THE TRANSACTIONS CONTEMPLATED HEREBY [OR THEREBY]. [EACH PARTY TO THIS AGREEMENT CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) SUCH PARTY HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) SUCH PARTY MAKES THIS WAIVER VOLUNTARILY, AND (D) SUCH PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION [NUMBER].]

Drafting Note: Waiver of Jury Trial

The waiver of jury trial clause is frequently included in complex agreements. Most sophisticated parties prefer that a judge hear and decide any dispute arising out of the agreement, rather than a jury of people who may not appreciate and understand the potentially complex issues involved in the litigation. However, this clause is not enforceable in all jurisdictions. The parties should review all applicable laws and regulations to determine if it is enforceable.

The waiver of jury trial clause is often combined with the governing law clause (see Section 19) and the submission to jurisdiction clause (see Section 20).

For a shorter waiver of jury trial clause, delete the last sentence of the clause.

For more explanations and drafting and negotiating tips regarding waiver of jury trial clauses, see Standard Clauses, General Contract Clauses: Waiver of Jury Trial.
END DRAFTING NOTE

22. Counterparts.

This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile[, email or other means of electronic transmission] shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

Drafting Note: Counterparts

The counterparts clause is useful when the parties are executing separate copies of an agreement. It is useful in large transactions involving multiple parties, where not all the parties will be physically present at signing and in transactions where there is no physical meeting. The absence of a counterparts clause does not invalidate an agreement that the parties execute by separate counterparts. However, including this clause may help to prevent a party from claiming that an agreement is not binding because there is no one copy that is signed by all parties.

Delete the bracketed language regarding email and other means of electronic transmission if notices under the agreement are not permitted to be sent by email.

For more explanations and drafting and negotiating tips regarding counterparts clauses, see Standard Clauses, General Contract Clauses: Counterparts.
END DRAFTING NOTE

23. Force Majeure.

No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement [(except for any obligations to make payments to the other party hereunder)], when and to the extent such failure or delay is caused by or results from acts beyond the affected party's reasonable control, including, without limitation: (a) acts of God; (b) flood, fire, earthquake, or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest; (d) government order or law; (e) actions, embargoes or blockades in effect on or after the date of this Agreement; (f) action by any governmental authority; [and] (g) national or regional emergency; [and] [(h) strikes, labor stoppages, or slowdowns or other industrial disturbances[; and]] [(i) shortage of adequate power or transportation facilities]. The party suffering a Force Majeure Event shall give notice [within [NUMBER] days of the Force Majeure Event] to the other party, stating the period of time the occurrence is expected to continue and shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized.

Drafting Note: Force Majeure

The underlying principle of a *force majeure* clause is that no party to an agreement should be held to its performance obligations to the extent that performance is prevented by certain extreme circumstances outside that party's control. Any party affected by continuing *force majeure* events will not be required to perform, or be liable for the failure to perform, its obligations as a result of those events. If the parties want to exclude payment obligations from the *force majeure* clause, include the bracketed language.

Force majeure clauses are found in a wide range of documents. This clause should be adapted to fit the circumstances of a transaction.

When negotiating and drafting a *force majeure* clause, consider whether:
- The *force majeure* clause should apply to each party to the agreement.
- There are any specific *force majeure* events listed in the proposed provision that should not qualify as a *force majeure* event.
- There are any additional events that are relevant to the circumstances of the transaction that should be added as *force majeure* events.
- The party not relying on the *force majeure* clause should be able to terminate the agreement if the *force majeure* event continues for more than a specified period of time.
- It is appropriate for the party relying on the *force majeure* clause to determine that this event has occurred. The parties may want to consider requiring independent determination of certain *force majeure* events (particularly those that require technical analysis).
- There should be a dispute resolution procedure in the event the parties disagree about the occurrence of a *force majeure* event.

For more explanations and drafting and negotiating tips regarding *force majeure* clauses, see Standard Clauses, General Contract Clauses: Force Majeure.
END DRAFTING NOTE

24. Joint and Several Obligations.

All obligations of [NAMES OF CO-OBLIGORS] under this Agreement shall be joint and several.

Drafting Note: Joint and Several Obligations

Two or more parties can be co-obligors under an agreement and can assume either **joint and several liability** or **several liability** to a third party. The joint and several obligations clause ensures that co-obligors' liability under an agreement are joint and several. This means each co-obligor is treated as having assumed the collective obligations of all obligors as well as its own. A claimant may choose to proceed against any one or more of the co-obligors irrespective of which of them caused the breach, for either:
- Full performance of the obligation.
- All its loss or damage arising from a breach or failure to perform.

If a co-obligor is compelled to perform in full or to pay all of the damages for a breach because a claimant has chosen to

proceed against it alone, its performance or payment discharges the obligations of the other co-obligors jointly and severally liable with it. Generally it will be entitled to seek reimbursement from the other co-obligors for their proportionate share of the full liability.

Questions of contribution among parties jointly and severally liable with each other are of no direct concern to the claimant. It may choose to sue (and recover against) any one or all of the co-obligors and leave them to sort out the apportionment of liability among themselves (either in separate proceedings or by joining them as third parties to the principal proceedings).

For a several obligations clause, see Section 25.

For more explanations and drafting and negotiating tips regarding joint and several obligations clauses, see Standard Clauses, General Contract Clauses: Joint and Several Liability.
END DRAFTING NOTE

25. Several Obligations.

All obligations of [NAMES OF CO-OBLIGORS] shall be several and not joint, and in no event shall a party have any liability or obligation with respect to the acts or omissions of any other party to this Agreement.

Drafting Note: Several Obligations

The several obligations clause ensures that co-obligors' liability under an agreement are **several**. This means each of them is treated as having assumed liability solely for its own performance and is responsible only for its own failure to perform and for the loss or damage resulting from its own breach.

For a joint and several liability obligations clause, see Section 24.

For more explanations and drafting and negotiating tips regarding several obligations clauses, see Standard Clauses, General Contract Clauses: Joint and Several Liability.
END DRAFTING NOTE

26. Relationship of the Parties.

Nothing herein shall be construed to create a joint venture or partnership between the parties hereto or an employee/employer or agency relationship. [[NAME OF PARTY 1] shall be an independent contractor pursuant to this Agreement.] Neither party hereto shall have any express or implied right or authority to assume or create any obligations on behalf of or in the name of the other party or to bind the other party to any contract, agreement, or undertaking with any third party. [Nothing in this Agreement shall be deemed or construed to enlarge the fiduciary duties and

responsibilities, if any, of [NAME OF PARTY 1] or any of its [Related Parties], including without limitation in any of their respective capacities as stockholder or directors of [NAME OF PARTY 2].]

Drafting Note: Relationship of the Parties

This clause is also known as an "independent contractor," "no agency or partnership," or "relationship of the parties" clause.

The purpose of a relationship of the parties clause is to minimize the risk of an agreement creating an unwanted joint venture, partnership, employer/employee or agency relationship between the parties. Creating this relationship may have unfortunate tax consequences and may result in one party being bound by another in relation to third parties in ways not contemplated by the agreement or in becoming liable for the other's acts and omissions. Another reason for wanting to exclude a partnership relationship is that partners in a partnership owe fiduciary duties to each other. Contracting parties usually prefer to exclude implied duties of this kind.

For more explanations and drafting and negotiating tips regarding relationship of the parties clauses, see Standard Clauses, General Contract Clauses: Relationship of the Parties.
END DRAFTING NOTE

27. Business Days.

If any date on which a party is required to make a payment or a delivery pursuant to the terms hereof is not a Business Day, then such party shall make such payment or delivery on the next succeeding Business Day.

Drafting Note: Business Days

Most agreements have various provisions requiring delivery or payment within a certain number of days after a specified event. The business days clause relieves a party from having to make a delivery or payment if the due date falls on a weekend or holiday.

The term "Business Day" should be defined in the applicable agreement, typically in the definitions or interpretation section. A sample definition is as follows:

"Business Day means any day except Saturday, Sunday, or any other day on which commercial banks located in [LOCATION] are authorized or required by law to be closed for business."
END DRAFTING NOTE

28. Time of the Essence.

Time shall be of the essence in this Agreement.

Drafting Note: Time of the Essence

The time of the essence clause enables the party relying on the clause to terminate the agreement for breach and, if appropriate, claim damages if the other party fails to perform an obligation in accordance with the date or time specified in the agreement. This clause should be included in any agreement where performance by a certain date is important. Courts generally will not consider time to be of the essence in an agreement unless the agreement expressly provides for it or the parties' conduct clearly indicates they intended to make it so. If the time of the essence clause is not included, the non-breaching party will be unable to terminate the agreement if the other party does not comply with the relevant time limits (and so will have only a claim for damages), unless a court decides that, in equity, performance of the agreement by a certain date was a condition of the agreement and the failure to perform amounted to a fundamental breach of contract.

For more explanations and drafting and negotiating tips regarding time of the essence clauses, see Standard Clauses, General Contract Clauses: Time of the Essence.
END DRAFTING NOTE

