Commercial Contract Drafting and Review

Reviewed on: ***05/22/2019***

This practice note addresses the issues to consider when drafting or reviewing a commercial contract. It includes a discussion of the standard provisions generally incorporated in a commercial agreement, including without limitation, a preamble, recitals, term and termination, confidentiality, representations and warranties, indemnifications, limitations on liability, and miscellaneous boilerplate provisions.

For a checklist of issues and provisions to consider when drafting or reviewing a commercial contract, see *Commercial Contract Drafting and Review Checklist*.

Preamble

A contract's preamble provides the name of the agreement, its effective date, and the full legal name of the parties. If the parties are business entities, the preamble will generally specify the entities and state of organization of each business. And the preamble generally includes a descriptive noun, such as "Service Provider" and "Client," to refer to the parties throughout the document. All agreements include a preamble.

The following is a sample preamble:

> This Creative Services Agreement (this "Agreement") is entered into as of the 5th day of February, 2018 (the "Effective Date") by and between XYZ Creative, Inc., an Arizona corporation (the "Service Provider"), and Jane Doe (the "Client"), in connection with Service Provider's rendition of creative services on Client's behalf. Service Provider and Client are each sometimes herein referred to as a "Party," and collectively as the "Parties."

Recitals

Recitals (also known as "whereas" clauses) are optional provisions sometimes incorporated in an agreement to provide the reader with background information regarding the deal. They set forth the parties' basic understanding of the circumstances and purpose(s) of the transaction. Recitals assist in guiding the interpretation of the agreement, particularly when the transaction involves multiple parties or agreements, or is part of a larger transaction. The language generally does not create obligations on, or provide any rights to, some or all of the parties to the agreement and recitals are unenforceable in and of themselves (unless expressly stated otherwise in the agreement). Recitals immediately follow the agreement's preamble, and generally begin with the words "WHEREAS" and end with the words "NOW, THEREFORE."

The following are sample recitals:

> WHEREAS, Service Provider is a professional photographer in the business of taking black and white photographic images of individuals and their pets;

> WHEREAS, Client is interested in engaging the services of Service Provider to take photograph images of her and her dog;
>
> NOW, THEREFORE, in consideration of the premises and mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto covenant and agree as follows:

For additional information on recitals, see *Term, Recitals, and Definitions*. For additional recital language, see *Recitals Clauses*.

Term; Termination

An agreement's term and termination provisions are inextricably linked.

Term

The term sets forth the contract's duration (i.e., how long it remains in full force and effect). Terms can be set for a specific duration (i.e., one year) or for an indeterminate period as necessary to fulfill the agreement's obligations (i.e., "the term of this Agreement shall continue until satisfactory completion of the services as contemplated for hereunder"). They can also be set for an automatically renewing period of time, commonly called an evergreen provision (e.g., "one year, automatically renewable for additional one-year period unless either party provides the other party with written notice of its intention not to renew on or before the end of the then current term."). Evergreen clauses eliminate the administrative efforts required to extend an agreement's term, and are most commonly included in service agreements where the services are provided on an ongoing basis (i.e., weekly or monthly gardening services). If an evergreen clause is included, counsel should ensure that his or her client knows applicable deadlines. Reminders should be set. For term provisions, see *Term Clauses*.

Termination

A contract's termination clause sets forth each party's respective right to terminate the agreement. Termination rights fall into two main categories: (1) with cause and (2) for convenience (i.e., without cause). Termination clauses can be made unilaterally (i.e., benefitting only one party) or mutual (i.e., benefitting both parties).

Termination for Convenience

Termination for convenience (i.e., without cause, or "at will") provides a party with the right to terminate an agreement for any or no reason. A mutual provision allows either party to end a relationship that no longer serves it for one or more reasons, including changing economic conditions or developing new business opportunities. Not all agreements provide for this right. In certain situations (including franchising and, to a lesser extent, business opportunity and dealership arrangements), termination without cause is prohibited. Most termination at will provisions require the terminating party to provide the other party with a certain number of days' advance written notice of its intention so the nonterminating party can put alternative business plans into place and prepare to wind-down its operations with the terminating party. Most termination for convenience clauses are upheld by courts, although they can be held unenforceable if determined to be against public policy or unsupported by adequate consideration. Counsel should ensure that his or her client is protected if a termination occurs at will by the other party by requiring the following, if and as applicable given the nature of the agreement (1) advance written notification (90 days is common); (2) payment of all amounts due up through the effective date of termination (which may include expenses associated with early termination); (3) reasonable cooperation and assistance in transitioning work in progress to a third party; and (4) the potential payment of a reasonable termination charge, which may be a liquidated damages fee. Liquidated damages are often used to define recoverable damages when they would otherwise be difficult or impossible to calculate, such as a lost business opportunity. They minimize the risk of a dispute over the amount of damages that would be appropriate in certain situations, thus eliminated uncertainty. If the parties to an agreement desire the inclusion of liquidated damages, counsel should clarify that the damages are

compensatory and not punitive, as courts do not enforce punitive damage clauses. For more information on liquidated damages, see *UCC Damages and Remedies*.

Termination for Cause

Termination for cause rights are generally always included in commercial contracts. The language should, ideally, permit either party to terminate the relationship immediately upon the occurrence of any of the following events: (1) a material uncured breach by the nonterminating party, (2) the negligence or misconduct of the nonterminating party, (3) a violation of applicable law by the nonterminating party, (4) the occurrence of an event that materially alters the nature of the agreement in general (such as an event of force majeure, as discussed later in this practice note); (5) the nonterminating party's severe financial distress, and (6) the high probability of material harm to the terminating party (i.e., such as reputational damage due to the nonterminating party's patently offensive behavior). A clause granting a party the right to terminate an agreement based upon the other party's improper, offensive behavior is known as a "morals clause," and provides each party with an opportunity to proactively guard against actions taken by the other party that, while not necessarily illegal or in breach of the agreement between them, could hurt its image, brand, and reputation.

The right to terminate for cause typically does not require advance notification (as the nonterminating party is most likely at fault for, and aware of, the circumstances triggering the terminating party's right in the first instance). When drafting a termination clause, counsel should ensure that his or her client's particular concerns are addressed, given the specific risks involved in the transaction. For example, a service provider should seek the right to terminate for cause if the other party (i.e., its client) fails to pay any installment of the applicable fee. See Installment Contracts for the Sale of Goods under the *Uniform Commercial Code* for more information on installment agreements. Termination rights are not obligations, however, and as such, do not require the entitled party to terminate the agreement. Instead, the entitled party may (1) request adequate assurances, (2) suspend the agreement (if suspension rights are granted pursuant to the contract) until the situation is rectified, (3) ignore the event giving rise to the entitled party's termination right, or (4) avail itself or whatever other contractual remedies are available. For examples of demands for adequate assurances, see *Letter from Seller Demanding Adequate Assurances from Buyer* and *Letter from Buyer Demanding Adequate Assurances from Seller*. For more information about adequate assurances, see *Anticipatory Repudiation and Adequate Assurance of Future Performance*.

Post Termination Obligations

An agreement should address, in the termination section, the obligations that will arise upon termination or expiration of the contract. Such language generally includes a mutual obligation to return each party's confidential information, work-in-progress (if any), and other materials to the other party. Additionally, if payment is due, termination or expiration should accelerate all obligations, making all such amounts immediately due. Service agreements can require a service provider to provide reasonable assistance in transitioning work-in-progress and other materials and information to a new service provider. Finally, certain provisions, such as the indemnification, confidentiality, warranty, governing law, and limitation of liability clauses, among others, may survive termination or expiration of an agreement, and this should be referenced, although such reference is not necessarily required. See the Survival Section, below, for more information on this topic. For more termination provisions, see *Termination Clauses*.

Confidentiality

As most agreements involve sharing proprietary information between parties, they generally include a confidentiality provision to protect such proprietary information from unauthorized use or disclosure. Confidentiality clauses can be made mutual or one-way. The following should be included in any well-drafted clause:

- **Term**. Most confidentiality provisions outlast the term of an agreement by a pre-determined number of years (usually, 2–5).

- **Definition**. A clear definition of what the parties consider confidential should be included. The definition should cover each party's proprietary business information, including its financial, personnel, marketing, and other similar such data. Best practices include referencing the terms of the agreement as confidential.
- **Carve-outs**. Information independently discoverable, already known prior to agreement, received from a third party entitled to provide such information, or in the public domain should be excluded from the definition of confidential information. Additionally, neither party should be held in breach of a confidentiality provision to the extent that it provided confidential information to a government agency under a subpoena or other valid discovery request.

Confidentiality provisions are used to safeguard trade secrets, which are protected by federal laws such as:

- The Defend Trade Secrets Act of 2016 (DTSA) (*114 P.L. 153, 130 Stat. 376, 114 P.L. 153, 130 Stat. 376*) which:
    - Creates a private cause of action for trade secret misappropriation
    - Grants legal immunity to corporate whistleblowers
- The Uniform Trade Secrets Act (UTSA), a model law published by the Uniform Law Commission in 1979 and adopted by 48 states (N.Y. and Massachusetts are not among them), which:
    - Defines the types of information entitled to trade secret protection
    - Sets forth a private cause of action for misappropriation
    - Provides remedies for misappropriation, including injunctions, monetary damages, and, sometimes, reasonable attorney's fees

Additionally, certain types of data, such as financial information and health records, require compliance with additional confidentiality related laws and regulations. For example, health care information is subject to The Health Insurance Portability and Accountability Act (HIPAA) (HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996, 1996 Enacted H.R. 3103, 104 Enacted H.R. 3103, *110 Stat. 1936, 104 P.L. 191*, 1996 Enacted H.R. 3103, 104 Enacted H.R. 3103) and the Health Information Technology for Economic and Clinical Health Act (HITECH) (enacted under Title XIII of the American Recovery and Reinvestment Act of 2009 (*111 P.L. 5*)); information respecting children may be subject to the Children's Online Privacy Protection Act (COPPA) (*15 U.S.C. § 6501*); and certain financial information may be subject to the Gramm-Leach-Bliley Act (GLBA) (*15 U.S.C. § 6801*) or the Fair Credit Reporting Act (FCRA) (*15 U.S.C. § 1681*). Counsel should ensure that all industry-specific laws are considered.

Additionally, each party may wish for the other party to have all of such other party's employees and third-party contractors understand and acknowledge the agreement's confidentiality requirements (in writing) prior to rendering services and receiving confidential information. If agreed upon, the confidentiality provision should explicitly set forth this requirement for added protection. A nondisclosure form can be added to the agreement as an exhibit.

While confidentiality requirements are generally set forth in the applicable agreement, they can, alternatively, in a separate, incorporated agreement. This is typically done when there is a lot of highly sensitive data being transferred between the parties. For more on confidentiality, see Mutual Confidentiality and Non-Disclosure Agreement and *Confidentiality Clause*.

Representations and Warranties

Representations and warranties are standard contractual provisions that provide the non-representing party with assurance of specific facts and conditions from the representing party, the failure of which provides a valid breach of contract claim for the non-representing party. When drafting or reviewing a commercial contract, counsel should ensure that the other party provides adequate representations and warranties given the nature and specifics of the deal to maintain sufficient breach of contract remedies. Typical mutual representations and warranties include (1)

an obligation to comply with all applicable laws, rules, and regulations (this is an important catchall clause to ensure that the party's performance is compliant, whether that be for data privacy, environmental, export, immigration, labor, securities, or any other legal requirement); (2) a covenant not to violate the intellectual property or other third-party rights of any person or entity at any time; and (3) a statement that each party can fulfill its obligations under the agreement without violating any other agreement to which it is a party. Additional representations and warranties are usually added as required by the parties and the applicable transaction type. For example, sale of goods agreements often include a representation by the seller regarding the clear title, quality, and/or functionality of the goods being sold. For more information on representations and warranties, see *Commercial Agreement Representations, Warranties, Covenants, Rights, and Conditions* and *Representations and Warranties Drafting*. For sample clauses, see *Standard Clauses (Commercial Purchase and Sale Agreement)*.

Indemnifications

Indemnification clauses, also known as hold harmless provisions, allocate the risk and expense arising out of either party's breach, negligence, or misconduct. The primary benefit of an indemnification clause is to protect the indemnified party from losses incurred from third-party claims made pursuant to an agreement. Indemnifications can be mutual or one-way. In a mutual indemnification, each party agrees to compensate the other party for costs or damages arising out of the indemnifying party's breach, negligence, or misconduct. In a one-way indemnification, only one party provides this indemnity for the other party. Indemnification clauses are typically heavily negotiated, and often heavily litigated provisions. They are generally included in contracts where the risks associated with a party's breach or nonperformance are great. For example, contracts that involve the license of intellectual property rights usually include an indemnification to protect against the potentially sizable liability associated with a third-party rights infringement lawsuit.

Counsel should ensure that the indemnity is tailored to his or her client's specific needs. For example, an indemnification can be restricted to particular third-party claims (such as breach of warranty) or limited to circumstances where a lawsuit has been filed or a final judgment has been rendered.

Indemnifying parties generally control the defense of a claim since they are responsible for paying it. A notice requirement should be included to protect the indemnifying party from having to defend against a claim that the indemnified party has learned of. Without such notice, the indemnifying party may be materially prejudiced by any delay in receiving all requisite information about the claim's existence and subject matter. Settlements most commonly require the approval of the indemnified party since its interests are directly at stake.

The parties to an agreement must determine what types of liabilities will be covered by the indemnity, and which liabilities will be expressly excluded. Exclusions should always be stated in a clear and conspicuous manner. Generally, indemnifications are drafted to cover material, uncured breaches, as well as negligence and willful misconduct. An indemnification clause can also exclude certain liabilities, such as taxes or pending litigation, for example. They can also be limited to third-party claims (i.e., excluding direct claims between the parties). Counsel should carefully weigh the risks and benefits associated with any such exclusions.

Before agreeing to an indemnity, counsel should review it carefully to ensure that his or her client's obligations are limited to its own mistakes or misconduct. For example, the phrase "to the extent arising out of the indemnifying party's negligence, breach, or misconduct" helps to provide this limitation. In contrast, the phrases "in any way arising out of" or "directly or indirectly related to" could expose a party to liability for the actions or inactions of the other party and/or a third party. The obligation to indemnify can also be limited by time (three or five years from the onset of a claim is most commonly seen in commercial contracts).

Indemnities can also be limited by dollar amount, although counsel should take great care in ensuring that the ceiling will protect its client's interests. If the parties want the indemnifying party to cover the indemnified parties' legal fees as a reimbursable expense, counsel should ensure that this is stated in writing, as courts typically exclude their recoverability unless the agreement specifically provides otherwise.

Indemnification provisions are most always enforced in court. However, there are exceptions to this general rule. For example, indemnities that require one party to indemnify the other party for any claim despite fault (also known as “no fault” or “broad form” indemnifications) are typically held unenforceable for public policy reasons. Additionally, not all states permit indemnities that include punitive damages and as such, counsel should understand and ensure compliance with all applicable state laws, paying close attention to the agreement’s governing law. Courts often deny recovery for damages that arise out of an improbable and unforeseeable result stemming from the other party’s actions, other than in situations where the indemnifying party knew of the circumstances. Indemnifications must always be drafted clearly, since ambiguity is most commonly resolved in the indemnifying party’s favor. They should also be sufficiently broad to address each party’s basic needs, yet equitable enough so their enforceability is not questioned. For more information on indemnities, see *Indemnification Provision Checklist*.

Limitations on Liability

A limitation on liability provision limits a party’s financial exposure when a claim is made or a lawsuit is filed. It's used to exclude one or both parties’ liability for specific types of damages, such as indirect (including punitive damages, an otherwise standard tort remedy), consequential, and incidental, among others. It can also include a liability cap. If such a provision is used, there should be language stating that the limitation will apply even if a party was advised of the possibility of such damages or such damages were reasonably foreseeable, regardless of whether such liability is based on breach of contract, tort, strict liability, or otherwise. Counsel should ensure that the clause is appropriately tailored to meet its client’s needs given the specifics of the applicable deal. For example, a limitation on liability clause can apply to the entire agreement or, alternatively, only to specific terms. Exceptions can be carved out, such as making the limitation not applicable to either party’s indemnification obligations. Additionally, limitations on liability can be mutual or one-way.

Counsel should consider his or her client’s role in a transaction in determining whether a limitation on liability makes sense or not, and if so, what terms would be most appropriate. Additionally, counsel should ensure that the language in the limitation on liability is consistent with the agreement’s indemnification clause and other contractual provisions. Counsel should also add a statute of limitations for claims made pursuant to the limitation on liability clause (one year is typical). Limitation on liability clauses should always be clear and conspicuous—ALLCAPS will achieve this purpose. For more information on limitation on liability clauses, see *Negligence, Gross Negligence, and Willful Misconduct Terms in Commercial Contracts*.

Attorneys’ Fees

An attorneys’ fees clause provides that the prevailing party in any dispute arising out of an agreement may recover its reasonable attorneys’ fees and related costs from the non-prevailing party. Such a clause protects against frivolous lawsuits, as it is far less likely that a party will sue the other party unless it reasonably believes that it will prevail under the circumstances.

The following is a sample attorneys’ fees clause:

> If either party incurs any legal fees associated with the enforcement of this Agreement or any of its rights hereunder, the prevailing party shall be entitled to recover, in addition to all other damages to which it may be entitled, its reasonable outside attorney’s fees and related costs and expenses from the other party.

This clause restricts recovery to “outside” legal fees (i.e., a party cannot seek reimbursement for its in-house counsel costs). Absent an attorneys’ fees clause, the “American rule” generally applies, requiring litigation costs to be borne by the party incurring the expense. Counsel should note that, depending on the jurisdiction, recovery may be limited by statute or otherwise in the judge’s discretion.

Notices

A notices clause provides the parties with a mechanism for communicating information to one another during the relationship. Requiring delivery to be made solely by one of a few approved methods ensures that the notices are received by the appropriate party. The clause should state when notices are effective (i.e., many clauses provide that notices are effective only upon receipt by the receiving party). The effective date could be important when deadlines, including statutes of limitations, apply to the communication. Counsel should be careful when including email as an acceptable delivery method, as it is difficult to confirm receipt of an email with certainty. Additionally, emails routinely arrive late (and sometimes not at all), commonly land in a junk file, and are often overlooked or inadvertently deleted by the intended recipient. They can also easily be intercepted and transmitted by unauthorized third parties. Best practices include not including email as an acceptable distribution method. For more information on notice provisions, see *Notice Clause Drafting*.

Assignment

An assignment clause addresses the permissibility of assigning an agreement, either in whole or in part, by either party. The following is a sample mutual assignment clause:

> Neither party may assign or otherwise transfer this Agreement, in whole or in part, without the prior written consent of the other party in each instance, such consent not to be unreasonably withheld, conditioned, or delayed. Notwithstanding the foregoing, either party shall be free to assign this Agreement in its entirety to any: (1) affiliate of such party; or (2) successor entity of such party that assumes all, or a majority of, such party's assets in writing. [The assigning party shall remain secondarily liable to the non-assigning party hereunder despite any such permitted assignment.] Any assignment in violation of this clause shall be null and void.

This clause that prevents either party from assigning the agreement (in whole or in part) to a third party without the other party's prior written consent in each instance. This clause provides an exception for assignments of the agreement in its entirety to affiliates or successor entities. This mutual no-assignment provision can be amended to restrict only one party. Restrictions on assignment are commonly incorporated in agreements where each party's decision to sign the agreement was based, on the other party's reputation, relationships, and other specific abilities (e.g., personal service agreements, endorsement agreements, and sponsorship agreements). The non-assigning party should be entitled to approve any assignment in advance, particularly when the assigning party is handling highly sensitive data that requires protection from unauthorized use and disclosure. If one party approved the other party's request to engage the services of a subcontractor, for instance, the non-assigning party's counsel should require the approved subcontractor/assignee to execute requisite intellectual property licensing, non-solicitation, non-compete, and confidentiality agreements in the non-assigning party's favor prior to its commencement of services.

The bracketed language requiring the assignor to remain secondarily liable to the non-assigning party can be included to provide the non-assigning party with added security if a breach occurs or default by the assignee under the agreement. It also encourages the assignor to be judicious when selecting an assignee, as it remains liable for such party's performance or nonperformance.

The final sentence renders any assignment in violation of the clause ineffective. Without this sentence, the non-assigning party may have only a breach of contract claim if the assigning party assigns the agreement improperly. For more information on assignment, see *Offers, Acceptance, Revocation, Assignment, and Delegation of Duties*.

Force Majeure

Force majeure clauses excuse a party's late performance or nonperformance to the extent not practically avoided for reasons outside of its reasonable control. They are an effective risk allocation tool, and permitted by both the UCC and the Restatement (Second) of Contracts. Force majeure clauses often require the affected party to (1) notify the other party in writing of the event of force majeure as soon as practically possible and (2) use reasonable efforts to limit its impact on performance. Force majeure events can be natural or man-made, and generally include: fire, earthquake, terrorist attacks, war, strikes, acts of God, and government orders.

A force majeure provision should be carefully considered by the parties' respective counsel to fairly allocate risk. Generally, when an agreement requires all or the lion's share of its obligations to be fulfilled by one party, that party's attorney should push for as broad a force majeure clause as possible. The nonperforming party's counsel should, correlatively, push for (1) a narrow force majeure clause to limit the performing party's right to be excused from its obligations and (2) the right to terminate the agreement if the event of force majeure continues for a designated period of time.

Many jurisdictions hold that a party's obligation to fulfill its contractual obligations is excused when performance becomes "impracticable." Under *Section 2-615 of the UCC* and Section 261 of the Restatement (Second) of Contracts, impracticability occurs when a party's obligation to perform is made impracticable solely because of an event, the nonoccurrence of which was a basic assumption upon which the parties relied when signing the agreement. As force majeure clauses typically reference only those events that fit the above description, the language may, arguably, be unnecessary. However, counsel should consider its inclusion for added protection. It is virtually impossible to list every event rendering performance not practically possible when drafting a force majeure clause. Listing only certain events, however, can exclude those which are not specifically referenced, rendering the affected party responsible for non-enumerated occurrences. The following language should be included in any well-drafted force majeure clause: "Neither party shall be held responsible for war, weather, strikes, lockouts, fires, acts of God, terrorism, or any other activities or factors beyond its reasonable control, whether similar or dissimilar to any of the foregoing." Also, counsel may wish to add certain, additional events to the list if and to the extent deemed important by their respective counsel given the nature and subject of the deal. For example, one or both parties may not be willing to assume particular market risks, such as computer failures, software glitches, or troubles with a third-party supplier or distributor. The more specific counsel is on the events covered, the better protection the language will provide to his or her client. Finally, counsel may want to consider the inclusion of language that allows his or her client to terminate the agreement if a particular event of force majeure continues for a specified period, especially if performance after such time would not be as valuable to the terminating party after a certain date. Such a termination should be made subject to the termination for cause section, if agreed upon by the parties. For more information on force majeure clauses, see *Force Majeure Clause Drafting*.

Waiver

Waiver clauses are generally incorporated in most commercial contracts. They effectively provide that, unless otherwise agreed to in writing, if a party fails to require performance by the other party of any provision, such party's full right to require such performance thereafter shall not be affected, nor will a waiver by a party of a breach of any provision by the other party be taken or held to be a waiver of the provision itself. Waiver clauses are sometimes called "no waiver" clauses, and their purpose is to prevent a party from accidentally or informally waiving its right to bring claims and recover damages under an agreement if a breach by the other party occurs. Some waiver clauses require a waiver to be executed by the waiving party, although they could also be drafted to require execution by the parties to the agreement.

Parties to an agreement commonly waive certain terms throughout their relationship, however, without preparing and executing the required waiver. In such instances, courts have regularly upheld oral waivers based upon the parties' actions and words, even when the underlying agreement requires a waiver to be made under an executed writing. This is not the case with sales of goods contracts, however, which are governed by the Uniform Commercial Code (UCC). Specifically, *UCC § 2-209* gives full effect to waiver clauses, and does not enforce oral waivers. Similarly, when the statute of frauds (which requires certain agreements to be made in writing) applies under *UCC § 2-201*, oral waivers are generally not enforced. Best practices dictate preparing the written documentation required under the underlying agreement in all instances. For more waiver clauses, see *Waiver Clauses*.

Severability

Most commercial contracts include a severability clause (otherwise known as a "partial invalidity" clause), which effectively states that if any of the agreement's terms are unenforceable for any reason, the remaining provisions

shall continue in full force and effect. A severability clause protects the enforceability of the agreement. Some severability clauses require the parties to negotiate a resolution on their own. Others require the court amend the invalid, illegal, or otherwise unenforceable provision, although not all jurisdictions enforce such language. Additionally, the court's decision may not as embody the parties' intent. For a severability provision, see *Severability Clause*.

Survival

A survival clause states that the provisions in an agreement, which should survive any expiration or termination thereof, shall so survive. The specific, surviving sections are usually referenced in the clause, although such a reference is technically not required, particularly since the survivability of certain clauses is often stated in the provision itself. The following is a sample survival clause:

> Following the term of this Agreement, any and all provisions set forth herein which, by their very nature, are intended to survive any expiration or termination hereof, shall so survive, including without limitation, the provisions respecting confidentiality, representations & warranties, non-compete, non-solicitation, indemnifications, limitations on liability, insurance, ownership, and accrued payment obligations.

For more information on this topic, see *Merger, Survival, and Notice Clauses*.

Relationship of the Parties

A "relationship of the parties" clause (sometimes referred to an "independent contractor" clause) is standard for many service agreements. This provision minimizes the risk of a court finding that the agreement created an unanticipated employer/employee, partnership, joint venture, or agency relationship between the parties (as such relationships invoke a host of fiduciary, tax, and liability consequences).

While an independent contractor determination is ultimately made on a state-by-state basis, the Internal Revenue Service (IRS) has established an influential "independent contractor test" which looks at the following factors to determine how much control one party (i.e., the client) has over the other party (i.e., the service provider), as control leans towards a finding of an employer/employee relationship:

- **Financial control**. A client is more likely to be deemed an employer of a service provider if the service provider is subject to the client's financial control. All payment and pricing information is considered when making this determination.
- **Behavioral control**. A client is more likely to be deemed an employer of a service provider if the service provider is subject to the client's behavioral control, such as requiring the service provider to fulfill its obligations at a certain location, during certain hours, and/or in a particular manner.
- **Benefits**. A client is more likely to be deemed an employer of a service provider if the service provider is receiving typical employee benefits, such as health insurance, a 401(k) plan, and paid time off, among others.
- **Other key factors**. Other factors that contribute to this determination include whether (1) the relationship is permanent (i.e., if the term is indefinite), (2) the services are key to the client's main business and not ancillary, and (3) a contract was entered into that specifically states that the service provider is an employee of the client.

Under an independent contractor relationship, neither party may bind the other party to any commitment or obligation of any kind other than as specifically agreed to or approved in advance and in writing by the other party. Counsel should ensure that the agreement includes all such rights in sufficient detail. Employment counsel should be consulted when dealing with individual service providers performing substantial services for a client to avoid an unwanted employer/employee classification.

No Third-Party Beneficiaries

A no third-party beneficiaries clause states that the agreement terms are solely to benefit the parties thereto and not any third party. Generally, parties to an agreement must expressly provide that the contract is being entered into to benefit one or more non-signatories for any such individuals or entities to maintain rights under the agreement. By including the clause, however, the parties are expressly disclaiming liability for any third party's reliance on the agreement's terms.

If any exceptions to the clause are intended, they should be specifically referenced in the agreement. For example, indemnification provisions typically provide that each party's employees, agents, affiliates, and representatives may bring a claim to enforce the agreement's indemnity as third-party beneficiaries thereto. The following is a sample clause:

> This Agreement is being entered into solely to benefit the parties, 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.

See *Third Party Beneficiaries Clauses*.

Headings

Section headings (i.e., captions), provide parties with an easy method of finding certain information in an agreement. A headings clause provides that the headings/captions used are for convenience and reference purposes only and have no substantive meaning or interpretative value in and of themselves. The following is a sample headings clause:

> The headings of the sections hereof are for reference purposes only and shall not affect the interpretation of any of the terms and conditions set forth herein.

Headings clauses eliminate ambiguity arising from the captions used in an agreement, especially where a caption inaccurately identifies a clearly drafted section on a specific topic. If a caption creates confusion, a party cannot use this as justification to invalidate the clause's terms, and limit their scope or applicability. Headings clauses are generally included in long-form contracts, although they are unnecessary as their absence typically has no effect. For more headings language, see *Headings Clause*.

Further Assurances

A further assurances clause requires each party to cooperate respect to the other party's fulfillment of obligations and exercise of rights under the Agreement. The clause covers contractual omissions that may have to effectuate the parties' intention later. For example, a rights transfer provision may require the transferee to execute an assignment agreement, and this obligation may have been inadvertently left out of the agreement. Further assurances clauses should indicate which party is financially responsible to provide such cooperation. The following is a sample clause:

> Each party, along with its respective employees, agents, directors, officers, and affiliates, shall, at its own cost and expense, execute any additional documents and take such further actions as may be reasonably required to carry out the provisions of this Agreement and give effect to the transactions contemplated hereby.

See *Further Assurances Clause*.

Equitable Remedies

If parties wish to establish their right to equitable relief, an agreement should incorporate a clause setting forth its availability. Such provisions can be made mutual or one-way, and can be made to the agreement or simply to certain types of breaches and/or forms of relief. Counsel should note, however, that despite inclusion of such a provision, courts and arbitration tribunals can nonetheless deny equitable relief in their discretion, as they generally favor the exclusive award of monetary damages unless such an award is insufficient, incalculable, or inadequate. But the language encourages the awarding of equitable relief, as it provides a court with information respecting the parties' intent and the level of harm anticipated if equitable relief were not provided to the aggrieved party. Additionally, courts are most likely to enforce equitable remedies clauses that are specific and applicable to breaches where equitable relief is commonly awarded. Standard clauses granting equitable relief generally include:

- An acknowledgment by the parties that a material breach would cause irreparable harm to the nonbreaching party
- An acknowledgment by the parties that there is no adequate remedy at law (i.e., monetary damages would be insufficient)
- A statement that the nonbreaching party may have equitable relief

An equitable remedies clause may also provide:

- That the nonbreaching party does not have to post a bond or other form of security in his or her claim for equitable relief (as courts often require a plaintiff to post a security bond while litigation is pending to cover any loss or damage that may be incurred by a defendant because of being wrongfully restrained, unless waived by the parties in the agreement)
- That the nonbreaching party need not prove damages to obtain relief
- That the breaching party waive its right to contest a final equitable relief court order
- That the nonbreaching party be entitled to seek equitable relief. Inclusion of the word "seek" acknowledges the discretionary nature of an equitable relief grant (i.e., that it is not available to a plaintiff as a matter of right). A plaintiff must always prove to the court that a breach occurred and that legal remedies would not make the plaintiff whole. Omitting the word seek sends a message to the court; however, respecting the importance of the equitable relief language, while use of the word dilutes the operative language of the provision

Equitable relief clauses are most commonly seen in confidentiality agreements, agreements that contain non-competes and/or non-solicitations (such as employment and other personal service contracts), and agreements for the sale or license of unique goods. For equitable remedies clauses, see *Equitable Remedies Clauses*.

In certain transactions, equitable relief can be devastating to the breaching party. Counsel may wish to exclude its applicability by expressly disclaiming one or both parties' right to obtain equitable relief from a court if a breach or misconduct occurs. This exclusion can be made to the agreement or simply to certain types of breaches and/or forms of relief. For example, agreements that contemplate licensing intellectual property often incorporate a "no equitable relief" provision so that a licensee in breach of the agreement can only be sued for monetary damages (i.e., the licensor cannot enjoin the licensee's distribution of final deliverables). For no equitable remedies clauses, see *No Equitable Relief Clauses*.

Cumulative Remedies

A cumulative remedies clause provides that the rights and remedies in an agreement are cumulative (i.e., that they can be obtained besides whatever implied rights or remedies are available at law or in equity). Including such a clause is not always necessary, however, as common law generally provides that cumulative remedies are available unless an agreement expressly disclaims their availability (with exceptions depending on the jurisdiction).

When a cumulative remedies clause is included in an agreement, it should incorporate carve-outs for any sections subject to exclusive remedies, such as limitations on liability, limited product warranties, and liquidated damages

provisions. Alternatively, an agreement can simply include an exclusive remedies clause (and potentially carve-out those provisions for which cumulative remedies still apply). Agreements can contain both a cumulative remedies clause and an exclusive remedies clause, each addressing different contractual provisions. For cumulative remedies clauses, see *Cumulative Remedies Clauses*. For more information on cumulative and exclusive remedies, see *Remedies*.

Counterparts

A counterparts clause is useful when there are multiple parties to an agreement in varying locations. While generally not required, they are commonly included in commercial contracts. The following is a sample clause:

> This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. An executed copy of this Agreement delivered by facsimile [, email or other means of electronic transmission] shall be deemed to be as effective as an original signed copy.

Regarding the bracketed language, please refer to the section on *Notices* for a brief discussion of emailed correspondence.

Governing Law

An agreement should always set forth the governing law and forum state. A governing law provision sets forth which state's laws would apply if a dispute occurs under the contract. Counsel should consider the agreement's governing law at the beginning of the negotiations because the law selected provides the context in which the agreement is to be drafted. The outcome is generally based upon the relative bargaining power of the parties, the location of their respective headquarters, the relative advantages gained from the applicable state's specific laws, and location(s) where each party's obligations are being fulfilled. The chosen state need not be the same state where either or both of the parties reside. Often, each party's counsel would be well advised to push for its own client's state laws to apply, as selecting a foreign state's laws could cause having to rely upon unfamiliar substantive law and procedures. Counsel should note that an agreement need not specify the laws of only one state. It could require certain disputes be governed by one state's laws, while other matters be governed by a different state's laws.

Submission to jurisdiction language provides the parties with some certainty regarding where and how conflicts will get resolved. The forum state and the governing law state need not be the same. An important factor to consider when selecting the forum is convenience (i.e., for the individuals involved in making appearances). For more on governing law and dispute forum provisions, see *Choice of Law and Choice of Forum Clauses*.

Additionally, if either party is a foreign entity and/or if the subject matter of an agreement is international, best practices include incorporation of language stating that the United Nations Convention on Contracts for the International Sale of Goods (CISG) does not apply. When an agreement incorporates international elements, the contract may be subject to CISG. As a ratified international treaty, the CISG preempts state Uniform Commercial Code (UCC) law unless its applicability is expressly excluded. U.S. counsel would be well advised to exclude CISG, as its language is interpreted in different ways by the courts of different countries, including regarding enforcing foreign judgments, and as such, the outcome of its application to any particular dispute remains difficult to predict. This problem is compounded by an extreme lack of guidance from past court rulings, which go largely unrecorded. Therefore, as compared with Article 2 of the UCC, the CISG offers much less settled law, precedence, and consistency (and therefore, more risk). Additionally, tremendous research is required to understand how the CISG applies to a specific transaction. A dispute under a CISG governed contract is often heard on foreign ground.

Counsel may also wish to add language expressly excluding the right to a trial by jury. If included, the language should be clear and conspicuous to protect its enforceability. Such clauses are often included to save time and

expense if a trial occurs. Jury waiver clauses, however, are not enforceable in all jurisdictions. For instance, they are prohibited in Georgia and California. The following is an example of a jury waiver clause:

> "THE PARTIES HEREBY AGREE, TO THE EXTENT PERMITTED BY APPLICABLE LAW, TO WAIVE ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY CLAIM, COUNTERCLAIM, OR ACTION ARISING FROM THE TERMS OF THIS AGREEMENT."

For more sample jury waiver clauses, see *Waiver of Jury Trial Clauses*.

Counsel may also wish for binding arbitration to apply instead of litigation if a dispute occurs, as arbitration is usually simpler and less expensive. If an arbitration clause is included, it should be made clear and conspicuous. There are pros and cons associated with both litigation and arbitration. Arbitration is more private than a trial, and is a less formal proceeding. Many consider arbitration to provide a less expensive and quicker resolution of a dispute, but an arbitrator could extend the time frame and increase costs (many arbitrators charge significant fees for their time). Arbitration also allows for a more expansive introduction of evidence since there are no exclusionary rules. In other words, the arbitrator may allow more evidence, testimony, and documents to be considered than a judge would allow in a court room or in front of a jury. Conversely, there is also the possibility of a reduced level of discovery, whereby a party may not gather as much information regarding a dispute as compared to a regular litigation proceeding. There is also no jury to decide the issues, and this may be advantageous only to one party. Another real concern is that the decision is final and there is no right to appeal. Decisions may also be more subjective, as they are typically based on broader principles of justice and equity that might have been supported in a body of law. The following is an example of a standard arbitration clause:

> "Any dispute arising hereunder shall be settled by arbitration administered by the [American Arbitration Association] pursuant to its then-current rules. The arbitration shall be conducted before a panel of [one (or) three] arbitrators in [state, county]. The arbitration shall be conducted in the English language. The arbitrators will be bound to apply the laws of the State of [state]. The decision of the arbitrator(s) will be made in writing, and shall be final and binding on the parties. Each party shall be responsible for its own costs with respect to the proceedings irrespective of the outcome. This Section provides the sole recourse for the settlement of disputes arising hereunder, except that either party may seek a preliminary injunction or other form of injunctive relief in any court of competent jurisdiction if, in its reasonable, good faith judgment, such action is necessary to prevent or curtail irreparable harm."

For more arbitration clauses, see *Arbitration Clauses*.

Finally, the clause can include a multi-tiered alternative dispute resolution (ADR) clause (also known as an escalation clause). An ADR/escalation clause requires the parties to engage in steps (including negotiation, mediation, or other potential nonbinding alternative resolution procedure) prior to submitting disputes to binding arbitration or litigation. For a multi-tiered alternative dispute resolution clause, see *Multi-tiered Alternative Dispute Resolution Checklist*.

Entire Agreement; Modification

An "entire agreement" clause (sometimes called an "integration clause" or a "merger clause") is included in most commercial contracts. It provides that the agreement contains all of the terms and conditions that will govern the parties' relationship. The clause promotes certainty, and prevents a party from asserting incorporation of statements or representations made before execution of the contract to the extent not incorporated. The following is a sample clause:

> This Agreement, along with Exhibit "A" and any other attachments specifically incorporated herein by reference, sets forth the entire agreement between the parties with respect to its subject matter and supersedes any prior agreements or communications between the parties, whether written or oral, relating hereto. No representation, inducement, or promise has been made or relied upon by either party in entering

> into this arrangement other than as specifically set forth herein. This Agreement may be modified only by a written amendment signed by an authorized representative of each party. To the extent that the terms hereof contradict any of the terms of any attachment hereto, the terms hereof shall govern, unless specifically set forth to the contrary in any such attachment.

This clause also includes a “no modification” provision, effectively stating that the agreement may be modified only under a written amendment signed by an authorized representative of each party.

Each party’s counsel should ensure that the agreement includes all of the parties agreed-upon terms, as those not set forth in the contract will not be made a part thereof, and a party could be barred from bringing a claim based on representations not set forth in writing in the final agreement.

Finally, the clause clarifies that to the extent the language in the agreement contradicts the language in any incorporated attachment, the language in the agreement would govern unless specifically agreed to otherwise in writing (i.e., with an acknowledgement of such contradiction). This prioritizes terms if a conflict occurs. Similar language can be included in each attachment, if and as necessary or desired. Courts generally enforce integration clauses, precluding the admissibility of prior agreements under the parole evidence rule absent showing fraud, misrepresentation, or mistake. Note, however, that a merger clause will not preclude the admissibility of supplementary and noncontradictory terms based on trade usage, course of dealing, and/or course of performance, unless also excluded by the parties. For entire agreement clauses, see *Entire Agreement Clauses*.

Related Content

Practice Notes

- *Term, Recitals, and Definitions*
- *UCC Damages and Remedies*
- *Anticipatory Repudiation and Adequate Assurance of Future Performance*
- Mutual Confidentiality and Non-Disclosure Agreement
- *Commercial Agreement Representations, Warranties, Covenants, Rights, and Conditions*
- *Representations and Warranties Drafting*
- *Negligence, Gross Negligence, and Willful Misconduct Terms in Commercial Contracts*
- *Notice Clause Drafting*
- *Offers, Acceptance, Revocation, Assignment, and Delegation of Duties*
- *Force Majeure Clause Drafting*
- *Merger, Survival, and Notice Clauses*
- *Choice of Law and Choice of Forum Clauses*
- *Warranty and Disclaimer of Warranty Drafting*
- *Remedies*

Annotated Forms

- *Contract Review and Preparation Intake Form*
- *Recitals Clauses*
- *Term Clauses*
- *Letter from Seller Demanding Adequate Assurances from Buyer*
- *Letter from Buyer Demanding Adequate Assurances from Seller*
- *Termination Clauses*
- *Confidentiality Clause*
- *Standard Clauses (Commercial Purchase and Sale Agreement)*
- *Waiver Clauses*
- *Severability Clause*
- *Third Party Beneficiaries Clauses*
- *Headings Clause*
- *Further Assurances Clause*
- *Equitable Remedies Clauses*
- *No Equitable Relief Clauses*
- *Cumulative Remedies Clauses*
- *Waiver of Jury Trial Clauses*
- *Arbitration Clauses*
- *Entire Agreement Clauses*

Checklists

- *Commercial Contract Drafting and Review Checklist*
- *Indemnification Provision Checklist*
- *Multi-tiered Alternative Dispute Resolution Checklist*
- *Confidentiality and Non-Disclosure Agreement Drafting Checklist*

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