

**Information & Instructions: Standard contractual clauses**

**PREVIEW**

1. Many "boilerplate" provisions reinforce or ratify traditional Uniform Commercial Code law interpretation of contracts and agreements. The standard contract clauses may or may not be appropriate for the practitioner's particular agreement; therefore, they should be reviewed before being inserted.
2. Many contracts contain provisions which state the agreement may be cancelled or cause a breach or default in the event a party enters bankruptcy. Per 11 U.S.C. sections 363-365 and 541, these clauses are invalid during the bankruptcy. Some attorneys prefer to leave the language in the agreements and others prefer to delete the provisions.
3. The practitioner should review the above cited federal law and determine his or her own preference.

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**STANDARD BOILERPLATE CLAUSES:**

**Information & Instructions: Amendment** Contracts may contain a provision prohibiting modification, amendment or change to the contract unless the parties agree in writing to the alteration. This provision embodies the "parol evidence rule," which prohibits the introduction of oral testimony in an effort to change or modify a written agreement. Such a provision gives rise to the presumption that the entire agreement is contained in the written document.

**Information & Instructions: Assignment**

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1. Contracts are generally assignable unless they are personal performance contracts or other contracts the assignment of which is prohibited by law. If assignment is not prohibited by law, the contract itself may contain a clause that either prohibits or allows a party to assign the party's interest or obligations in the agreement to third parties who are not currently parties to the original agreement. The best practice is to include a provision addressing the issue of assignability.

**Information & Instructions: Paragraph headings, use of pronouns and captions**

1. In order to avoid ambiguity in the construction and interpretation of the agreement, a paragraph heading clause may be inserted. This provision states that the paragraph headings used in the contract are for descriptive purposes only and have no legal force or effect, but exist rather for ease of administration and identification.

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2. The contract may also contain a clause stating that the use of neuter, singular or plural pronouns to refer to the parties described in the agreement can constitute a proper reference even though the parties may be individuals, partnerships, corporations, groups of two or more individuals, trusts, or associations. The clause also states that necessary grammatical changes may be made to render the agreement effective as long as the changes do not affect the substance of the agreement.

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**Information & Instruction: Confidential Information**

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1. The parties may wish to include a clause in the agreement stating that the information available to the parties during the contractual negotiation period and during the term of the contract is considered proprietary and confidential. Therefore both parties agree not to divulge or disclose the information to third parties.

**Information & Instructions: Corporate authority**

1. To ensure that the contract is binding on a corporate party, a contract may also contain a recitation that the contract is valid and has been executed by the proper corporate authority. The corporation should have held a corporate meeting to authorize and ratify the officer's execution of the agreement in order to bind the corporation. The corporation should submit to the other party to the agreement a corporate resolution authorizing and ratifying the officer's execution of the agreement.

**Information & Instructions: Defend, hold harmless, and indemnity clause**

1. Contracts typically provide "boilerplate" provisions stating that if one party causes liability to the other party as a result of the parties' contractual arrangements, the party that caused the damage or liability will be liable to the other party to defend, indemnify, or hold that party harmless from the damage or liability.

2. A hold-harmless agreement requires the party to release the other party from any type of liability that may arise as a result of the contractual transaction. Similarly, an indemnity clause addresses the issue of liability between contracting parties and provides that a party at fault will be liable for any action based on that fault and will indemnify and protect the other from the action.

3. A typical indemnity clause may require that one party protect the other against any loss, harm, or consequence that may arise as a result of the party's performance of the agreement.

**Information & Instructions: Dispute or contest**

1. The payment of attorneys' fees in the event of a dispute or litigation or contest is an important provision in an agreement. An agreement may typically provide that if the contract is breached, or if a dispute arises under it, the prevailing party will be entitled to recover reimbursement of attorney's fees and costs of litigation.

2. In the alternative, the parties may by contract agree to have their differences resolved by a commercial arbitrator rather than litigate their differences in court. Often, disputes can be resolved more quickly and inexpensively through arbitration than in litigation. An arbitration clause may specify under what circumstances the dispute will

be resolved by the arbitrator, how the arbitrator will be chosen, the effect of the arbitrator's decision, and the rules and regulations governing the arbitration process.

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**Information & Instructions: Force Majeure**

1. A "Force Majeure" clause is an exculpatory clause stating that the parties are not responsible for breach of contract if the breach consists of nonperformance due to some act of God or other circumstance over which the parties have no control.

2. For instance, if a company hired a contractor to build a drilling platform in the Gulf of Mexico and the facility's completion was delayed due to a hurricane, a Force Majeure clause should excuse the delay in the performance of the contractual obligation applicable to the deadline for completion of the project, notwithstanding any type of deadline or time requirements otherwise contained in the agreement.

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**Information & Instructions: Further assurances**

1. This clause is a representation by both parties that they will cooperate in administering the agreement and that each party will perform any further acts or execute or deliver subsequent documents which are reasonably necessary to carry out the provisions of the contract.

**Information & Instructions: Independent contractor relationship; no partnership intended provision**

1. Parties to an agreement typically state in the agreement that the agreement does not expressly or impliedly create any employee or partnership or joint venture agreement or any joint liability.

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2. The parties expressly stipulate that they remain independent contractors despite the agreement into which they have entered. The clause may be effective to eliminate liability in the event a partnership, joint venture, or other relationship is claimed by a stranger to the agreement.

**Information & Instructions: Multiple counterparts**

1. Frequently, an agreement is duplicated, and duplicate originals may be signed so that each party has a signed agreement. In that event, a clause should be inserted stating the effect of duplicate copies.

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**Information & Instructions: No waiver clause**

1. The no waiver clause states that a failure or delay in enforcing any contractual rights will not constitute a waiver of or bar to enforcement of those rights or obligations at some future time. Under common law, the failure to enforce the party's rights immediately and reasonably constituted a waiver of those rights.

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2. In order to avoid the common law consequence of acting as a good samaritan, parties frequently insert a no waiver clause to prevent the equitable doctrine of estoppel from barring the non breaching party's assertion of rights at a future date.

3. The non breaching party may then exercise those rights in spite of a delay or failure to enforce them at the time the cause of action arose.

## Information & Instructions: Notices

1. A notice provision states to whom and by what method notices or further communications should be sent or served. For instance, the notice may be sent by registered mail, return receipt requested, by ordinary mail, or by facsimile transmission (FAX).

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## Information & Instructions: Parties bound clause

1. The purpose of the Parties Bound clause is to ensure that the contractual obligations will be binding not only on the party to the agreement, but on any assignee or successor who steps into the assignor's shoes, such as an administrator.

2. This clause is important because it prevents a party from succeeding in an attempt to escape debts and obligations simply by transferring assets to a new entity or corporation.

## Information & Instructions: Representations

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1. Parties to an agreement frequently state in the agreement that no representations or promises are included in the agreement made to induce the other party to execute the agreement. The clause also states that the agreement contains all of the terms of the agreement.

## Information & Instructions: Severability

1. A contract may contain a clause stating that if any provisions of the agreement are determined to be violative of any applicable law or held to be unconscionable, the part that is violative is unenforceable. The purpose of the provision is to prevent the remainder of the contract from becoming void as well. The provision states that the remainder of the agreement is neither violative of public policy nor unconscionable. The contract itself and the remaining provisions should, therefore, remain in full force and effect unless the removal of the invalid provision destroys the legitimate purposes of the agreement and the agreement cannot function with deletion of the provision. In that event, of course, the agreement should then be cancelled by both parties.

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2. Severability clauses are important in contracts that are subject to heavy regulation by governmental entities, since regulations and laws may change, thereby rendering performance impossible or impractical.

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**Information & Instructions: State law and venue determination**

1. The contract may contain a clause that states that the agreement is subject to and governed by the laws of the state in which the contract was entered into, as, for instance, the State of Texas.

2. One of the purposes of this particular provision is to ensure that if a contest arises under the agreement, the venue will be in the state and in the county designated in the agreement.

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3. Texas Business and Commerce Code Section 55.53 contains a provision applicable to contracts that provide for applicable state law: if any element of the execution of the contract occurs in Texas and one party to the contract is a resident of the state or is a corporation with its principal place of business in Texas, any provision that makes the contract subject to the laws of another state or providing for litigation in the courts of another state or arbitration in another state must be conspicuously set out.

4. If the provision is not conspicuously set out, it is voidable by a party against whom it is sought to be enforced.

**Information & Instructions: Term**

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1. Most contracts provide a beginning and ending time for the contractual obligations to be in effect. In fact, without a term provision, the contract may be fatally defective. Accordingly, a term provision should be inserted.

**Information & Instructions: Time limit**

1. Courts cannot always ascertain if timely performance was required under an agreement. Accordingly, a time limits clause should be inserted if the time limits are considered significant and important obligations under the contract, and failure to observe a time limit would be considered a material and significant breach.

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2. A "time is of the essence" clause imposes a requirement that the parties comply with the time limits, and provides that failure to do so constitutes a significant or material breach of the agreement. Without the provision, the Court may have the power to waive the enforcement of the time limit stated in the agreement.

**Information & Instructions: Closing representations and signatory clause**

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1. A contract will generally conclude with a signatory clause stating that the agreement was signed, accepted and agreed to on a certain date. The parties may also acknowledge that they have read and understood the agreement.

2. The clause may state when the agreement becomes effective and affirm that the agreement was entered into voluntarily and signed by the authorized parties.

#### **Information & Instructions: Electronic signatures and e-commerce**

On June 12, 2001, Texas adopted the Uniform Electronic Transactions Act. The act added a new chapter to Chapter 43 of the Texas Business and Commerce Code.

The act makes electronic signatures legally binding, just as the related Federal Electronic Signatures in Global and National Commerce Act (E-Sign).

E-Sign provides that in any transaction that effects interstate commerce an electronic signature, contract or record cannot be denied legal effect, validity or enforcement just because it is in an electronic form.

E-Sign defines an electronic signature as an electronic sound, symbol or process that is attached to or associated with a contract with the intent to constitute a signature. This may include a signature consisting of letters or numbers or an act such as clicking on an "I agree" button on a Web site.

E-Sign also provides that where a transaction is required to be evidenced in writing, the use of an electronic document will satisfy that requirement, subject to certain restrictions, including some consumer protections that are incorporated into the act.

#### **Information & Instructions: Notary clause**

1. The contract may also contain a notary clause by which the parties' signatures are notarized. Notarization entitles the contract to be recorded if recording is desired.

2. The form gives an example of a signature clause that is used to attest to the fact that the agreement was signed by an officer of a corporation and that the corporation had ratified and approved the agreement.

#### **Information & Instructions: Non-competition clause**

1. The 73rd Legislature amended Tex. Bus Com Code Section 15.50 et seq., effective September 1, 1993, to change the enforceability of covenants not to compete.

2. These contracts can now only be enforced if the covenant is ancillary to or part of an otherwise enforceable agreement, e.g., an employment agreement and the covenant must be included in the final agreement's final form.

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3. The covenant must be considered reasonable in its:
- a. geographical area,
  - b. length of time,
  - c. and scope of activity being restrained.

4. A contract may place restrictions upon the parties prohibiting direct competition with each other during the term of the agreement. For instance, in employment agreements, employers commonly insert a non competition clause that prohibits the employee from engaging in an activity that competes with the employer. Restrictive covenants also place restrictions on the employees so that they may not keep, disseminate, or make public the reports, documents, or trade secrets of the employer.

5. Restrictive covenant agreements are difficult to enforce in court; accordingly, they must be precisely drafted to withstand the unconscionability test which courts may apply to the agreement. It is permissible to have a separate non competition agreement or have the non competition agreement contained in the body of the agreement.

6. Simple and over broad non competition clauses are difficult to enforce; accordingly, a short form of the clause is not included under the standard clause section of this chapter.

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