

**THE CORPORATION LAW COMMITTEE OF THE
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**

Sample Contract Boilerplate

Adopted March 2013

The term “boilerplate,” when used in the context of corporate agreements, refers to provisions that relate to agreements in general rather than to the specifics of a particular transaction, and thus can be bolted, like a steel boilerplate, onto any agreement. Often these provisions are at the end of an agreement, preprinted on the reverse of a form, or collected in a “Miscellaneous” article. Boilerplate provisions typically include sections dealing with contract interpretation, notices, amendments, parties, dispute resolution and general enforceability. These often-overlooked provisions can have a significant impact on the rights of the parties.

The following provisions are examples of common boilerplate provisions identified by the Corporation Law Committee of the Association of the Bar of the City of New York (the “Committee”). The Committee has collected these examples and provided the related commentary to assist parties in drafting contracts governed by New York law. Despite being “boilerplate,” these provisions should be tailored to the needs of each individual contract.

Provision

Commentary

Section 1. Interpretation.

Section 1.1. Rules of Construction.

- The sample provision is designed to set forth rules of construction to be used in the event of a future dispute relating to the meaning of agreement provisions and to reduce repetition throughout the agreement. The sample provision is based on “best practice” in the market as observed by members of the Committee.

(a) When a reference is made in this Agreement to an Article, a Section, an Exhibit or a Schedule, such reference shall be to an Article of, a Section of, or an Exhibit or a Schedule to this Agreement unless otherwise indicated.

Provision

- (b) Whenever the words “include,” “includes” or “including” are used in this Agreement or any other *Transaction Document*¹, they shall be deemed to be followed by the words “without limitation.”
- (c) Whenever the word “or” is used in this Agreement, it shall not be deemed exclusive.
- (d) The words “*hereof*,” “*herein*” and “*hereunder*” and words of similar import when used in this Agreement or any other Transaction Document shall refer to this Agreement or such other Transaction Document, as the case may be, as a whole and not to any particular provision of this Agreement or such other Transaction Document, as the case may be.
- (e) All terms defined in this Agreement shall have the defined meanings when used in any other Transaction Document or in any certificate or other document made or delivered pursuant hereto or thereto unless otherwise defined therein. The definitions contained in this Agreement and any other Transaction Document are applicable to the singular as well as to the plural forms of such terms and to the masculine as well as to the feminine and neuter genders of such terms. Whenever the context requires, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms.

Commentary

- Clause (b) is designed to reverse the default rule of *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”), that items not on the list are assumed not to be included.
- Clause (c) is the default rule in New York, and has been included to avoid ambiguity. See 22 N.Y. Jur. 2d *Contracts* § 245 (2008). However, the nonexclusivity may not be appropriate in all cases.

¹

NTD: Insert appropriate defined term from the underlying agreement.

Provision

(f) Except as expressly stated in this Agreement, all references to any statute, rule, regulation or form (including in the definition thereof) are to such statute, rule, regulation or form as amended, modified, supplemented or replaced from time to time (and, in the case of any statute, include any rules and regulations promulgated under such statute), and all references to any section of any statute, rule, regulation or form include any successor to such section.

(g) Except as expressly stated in this Agreement, all references to any agreement are to such agreement and include any exhibits, annexes and schedules attached to such agreement, in each case, as the same is in effect as of the date of this Agreement and in the case of any such agreement to which the parties are other than all of the parties to this Agreement, without giving effect to any subsequent amendment or modification.

(h) All references to “\$” or “dollars” mean the lawful currency of the United States of America.

(i) Unless otherwise specified herein, all accounting terms used herein shall be interpreted, all determinations with respect to accounting matters hereunder shall be made, and all financial statements and certificates and reports as to financial matters required to be furnished hereunder shall be prepared in accordance with United States generally accepted accounting principles[, as consistently applied by the Company].²

Commentary

- For clause (f), consider whether references to statutes, rules, regulations or forms should be limited to those in effect as of the date of the agreement. Failing to “freeze” the referenced statutes, rules, regulations or forms could result in a material change to the parties’ rights and obligations under the agreement.
- For clause (g), the sample provision “freezes” third-party agreements to those in effect as of the date of the agreement in order to avoid renegotiations between third parties affecting the rights of the parties to the agreement in question without their consent. This is a different approach from clause (f).
- For clause (i), consider whether the agreement should permit changes based on changes in generally accepted accounting principles or whether the agreement should limit accounting terms to generally accepted accounting principles as in effect on the date of the agreement. Changes to generally accepted accounting principles may be especially relevant in agreements containing terms that are dependent upon future financial statements, such as buy-sell provisions, earn-outs, royalties and financial covenants.

²

NTD: Insert appropriate entity reference or delete the bracketed language.

Provision

(j) No specific provision, representation or warranty shall limit the applicability of a more general provision, representation or warranty. It is the intent of the parties that each representation, warranty, covenant, condition and agreement contained in this Agreement shall be given full, separate, and independent effect and that such provisions are cumulative.³

(k) The parties hereto have participated jointly in the negotiation and drafting of this Agreement and the other Transaction Documents with the assistance of counsel and other advisors and, in the event an ambiguity or question of intent or interpretation arises, this Agreement and the other Transaction Documents shall be construed as jointly drafted by the parties hereto and thereto, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement or any other Transaction Document.

Commentary

- Clause (j) is designed to reverse the default rule in New York that where there are general and specific provisions relating to the same matter, the specific provisions control. *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 133 N.E.2d 688, 150 N.Y.S.2d 171 (1956); *Kahn v. New York Times Co.*, 122 A.D.2d 655, 503 N.Y.S.2d 561 (1st Dep’t 1986).
- Clause (k) is typical for agreements between sophisticated parties and is designed to reverse the default rule in New York that ambiguity is construed against the draftsperson. *Moran v. Standard Oil Co. of N.Y.*, 211 N.Y. 187, 105 N.E. 217 (1914); *Taddeo v. Medallic Art Co.*, 40 A.D.3d 444, 834 N.Y.S.2d 658 (1st Dep’t 2007).

³

NTD: A seller of goods or a business may wish to omit this paragraph.

Provision

Section 1.2. Entire Agreement. This Agreement, the other Transaction Documents, the Schedules hereto and thereto, and the other agreements included as exhibits hereto and thereto constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all prior agreements and, understandings[, representations and warranties], both written and oral, among the parties with respect to the subject matter hereof and thereof. In the event of a conflict between the terms of this Agreement and the other Transaction Documents, the terms of [this Agreement]⁴ shall govern.

Commentary

- The sample provision (known as an integration or merger clause) is used to prevent the parties from being liable for any agreements or understandings that are not within the four corners of the subject agreement (and, if applicable, the other agreements referred to in the clause).
- The bracketed language is sometimes seen in an agreement for the acquisition of goods or a business:
 - A seller will want to include the bracketed language to prevent being found liable (whether in tort, under statutory provisions or for fraud) for a representation or warranty that it made outside of the Transaction Documents, such as in the sales or due diligence process. In some jurisdictions, a seller will need to obtain an affirmative representation from the buyer that it has not relied on any representation or warranty outside of the referenced agreements.
 - A buyer may want to resist including the bracketed language to preserve its extracontractual remedies.
- A section heading in an agreement may be imprecise, poorly drafted or a truncated summary of complex text. This sample provision provides that the parties and a court not give substantive effect to the table of contents and the headings in interpreting the agreement.

⁴

NTD: Insert appropriate hierarchy indicating which agreement controls in the event of a conflict.

Provision

Section 1.4. Business Day Defined.

“Business Day” means any day except (a) a Saturday or Sunday or (b) any day on which banks in the City of New York are authorized or required by Law or executive order to be closed[; provided, however, that Lincoln’s Birthday (February 12) and Election Day shall not be excluded from the definition of Business Day by virtue of this clause (b)].

Alternate formulation:

“Business Day” means any day except (a) a Saturday or Sunday or (b) a day on which the New York Stock Exchange or the NASDAQ Stock Market is closed for trading.

Section 2. Notices. All notices and other communications hereunder shall be in writing and shall be deemed duly given (a) on the date of delivery if delivered personally, (b) on the date sent by [facsimile (with confirmation of transmission) or] electronic mail if sent during normal business hours of the recipient during a Business Day, and otherwise on the next Business Day, if sent after normal business hours of the recipient, provided that in the case of electronic mail, each notice or other communication shall be confirmed within one Business Day by dispatch of a copy of such notice pursuant to one of the other methods described herein, (c) if dispatched via a nationally recognized overnight courier service (delivery receipt requested)

Commentary

- In many contracts certain obligations may only be performed on Business Days due to the need to utilize the banking system. Additionally, it has become conventional to measure certain time periods based on Business Days.
- A draftsperson may want to refer to different or additional cities or markets if the closing of the subject transaction may involve parties outside of New York or the United States.
- N.Y. GEN. CONSTR. LAW § 24-a (McKinney 2012) provides that banks in New York are authorized to close on Saturdays, Sundays and public holidays. This provision results in Election Day and Lincoln’s actual birthday (February 12) not constituting “Business Days,” which the Committee believes to be contrary to the expectation of most parties; therefore, the Committee has proposed both the bracketed language and the alternate formulation which is based on the opening of the equity markets.
- The notice provision is designed to set forth the manner in which the parties deliver information to each other during a contract’s term. It is important to coordinate this provision with other provisions in the agreement that provide for deadlines for notice.
- The provision should address (i) which form the notice should take, (ii) what method of delivery is appropriate, (iii) when notice is effective, (iv) who must receive the notice, and (v) how changes to the address or contact person to which notice should be sent shall be communicated. The forms of notice selected should

Provision

with charges paid by the dispatching party, on the later of (i) the first Business Day following the date of dispatch, or (ii) the scheduled date of delivery by such service, or (d) on the fifth Business Day following the date of mailing, if mailed by registered or certified mail, return receipt requested, postage prepaid to the party to receive such notice, at the following addresses, or such other address as a party may designate from time to time by notice in accordance with this Section.

If to [insert parties' names and addresses]:

With a copy (which shall not constitute notice) to:

Commentary

reflect what the parties are comfortable with. For some agreements, or, for certain provisions, parties may prefer to provide that notice is effective only upon actual receipt.

- Where electronic communication is permitted, safeguards to ensure receipt should be considered (e.g., whether an original must follow a faxed or .pdf notice, or if some manner of confirmation should be required, such as a “read” notification).
- When email notification is used, parties should consider whether to establish monitored email addresses for notices. If an individual’s email address is used, parties should consider drafting appropriate rules for “out-of-office” or other “bounce-back” notifications.
- Anecdotally, many enterprises are reducing the use of facsimile notice.
- In multinational contracts, parties may wish to specify the language of the notice.

Provision

Section 3. Covenants.

Section 3.1. Fees, Costs and Expenses. Except as expressly provided otherwise in this Agreement or any other Transaction Document, all fees, costs and expenses incurred in connection with this Agreement and the other Transaction Documents and the transactions contemplated hereby and thereby (collectively, the “*Transactions*”) shall be paid by the party incurring such fees, costs and expenses, whether or not the *Transactions* are consummated. In the event of termination of this Agreement or any other Transaction Document, the obligation of each party to pay its own fees, costs and expenses will be subject to any rights of such party arising from a breach of this Agreement or any other Transaction Document by any other party.

Commentary

- If the agreement does not have a general Specific Performance clause (see Section 6.5 below), the draftsperson should consider including language authorizing specific performance for Sections 3.2, 3.4 and 3.5.
- In the absence of a specific agreement to the contrary, the fees, costs and expenses of negotiating, drafting and performing an agreement must be paid by the party incurring such fees, costs and expenses. However, even if the parties agree to bear the respective fees, costs and expenses they incur, the parties may nonetheless elect to include a clause addressing fees, costs and expenses to prevent a party from later arguing that the other party agreed to pay some or all of its fees, costs and expenses.
- When drafting and negotiating the fees, costs and expenses clause, consider whether there are any fees, costs and expenses of one party that should be shared with or wholly paid by the other. If the parties elect to allocate certain fees, costs and expenses amongst themselves (*e.g.*, Hart-Scott-Rodino filing fees), the parties should specifically enumerate such fees, costs and expenses in the provision.

Provision

Section 3.2. Further Assurances. From and after the [date hereof or the Closing Date *for agreements with a deferred closing*], the parties shall do or cause to be done all such reasonable acts and things as may be necessary, proper or advisable, consistent with all applicable *Laws*,⁵ to make effective the Transactions. Without limiting the foregoing, each party shall execute and deliver, or cause to be executed and delivered, such further documents and instruments, in each case as may be necessary or proper and reasonable to carry out the provisions and purposes of this Agreement and the other Transaction Documents.

Commentary

- This provision is NOT designed to describe the efforts required to cause a closing to occur in contracts for which there is a delay between the signing of the contract and the “closing” of the transaction (typically an acquisition agreement). This provision is designed to facilitate the implementation of an already closed transaction. In certain types of agreements, such as an acquisition in the form of an asset purchase agreement, this provision may not be considered boilerplate and may be subject to extensive negotiation.
- Including a separate section specifying each party’s rights and obligations in detail is preferable in cases where the parties can identify certain actions that will need to be taken, documents that will need to be drafted or cooperation from the other party that will need to be obtained.
- 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 “best efforts” or another standard;
 - whether the further assurance obligation should be at the request (or reasonable request) of the other party or, alternatively, limited to matters that are necessary (or reasonably necessary) to give the

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NTD: Insert the appropriate defined term from the underlying agreement.

Provision

Section 3.3. Time Is of the Essence. Time is of the essence in the performance of the Transactions.

Commentary

- 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; and
- who should bear the expense of performing the further assurance obligations.
- A “time of the essence” clause requires performance on the contractually specified date, and the failure to perform on that date constitutes a material breach of the agreement. *New Colony Homes, Inc. v. Long Island Prop. Group, LLC*, 21 A.D.3d 1072, 803 N.Y.S.2d 615 (2d Dep’t 2005).
- In the absence of a “time of the essence” clause in a contract, a party is obligated to perform within a “reasonable” time period. *Parker v. Booker*, 33 A.D.3d 602, 822 N.Y.S.2d 156 (2d Dep’t 2006), *leave to appeal denied*, 8 N.Y.3d 811, 836 N.Y.S.2d 550, 868 N.E.2d 233 (2007); *Savasta v. 470 Newport Assocs.*, 82 N.Y.2d 763, 623 N.E.2d 1171, 603 N.Y.S.2d 821 (1993).
- When determining whether to include a “time of the essence” clause, a draftsperson should consider if there is a deadline included in the agreement that must be strictly adhered to in order to meet the expectations of the draftsperson’s client. If yes, a “time of the essence” clause should be included in order to facilitate a breach of contract claim for failure to perform by that deadline.

Provision

Section 3.4. Publicity and Reports. Each party agrees that, except as otherwise required by Law,⁶ it will not issue any reports, statements or releases, in each case relating to the Transactions, without the prior written consent of the other parties hereto, which consent shall not unreasonably be withheld or delayed. To the extent disclosure is required by Law, the non-disclosing party shall have the right to review any report, statement or release as promptly as possible prior to its publication and to reasonably consult with the disclosing party with respect to the content thereof.

Commentary

- When negotiating and drafting the publicity clause, consider the following:
 - If there is a confidentiality provision or stand-alone confidentiality agreement in place, the publicity clause and the confidentiality provision should be reviewed together to avoid any possible conflicts.
 - If one party to the Transaction is a public company, it may be required to disclose certain information about the Transaction, and the other party will not be able to control such announcements.

⁶ NTD: If the definition of “Law” in the underlying agreement does not include stock exchange or regulatory requirements, those provisions should be expressly added here.

Provision

Section 3.5. Confidentiality.

(a) Except as provided in paragraph (b) below, each of the parties hereto shall keep confidential, and not disclose or use for a purpose other than the Transaction, any confidential and proprietary information of any other party hereto (the “*Protected Party*”), including this Agreement and all of the terms and conditions hereof (collectively, “*Confidential Information*”).

(b) Paragraph (a) hereof shall not restrict a party from disclosing Confidential Information (subject to the limitations of applicable Law): (i) to the extent consented to by the Protected Party, (ii) to the extent required by a discovery request in a court, arbitration or administrative proceeding; provided, that such party shall have first provided the Protected Party with prompt written notice of such discovery request so that the Protected Party may seek a protective order or other appropriate remedy, and in the event such protection or other remedy is not obtained, such party shall exercise commercially reasonable efforts to obtain assurance that confidential treatment will be accorded to such Confidential Information, (iii) to accountants, auditors, attorneys and tax or financial advisors who have been informed of and have agreed with such party to abide by the terms of this Section, or who are otherwise bound by confidentiality obligations with such party and (iv) to the extent necessary to enforce such party’s rights under this Agreement.

Commentary

- To the extent an agreement, or the schedules to an agreement contain confidential or proprietary information, the parties should consider an express confidentiality provision.
- A confidentiality provision may not be a “boilerplate” provision, and should be coordinated with other confidentiality provisions in the agreement and the Transaction Documents.

Provision

Section 4. Amendments and Modifications.

Section 4.1. Amendments. This Agreement may be amended, superseded, canceled, renewed or extended only by a written instrument signed by each of the parties hereto.

Commentary

- In multiparty contracts, the draftsperson should consider whether there are circumstances in which less than all of the parties should be authorized to amend the agreement.
- Parties tend to restrict the ability to amend a written agreement by oral agreement in order to avoid future disputes over the nature of any oral amendments. See Samuel Goldwyn's Law of Contracts ("A *verbal contract isn't worth the paper it is written on.*")
<http://www.brainyquote.com/quotes/quotes/s/samuelgold122394.html>, accessed on October 19, 2012.

Provision

Section 4.2 Waiver. A party may by written instrument signed on behalf of such party: (a) extend the time for the performance of any of the obligations or other acts of another party due to it, (b) waive any inaccuracies in the representations and warranties made to it contained in this Agreement or any Transaction Document, or (c) waive compliance with any covenants, obligations, or conditions in its favor contained in this Agreement or in any Transaction Document. No claim or right arising out of this Agreement or any Transaction Document can be waived by a party, in whole or in part, unless made in a writing signed by such party. Neither any course of conduct or dealing nor failure or delay by any party in exercising any right, power, or privilege under this Agreement or any of the Transaction Documents will operate as a waiver of such right, power, or privilege, and no single or partial exercise of any such right, power, or privilege will preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power, or privilege. A waiver given by a party will be applicable only to the specific instance for which it is given.

Commentary

- Similar to the provision relating to amendments, the Waiver provision is designed to preclude disputes over unintended waivers of an agreement and reverse the default rule in New York that conduct or failure to enforce contractual rights may constitute a waiver. *Alsens Am. Portland Cement Works v. Degnon Contracting Co.*, 222 N.Y. 34, 118 N.E. 210 (1917); *Int'l Shared Servs., Inc. v. McCoy*, 259 A.D.2d 668, 686 N.Y.S.2d 828 (2d Dep't 1999) (employer waived a non-competition covenant by assisting a former employee in obtaining competing employment).
- No-waiver clauses may be strictly enforced. *Nassau Beekman, LLC v. Ann/Nassau Realty, LLC*, 2013 WL 362816, 2013 N.Y. Slip. Op. 00566 (1st Dep't Jan. 31, 2013). However, even though a contract contains a no-waiver clause, there is authority that such a clause does not itself preclude waiver of a contract right. E.g., *Kenyon & Kenyon v. Logany, LLC*, 33 A.D.3d 538, 823 N.Y.S.2d 72 (1st Dep't 2006); *Dice v. Inwood Hills Condo.*, 237 A.D.2d 403, 655 N.Y.S.2d 562 (2d Dep't 1997); *Acuman Re Mgmt. Corp. v. Gen. Sec. Nat'l Ins. Co.*, No. 09-CV-1796, 2012 WL 3890128 (S.D.N.Y. Sept. 7, 2012); *Wyeth v. King Pharms., Inc.*, 396 F. Supp. 2d 280 (E.D.N.Y. 2005). In addition, a party that chooses to continue with a contract after a breach can be deemed to have exercised a right of election and thereby forego its rights with respect to that breach. *Emigrant Indus. Sav. Bank v. Willow Builders, Inc.*, 290 N.Y. 133, 48 N.E.2d 293 (1943).

Provision

Section 5. Parties.

Section 5.1. Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement, nor any right, duty or obligation of any party hereunder, may be assigned or delegated by any party (in whole or in part) [*without the prior written consent of the other parties hereto*.]⁷ Any purported assignment of rights or delegation of obligations in violation of this Section will be void. References to a party in this Agreement and in any Transaction Document also refer to such party's successors and permitted assigns.⁸

Commentary

- The parties should carefully consider the terms under which a contract may be assigned.
- N.Y. U.C.C. §§ 9-401 – 9-409 (McKinney 2012) as in effect in New York overrides provisions of certain contracts that would otherwise restrict assignment of the right to receive payment.
- RESTATEMENT (SECOND) OF CONTRACTS § 322 (1981) provides that “a contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective.” The “void” language is seen as best practice to render any assignment in violation of the terms of the contract invalid, as opposed to merely the basis for a suit for breach.
- When one of the parties to a contract is an entity, consider the following:
 - Whether the entity should be permitted to assign to its affiliates.
 - Whether a “change of control” of the entity should be treated the same as an assignment.

⁷

NTD: Insert the agreed-upon standard for assignment.

⁸

NTD: There may be reasons not to include successors and permitted assigns in place of original references to a party, such as in a personal services contract.

Provision

Section 5.2. No Third-Party Beneficiaries. [Except as set forth in Section __ hereof,]⁹ nothing in this Agreement is intended or shall be construed to give any person, other than the parties hereto, their successors and permitted assigns, any legal or equitable right, remedy or claim under or in respect of this Agreement the Transaction Documents or any provision contained herein or therein.

Commentary

- Under New York law, to be treated as a third-party beneficiary a person must establish that the parties to the contract intended to confer a benefit on the third party. *Subaru Distrib. Corp. v. Subaru of Am. Inc.*, 425 F.3d 119, 124 (2d Cir. 2005). New York courts have adopted RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) as an accurate statement of New York third-party beneficiary law. The Restatement provides that “unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance”. The sample provision clarifies that the parties do not intend any person to be third-party beneficiaries except as specifically identified.
- At least one court has found that where an agreement provides for rights in favor of third parties, those parties may sue under the agreement even in the face of a “no third-party beneficiaries” clause. *Diamond Castle Partners IV PRC, L.P. v. IAC/Interactivecorp.*, 82 A.D.3d 421, 918 N.Y.S.2d 73 (1st Dep’t 2011). Similarly, if the parties’ intention is not clear, courts may look to the entire contract and other evidence. In *Bayerische Landesbank v. Aladdin Capital Management LLC*, 692 F.3d 42 (2d Cir.

⁹ NTD: Certain types of Agreements will typically include indemnification provisions in favor of persons who are not party to the Agreement. Consider whether indemnified persons should be expressly excepted so that they may enforce the indemnification provisions of the Agreement.

Provision**Commentary**

2012), the court held that noteholders in a securitization could plausibly be intended third party beneficiaries based on the ambiguity of whether the phrase “except as otherwise provided herein” referred to the no third-party beneficiaries section or the entire agreement (where the agreement otherwise contained provisions for the benefit of the noteholders).

- In acquisition agreements that are financed, lenders are sometimes made express third-party beneficiaries of the so called “Xerox Provisions,” which provide for New York governing law and venue for litigation relating to the financing, waiver of trial by jury, no recourse of sellers against the lenders and that seller's sole remedy is a reverse breakup fee or other limitation of liability.
- In merger agreements, the parties may include an exception giving the target's stockholders the right to receive the merger consideration on consummation of the merger. In *Consolidated Edison v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005) (“ConEd IV”), the court held that neither target stockholders directly, nor the target on their behalf, could enforce the merger agreement against a breaching buyer to collect a lost deal premium since the agreement did not expressly provide that target stockholders were third-party beneficiaries. Parties sometimes address the decision in ConEd IV by explicitly granting target stockholders third-party beneficiary rights that are solely enforceable by the target.

Provision

Section 5.3 Relationship of the Parties/No Fiduciary Duties.

The parties shall perform all obligations under this Agreement as independent contractors, and nothing contained in this Agreement shall be deemed to create any association, partnership, joint venture, or relationship of principal and agent or master and servant between the parties to this Agreement or any affiliates or subsidiaries thereof, or to provide either party with the right, power or authority, whether express or implied, to create any such duty or obligation on behalf of the other party.

Section 5.4. No Recourse Against Nonparty Affiliates. All claims, obligations, liabilities, or causes of action (whether in contract, common or statutory law, equity or otherwise) that arise out of or relate to this Agreement or any other Transaction Document, or the negotiation, execution, or performance of this Agreement or any other Transaction Document (including any representation or warranty made in, in connection with or as an inducement to this Agreement or any other Transaction Document), may be made only against the parties that are signatories to this Agreement or such other Transaction Document, as the case may be (“*Contracting Parties*”). No Person who is not a Contracting Party, including any officer, employee, member, partner or manager signing this Agreement, the Transaction Documents or any certificate delivered in connection herewith or therewith on behalf of any Contracting Party (“*Nonparty Affiliates*”) shall have any liability (whether in contract, tort, common or statutory law, equity or otherwise) for any claims, obligations, liabilities or causes of action arising out of, or relating in any manner to, this Agreement or any other Transaction Document or based on, in respect of, or by reason of this Agreement or any other Transaction Document or the negotiation, execution, performance, or breach of the Agreement or any other Transaction Document; and, to the maximum extent

Commentary

- This provision may only be applicable in services, management and similar agreements, and is designed to prevent the implication of rights and obligations on the parties unless expressly intended.
- A provision releasing and exculpating nonparties is designed to limit the contractual obligations to the signatories to the contract and to provide protection to those who may be vicariously liable, such as partners and controlling equityholders and to officers who may sign closing certificates or similar documents in connection with the agreement. See Glenn D. West & Natalie A. Smeltzer, *Protecting the Integrity of the Entity-Specific Contract: The “No Recourse Against Others” Clause – Missing or Ineffective Boilerplate?*, 67 BUS. LAW. 39, 39-74 (Nov. 2011)

Provision

permitted by law, each Contracting Party hereby waives and releases all such liabilities, claims, causes of action, and obligations against any such Nonparty Affiliates.

Section 6. Dispute Resolution and Remedies.

Section 6.1. Governing Law. This Agreement, the other Transaction Documents, and any dispute, controversy or proceeding arising out of or relating to this Agreement, the other Transaction Documents, or the Transactions or the subject matter hereof or thereof or the relationship among the parties hereto or thereto in connection herewith or therewith (in each case whether in contract, tort, common or statutory law, equity or otherwise) shall be governed by the substantive laws of the State of New York [without regard to conflict of law principles thereof or of any other jurisdiction that would cause the application of laws of any jurisdiction other than those of the State of New York].

Commentary

- Under New York law, contractual choice of law provisions are generally enforced. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2012) permits parties to choose New York as the governing law if the contract amount exceeds \$250,000, even when neither the parties nor the transaction has any relationship with the state. Section 5-1401 exempts labor and personal service contracts, and transactions for personal, family or household purposes, but otherwise does not recognize a public policy exception to its application. A December 2012 decision by the New York Court of Appeals made the inclusion of the commonly used phrase “without regard to conflict of law principles thereof” unnecessary. *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 N.Y.3d 310, 2012 WL 6571286, *1 (Dec. 18, 2012).
- If New York is not the jurisdiction of incorporation for a corporate party, the draftsperson should consider if inclusion of the following proviso is appropriate: “provided, however, that any matter involving the internal corporate affairs of the company or any other corporate party hereto shall be governed by the provisions of the jurisdiction of its incorporation.”
- Even if there is a choice of law clause specifying the law of the jurisdiction that will govern the contract and disputes arising under or related to the contract, an issue

Provision

Section 6.2. Exclusive Forum in Designated Courts. Any dispute, controversy, proceeding or claim arising out of or relating to: (i) this Agreement or any other Transaction Document, or any of the Transactions or the subject matter hereof or thereof, (ii) the breach, termination, enforcement, interpretation or validity of this Agreement, or any other Transaction Document, including the determination of the scope or applicability of this agreement to arbitrate, or (iii) the relationship among the parties hereto or thereto, in each case, whether in contract, tort, common or statutory law, equity or otherwise (collectively, a “*Dispute*”), shall be brought exclusively in either (x) the United States District Court for the _____ District of New York, to the extent that such court has subject matter jurisdiction, or (y) the Commercial Division of the Supreme Court of the State of New York in the County of _____ (or if such court lacks subject matter jurisdiction, in the courts of the State of New York in the County of _____) (the “*Designated Court*”). Each of the parties hereto hereby irrevocably submits with regard to any such action or proceeding for itself and in respect of its property, generally and unconditionally, to the personal jurisdiction of the Designated Court and agrees that it will not bring any action whether in tort, contract, common or statutory law, equity or otherwise arising out of or relating to this Agreement or any other Transaction Document or any of the Transactions or the subject matter hereof

Commentary

pertaining to the validity of the contract (i.e. fraudulent inducement) will nonetheless be governed by the law of the jurisdiction where the contract was made. [*Keywell Corp. v. Weinstein*, 33 F.3d 159, 159 (2d Cir. 1994), *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 534 N.Y.S.2d 374 (1st Dep’t 1988), *Pegasus Aviation IV, Inc. v. Aerolineas Austral Chile, S.A.*, No. 08-CIV-11371, 2012 WL 967301 (S.D.N.Y. Mar. 20, 2012)]

- The choice of law clause is often accompanied by a clause providing for the sole and exclusive jurisdiction in New York for resolution of disputes so as to not leave open the risk that a foreign court would apply non-New York procedural rules to substantive effect or misconstrue New York law.
- The provision is designed to select an exclusive judicial forum for resolution of disputes. The provision allows a party to select either federal or state court. The parties may wish to specify that federal court jurisdiction is mandatory if the federal court can obtain subject matter jurisdiction. To the extent that the contract relates to real estate in jurisdictions outside of New York, the draftsperson should consider making a special provision for disputes relating to such non-New York real estate.
- N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2012) provides that an action against a foreign corporation, nonresident or foreign state may be maintained in the courts of the State of New York if the contract relates to not less than \$1 million and the parties have agreed to submit to the jurisdiction of the courts of New York. Courts generally view a forum selection pursuant to §5-

Provision

or thereof in any court other than the Designated Court. Each of the parties hereto hereby irrevocably waives, and agrees not to assert as a defense, counterclaim or otherwise, in any action or proceeding with respect to this Agreement or any other Transaction Document, (a) any claim that it is not personally subject to the jurisdiction of the Designated Court, (b) any claim that it or its property is exempt or immune from jurisdiction of the Designated Court or from any legal process commenced in such Designated Court (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise), and (c) to the fullest extent permitted by applicable Law, any claim that (i) the suit, action or proceeding in such Designated Court is brought in an inconvenient forum, (ii) the venue of such suit, action or proceeding is improper, or (iii) this Agreement, any other Transaction Document, or the subject matter hereof or thereof, may not be enforced in or by such Designated Court.

Alternate Section 6.2. Arbitration; Dispute Resolution.

(a) *Exclusive Dispute Resolution.*¹⁰ Any dispute, controversy, proceeding or claim arising out of or relating to: (i) this Agreement or any other Transaction Document, or any of the Transactions or the subject matter hereof or thereof, (ii) the breach, termination, enforcement, interpretation or validity of this Agreement, or any other Transaction Document, including the determination of the scope or applicability of this agreement to arbitrate, or (iii) the relationship among the parties hereto or thereto, in each case, whether in contract, tort, common or statutory law, equity or otherwise (collectively, a “*Dispute*”) may

Commentary

1402 to preclude a claim of *forum non conveniens*. See e.g. *AIG Fin. Prods. Corp. v. Pennncara Energy, LLC*, 83 A.D.3d 495, 922 N.Y.S.2d 288 (1st Dep’t 2011) and *Sebastian Holdings, Inc. v. Deutsche Bank AG.*, 78 A.D.3d 446, 912 N.Y.S.2d 13 (1st Dep’t 2010)

- The sample provision is designed to provide the benefits of § 5-1402 whether or not applicable.
- If arbitration is the selected method of dispute resolution consider adding the following to the choice of law provision:

Notwithstanding the provisions relating to the choice of the applicable substantive law, any arbitration conducted pursuant to the terms of this Agreement shall be governed by the Federal Arbitration Act 9 U.S.C. §§ 1-16 (1947).
- Many private arbitration firms empower their arbitrators to award equitable relief. Nonetheless, the parties may wish to preserve their rights to seek judicially mandated

¹⁰ NTD: The draftsperson may wish to preserve judicially ordered equitable remedies, in which case the provision should begin: *Except as provided in Section [cross reference to specific performance section].*

Provision

only be resolved by arbitration as provided in this Section. No party hereto shall commence any litigation with respect to a Dispute except as expressly set forth in this Section and Section [cross reference to specific performance section if judicially ordered equitable remedies are preserved].

(b) *Arbitration.* To resolve a Dispute, any party hereto may commence an arbitration to be administered by [insert name of private arbitration firm] pursuant to its [insert description of rules of the selected arbitration firm]. The arbitration shall be conducted before a single arbitrator, in New York, New York, and in accordance with the [consider inserting a reference to any special or expedited rules of the arbitration firm.] In the event of a conflict between the rules of the selected arbitration firm and this Agreement, the terms of this Agreement shall govern. The decision of the arbitrator shall be final, binding on the parties hereto, and not subject to further review.

[Optional Provision: (c) *Prevailing Party Fees.* In any arbitration of a Dispute, the arbitrator shall award to the prevailing party, if any, the costs and attorneys' fees reasonably incurred by the prevailing party in connection with the arbitration. If the arbitrator determines a party to be the prevailing party under circumstances where the prevailing party won on some but not all of the claims and counterclaims, the arbitrator may award the prevailing party an appropriate percentage of the costs and attorneys' fees reasonably incurred by the prevailing party in connection with the arbitration. In the event that litigation is commenced to enforce an arbitration award, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs whether or not such action proceeds to judgment.]

(d) *Judgment on Award.* Judgment upon any award rendered by

Commentary

equitable relief. We have provided for that option in the footnote to the first clause of paragraph (a).

- Attention should be paid to the private arbitrator selected, as different firms have different rules relating to arbitration panels and procedural rules. Parties may wish to choose single or multiple member panels. Other options available to parties are the ability to specify the qualifications of arbitrators and the availability of an appellate-type remedy.
- One of the perceived advantages of arbitration is that it allows the parties to engage in private ordering of disputes. The Committee has provided optional provisions relating to prevailing party fees in clause (c) and confidentiality in clause (e).
- Regarding clause (c), consider whether:
 - what a “prevailing party” means should be defined by the agreement; and
 - whether the “English Rule” of “prevailing party pays” should be applied to litigation as well.

Provision

the arbitrator may be entered in any court having jurisdiction. Without limiting the foregoing, each party consents to the non exclusive jurisdiction of (x) the United States District Court for the _____ District of New York, or (y) the Courts of the State of New York, _____ County (the “*Designated Court*”), to render judgment on an award. Each of the parties hereto hereby irrevocably submits with regard to any such action or proceeding for itself and in respect of its property, generally and unconditionally, to the personal jurisdiction of the Designated Court. Each of the parties hereto hereby irrevocably waives, and agrees not to assert as a defense, counterclaim or otherwise, in any action or proceeding to enforce an arbitration award rendered pursuant to this Agreement, (a) any claim that it is not personally subject to the jurisdiction of the Designated Court, (b) any claim that it or its property is exempt or immune from the jurisdiction of the Designated Court or from any legal process commenced in such Designated Court (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise), and (c) to the fullest extent permitted by applicable Law, any claim that (i) the suit, action, or proceeding in such Designated Court is brought in an inconvenient forum, (ii) the venue of such suit, action or proceeding is improper, or (iii) such arbitration award may not be enforced in or by such Designated Court.

[Optional Provision (e) Dispute Confidentiality. [In addition to the requirements of Section [insert cross reference to any confidentiality provision],] no party shall directly or indirectly make any disclosure with respect to a Dispute or the resolution of a Dispute, except to such party’s legal counsel, to persons who will be witnesses or experts in connection with an arbitration and to the arbitration panel formulated pursuant to this Section, and except to the extent required by applicable Law. Each of the

Commentary

Provision

parties hereto acknowledges that the other parties hereto shall have no adequate remedy at law for breach of the provisions of this paragraph (e) and the harm to the other parties that will result from the disclosure of a Dispute. Therefore, each party agrees that the other parties shall be entitled to injunctive relief to enforce the provisions of this paragraph (e).]

Section 6.3. Consent to Service of Process. Each of the parties hereto hereby irrevocably and unconditionally consents to service of process in the manner provided for notices in Section ___ and agrees that nothing in this Agreement or any other Transaction Document will affect the right of any party hereto to serve process in any other manner permitted by applicable Law.

Commentary

- This provision sets forth a method of service of process in the event of litigation and reduces the risk that a party will claim that it was not properly served.
- If email notification is permitted by the Notice provision, the draftsperson may wish to consider whether email should be excluded from the permitted forms of service of process.
- If any party is a foreign entity or is not present in New York, the draftsperson should consider providing for an appointment by that party of an agent for service of process in the jurisdiction where disputes are to be brought. Similarly, if a foreign entity or entity not present in New York believes that it will be difficult to be served with process and wishes to use that as leverage, the draftsperson may want to omit this provision.

Provision

Section 6.4. Waiver of Jury Trial. EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY DISPUTE¹¹ IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE IT KNOWINGLY, VOLUNTARILY, INTENTIONALLY, IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY DISPUTE.

Commentary

- The waiver of any jury trial clause is frequently included in complex agreements.
- In examining a waiver of a jury trial provision, courts will evaluate the negotiability of the contract terms, a disparity in bargaining power between the parties, the business acumen of the party opposing the waiver and the conspicuousness of the jury waiver provision in the contract. For this reason, waiver provisions are generally capitalized and/or in large or bold font.
- New York courts generally allow parties to waive by contract a right to a trial by jury except for certain types of claims (e.g., in connection with leases of real property and claims for personal injury or property damage). However, where questions of fraud or unconscionability arise with respect to a contract, a clause waiving a jury trial will be closely scrutinized. Some courts have held that where the validity of a contract containing a jury waiver has been put in question by a defendant, the waiver does not preclude the defendant's having the issue of the contract's validity submitted to a jury. See *D.B. Zwirn Special Opportunities Fund, L.P. v. Brin Inv. Corp.*, 26 Misc. 3d 528, 888 N.Y.S.2d 876 (Sup. Ct. N.Y. Cnty. 2009).
- The scope of the waiver should be coordinated with the language in the choice of law and choice of forum provisions.

¹¹

NTD: This is referencing the term "Dispute" defined in Section 6.2.

Provision

Section 6.5. Specific Performance. The parties agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms and that monetary damages, even if available, would not be an adequate remedy therefor. It is accordingly agreed that the parties shall be entitled to specific performance of the terms hereof, this being in addition to any other remedy to which they are entitled at law or in equity. The parties acknowledge that the awarding of equitable remedies is within the discretion of the applicable court.

Commentary

- Even if the parties acknowledge the availability of specific performance, a court may be unwilling to award equitable relief. *RJE Corp. v. Northville Indus. Corp.*, 198 F. Supp. 2d 249 (E.D.N.Y. 2002), *aff'd*, 329 F.3d 310 (2d Cir. 2003) (applying New York law); *Da Silva v. Musso*, 53 N.Y.2d 543, 428 N.E.2d 382, 444 N.Y.S.2d 50 (1981).
- If one party believes that it is the party likely to obtain specific performance, that party may add provisions that:
 - waive the necessity of posting a bond, which may be a practical impediment to the receipt of a temporary restraining order or preliminary injunction; and
 - a party obtaining an award of specific performance shall also be entitled to its attorneys' fees.

Section 6.6. Remedies Cumulative. The rights and remedies of the parties are cumulative and not alternative.

Section 7. General Enforceability.

Section 7.1. Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

- This provision is useful when the parties are executing separate copies of an agreement, as it may help to prevent a party from claiming that the agreement is not binding because there is no one copy that is signed by all parties.

Provision

Section 7.2. Signatures/E-delivery. A manually signed copy of this Agreement or any other Transaction Documents 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. No legally binding obligation shall be created with respect to a party until such party has delivered or caused to be delivered a manually signed copy of this Agreement.

Commentary

- Electronic or digital signatures are acceptable under New York and federal law. This provision is designed to both (1) permit the delivery of a manual signature by electronic means, and (2) reverse the default rule that a party can be bound by “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” Electronic Signatures in Global and National Commerce Act of 2000, 15 U.S.C. §§ 7001-7031 (2001) (“*E-SIGN*”) and the Electronic Signatures and Records Act of 1999, N.Y. STATE TECH LAW §§ 301-309 (McKinney 2012) (“*ESRA*”).
- E-SIGN and ESRA provide that parties cannot contest the validity of signatures solely because they are electronic. However, parties are not required to accept electronic signatures and may exclude the use of electronic signatures.

Provision

Section 7.3. Reproduction of Documents. This Agreement, the other Transaction Documents, and all certificates and documents relating hereto and thereto, including, without limitation, (i) consents, waivers and modifications that may hereafter be executed, (ii) documents received by each party pursuant hereto, and (iii) financial statements and other information previously or hereafter furnished to each party, may be reproduced by each party by electronic digital storage, computer tapes, photographic, photostatic, optical character recognition, microfilm, microcard, miniature photographic or other similar process, and each party may destroy any original document so reproduced. All parties hereto agree and stipulate that any such reproduction shall be admissible in evidence as the original itself in any judicial, arbitration or administrative proceeding (whether or not the original is in existence and whether or not such reproduction was made by each party in the regular course of business) and that any enlargement, facsimile or further reproduction of such reproduction shall likewise be admissible in evidence.

Commentary

- In many transactions the parties will exchange documents and signature pages by email; thus, arguably, parties may not be able to satisfy the “best evidence rule” to introduce original contracts in the event of a dispute. The purpose of this provision is to prevent that outcome.

Provision

Section 7.4. Force Majeure. No party shall be liable to another party, nor be deemed to have defaulted under or breached this Agreement or any other Transaction Document, for any failure or delay in fulfilling or performing any term of this Agreement or any other Transaction Document due to any of the following causes beyond such party's reasonable control (such causes, "*Force Majeure Events*"):

- (i) acts of God,
- (ii) flood, fire or explosion,
- (iii) war, invasion, riot or other civil unrest,
- (iv) actions, embargoes or blockades in effect on or after the date of this Agreement,
- [*(v) action by any Governmental Authority,^{12]}*
- (vi) national or regional emergency,
- (vii) strikes, labor stoppages or slowdowns or other industrial disturbances,
- (viii) shortage of adequate power or transportation facilities, or
- (ix) any other event that is beyond the reasonable control of such party.

The lack of funds shall not be deemed to be a Force Majeure Event. The party suffering a Force Majeure Event shall give notice within [X] days of the Force Majeure Event to any other party to which performance is owed, stating the period of time the occurrence is expected to continue, and shall use diligent efforts to end the failure or delay and ensure that the effects of such Force Majeure Event are minimized.

Commentary

- Force Majeure clauses are typically seen in contracts for the purchase and sale of goods, and may not be applicable to other types of transactions. Considerations in drafting a Force Majeure clause include whether:
 - the facts and circumstances of the transaction dictate adding or deleting certain events as force majeure events; clause (v) may not be an appropriate Force Majeure event in many circumstances;
 - the party not relying on the force majeure event 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 an independent party (rather than the party relying on the force majeure clause) to determine whether a force majeure event has occurred (particularly those that require technical analysis); and
 - there should be a dispute resolution procedure in the event the parties disagree about the occurrence of a force majeure event.

¹²

NTD: Insert appropriate defined term from the underlying agreement.

Provision

Section 7.5. Severability.

(a) If any provision of this Agreement or any other Transaction Document is determined to be invalid, illegal or unenforceable, the remaining provisions of this Agreement and the other Transaction Documents shall remain in full force, if the essential terms and conditions of this Agreement and the other Transaction Documents for each party remain valid, binding and enforceable. [Furthermore, in lieu of any such invalid or unenforceable term or provision, the parties hereto intend that there shall be added as a part of this Agreement a provision as similar in terms to such invalid or unenforceable provision as may be possible and be valid and enforceable.]

(b) Any provision of this Agreement or any other Transaction Document held to be invalid, illegal or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability without affecting the validity, legality and enforceability of the remaining provisions hereof or thereof; and the invalidity of a particular provision in a particular jurisdiction shall not invalidate such provision in any other jurisdiction.

Commentary

- The purpose of the severability provision is to ensure that if one or more provisions are determined to be invalid, illegal or unenforceable, the agreement as a whole will survive by severing the invalid, illegal or unenforceable provisions from the agreement.
- However, notwithstanding the presence of the severability provision, if the unenforceable provision is not clearly severable from the other parts of an agreement, a court may decide that the contract is unenforceable as a whole.
- New York courts have adopted a common law "rule of reasonableness," whereby a court may reform an unenforceable provision to the extent reasonable under the circumstances, and enforce it as so reformed. *Karpinski v. Aingrasci*, 28 N.Y.2d 45, 268 N.E.2d 751, 320 N.Y.S.2d 1 (1971).