

## THOMSON REUTERS PRACTICAL LAW

## Transportation Agreement (Pro-Shipper)

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*A long-form agreement for the inland transportation of goods by truck, drafted in favor of the customer of transportation services, commonly known as a shipper. This resource, which can also be used by truck transportation service providers (commonly referred to as carriers) for benchmarking purposes, includes key obligations of the carrier and its customer, and contemplates a direct agreement between the carrier and its customer without the involvement of a freight forwarder or other intermediary. This Standard Document has integrated notes with important explanations and drafting and negotiating tips.*

### READ THIS BEFORE USING DOCUMENT

Transportation agreements vary in length and complexity depending on many factors, such as:

- The relationship between the parties.
- The size of the deal.
- Whether the transportation services are tailored for the customer.
- The creditworthiness of the customer.
- The allocation of risk and other responsibilities.

This Standard Document is a long-term transportation agreement for trucking services between a:

- Contract carrier (carrier), which contracts on a for-hire basis (for compensation) to transport goods on behalf of its customer, the shipper, between the locations specified in the agreement.
- Shipper (customer), which:
  - owns or has lawful possession of the goods; and
  - engages the carrier to take possession of and transport the goods between the locations specified in the agreement.

This agreement contemplates that:

- The parties will, periodically throughout the term of this agreement, enter into individual transactions for the shipment of goods.
- Each individual shipment transaction will be evidenced by a corresponding customer's shipment request.

This Standard Document is drafted from the perspective of the shipper, but contains many provisions that are reasonable (and in some cases nonnegotiable) from the perspective of most carriers.

Many established carriers have their own forms of transportation agreements, which contain terms and conditions that heavily favor the carrier. However, many companies have growing shipping requirements and are eager to leverage their shipping volume to negotiate their own more

balanced terms and conditions with the carrier. A shipper can use this form to present terms and conditions to the carrier as either its first reasonable draft of agreement or to counter the carrier's initial draft.

For a standard form of pro-carrier truck transportation agreement, see [Standard Document, Transportation Agreement \(Pro-Carrier\)](#).

## Assumptions

This agreement assumes the following:

- **The deal is large enough to warrant a long-form agreement.** If the size of the deal is relatively small, the parties may decide it is not worth the cost and time it would take to negotiate a long-form transportation agreement. If the deal is small or consists of one or a few shipments, the parties may decide to document the shipment or shipments solely through a short-form transportation agreement, such as the carrier's general terms and conditions.
- **The carrier does not provide common carrier services.** Examples of common carriers include public airlines, bus lines, taxi companies, railroads and cruise ship lines. A common carrier provides transportation services:
  - to the public without discrimination under mandatory pricing under a public tariff; and
  - must carry cargo insurance and demonstrate compliance by filing a form BMC-32 with the FMCSA.
- **The carrier provides contract carrier services.** A contract carrier typically provides for-hire truck transportation services to specific, individual shippers based on private contracts to be entered into between the carrier and each shipper. Contract carriers and shippers negotiate the terms of the transportation agreement, including:
  - the services to be offered;
  - the prices to be charged; and
  - whether the contract carrier must carry cargo insurance.
- **The agreement contemplates that the carrier will provide truck transportation services.** The parties should not use this form if they contemplate the provision or purchase of rail, water-borne, pipeline, or air transportation services, which involve industry practices and legal and practical considerations that are beyond the scope of this resource.
- **The agreement contemplates the inland transportation of goods within the US.** If the goods will be shipped outside of the US or either of the parties is organized or operates in or is located in a foreign jurisdiction, the parties must modify the agreement to comply with applicable laws and international treaties. These include, for example:
  - the Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended), which regulates a carrier's liability in international air shipments; and
  - the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road, as amended), which regulates a carrier's liability in international overland shipments.
- **The customer is not a government entity.** In the US, contracts with the government are more heavily regulated than non-government contracts. Therefore, if the customer is a government entity, the parties must revise this agreement.
- **The parties desire a flexible relationship.** This agreement contemplates that the customer will order, and the carrier will fulfill, any number of spot shipment requests. Therefore, the parties:
  - enter into a non-exclusive arrangement; and
  - have no annual minimum commitments.
- **There are a single carrier and a single customer, and both parties are business entities.** The parties should revise this agreement if there are additional carriers or customers. For example, multiple carriers or customers must determine whether their obligations are [joint](#), [several](#), or [joint and several](#), and amend the agreement accordingly. For an example of a provision for several and joint and several liability, see [Standard Clause, General Contract Clauses: Joint and Several Liability](#).
- **These terms are being used in a business-to-business transaction.** These provisions should not be used for providing transportation services to individual consumers, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.

- **These terms are not industry-specific.** These provisions do not account for any industry-specific practices or federal or state laws, rules, or regulations that may apply to:
  - the transportation of certain goods; or
  - certain types of transportation (such as air or rail freight).

## Bracketed Items

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

## Transportation Agreement

This Transportation Agreement, dated as of [DATE] (this "**Agreement**"), is entered into between [CARRIER NAME], a [STATE OF ORGANIZATION] [TYPE OF ENTITY] ("**Carrier**"), and [CUSTOMER NAME], a [STATE OF ORGANIZATION] [TYPE OF ENTITY] ([on its own behalf and on behalf of its affiliated and subsidiary companies] "**Customer**", and together with Carrier, the "**Parties**", and each, a "**Party**").

WHEREAS, Carrier is engaged in the business of transporting property by motor vehicle in intrastate and interstate trade and desires to furnish to Customer certain motor carrier transportation and related services, as hereinafter more fully described; and

WHEREAS, Customer desires to obtain such transportation and related services from Carrier.

## RECITALS

While not legally required, recitals are used to provide information about the basic background and purpose of the agreement. In this transportation agreement, they provide only a general description of the parties and the transaction. The parties can supplement or revise these recitals to include additional information.

When drafting recitals, the parties should draft them in a way that avoids ambiguity. For example, the parties should not include any language in the recitals that adds legally binding obligations or contradicts the wording contained in an operative provision of the contract.

The parties should also avoid incorporating any language that could be interpreted as a representation or warranty. For example, it is likely harmless for the carrier to agree to include the above language asserting that the carrier is "engaged in the business of transporting property by motor vehicle." However, the carrier should avoid asserting that it is engaged in the business as a "licensed" motor carrier because this could be interpreted as a representation by the carrier that is broader than any representation about its legal status contained in the operative provisions of the agreement.

NOW, THEREFORE, in consideration of the mutual covenants, terms, and conditions set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Definitions. Capitalized terms have the meanings set forth or referred to in this [Section 1](#).

## DEFINITIONS

[Section 1](#) attributes specific meanings to particular words used in the agreement to avoid ambiguity. Some terms are defined in the body of the document and are listed in Section 1 with a cross-reference to the section where the term is defined. After each round of revisions, the parties should review the definitions carefully to see if any terms have been added or deleted or if any cross-references have changed. Consistency should be maintained throughout the document. Once a term is defined, it should not be used without capital letters in other sections of the agreement or to introduce a different word or phrase to mean the same thing (unless the difference is intentional for a broader or otherwise alternative meaning).

**"Action"** means any claim, action, cause of action, demand, lawsuit, arbitration, inquiry, audit, notice of violation, proceeding, litigation, citation, summons, subpoena, or investigation of any nature, civil, criminal, administrative, regulatory, or otherwise, whether at law, in equity, or otherwise.

**"Affiliate"** of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.

## AFFILIATE

Each party should review the different provisions that use this term. For example, a broad definition may be advantageous:

- To a party when used in the context of its right to assign the agreement to its own affiliates.
- In the context of the other party's confidentiality obligations, if those obligations also extend to the receiving party's affiliates.

However, a broad definition is less advantageous when used in the context of the other party's right to assign the agreement to its affiliates or to define the universe of the opposing party's indemnified persons. If appropriate, the parties should consider using different definitions for different purposes, including using the generic term "affiliates" where appropriate.

**"Agreement"** has the meaning set forth in the preamble.

**"Basic Shipment Terms"** means, collectively, any one or more of the following terms specified by Customer in a Shipment Request under [Section 3.1](#): (a) a list of the Goods to be shipped [, including [make/model number/UPC/SKU/[OTHER IDENTIFIER]]]; (b) the quantity of each of the Goods to be shipped; (c) the requested [shipment/delivery] date; (d) Pick-up Location; (e) the billing address; and (f) the Delivery Location. For the avoidance of doubt, the term "Basic Shipment Terms" does not include any general terms or conditions that may be contained in any Bill of Lading or Carrier or Customer documentation.

## BASIC SHIPMENT TERMS

In this pro-carrier agreement, the defined term Basic Shipment Terms functions to:

- Incorporate the necessary individual transaction-specific commercial terms set out in the customer's shipment request into this agreement.
- Expressly exclude other non-commercial terms and conditions that may be included in or attached to the carrier's documentation, or in this reasonable draft, the customer's shipment request.

**"Bill of Lading"** has the meaning set forth in [Section 3.2](#).

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

**"Claim"** means any Action brought against a Person entitled to indemnification under [Section 16](#).

**"Confidential Information"** has the meaning set forth in [Section 13](#).

**"Control"** (and with correlative meanings, the terms "Controlled by" and "under common Control with") means, regarding any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of another Person, whether through the ownership of voting securities, by contract, or otherwise.

**"Delivery Location"** means the street address of the requested destination of the Goods specified in the applicable Shipment Request.

**"Disclosing Party"** has the meaning set forth in [Section 13](#).

**"Dispute"** has the meaning set forth in optional [Section 17.15](#).

## DISPUTE

Parties should include this definition if they include optional [Section 17.15](#).

**"Dispute Notice"** has the meaning set forth in optional [Section 17.15](#).

## DISPUTE NOTICE

Parties should include this definition if they include optional [Section 17.15](#).

**"Early Payment Discount"** has the meaning set forth in [Section 8.3](#).

**"Escalation to Executive Notice"** has the meaning set forth in optional [Section 17.15](#).

## ESCALATION TO EXECUTIVE NOTICE

Parties should include this definition if they include optional [Section 17.15](#).

**"Escalation to Mediation Date"** has the meaning set forth in optional [Section 17.15](#).

## ESCALATION TO MEDIATION DATE

Parties should include this definition if they include optional [Section 17.15](#).

**"Executive"** has the meaning set forth in optional [Section 17.15](#).

## EXECUTIVE

Parties should include this definition if they include optional [Section 17.15](#).

**"Force Majeure Event"** has the meaning set forth in [Section 17.20](#).

**"Goods"** means the goods to be shipped under a Shipment Request that the Carrier accepts under [Section 3.1](#).

**"Governmental Authority"** means any federal, state, local, or foreign government or political subdivision thereof, or any agency or instrumentality of such government or political subdivision, or any self-regulated organization or other non-governmental regulatory authority or quasi-governmental authority (to the extent that the rules, regulations or orders of such organization or authority have the force of Law), or any arbitrator, court, or tribunal of competent jurisdiction.

**"Governmental Order"** means any order, writ, judgment, injunction, decree, stipulation, award, or determination entered by or with any Governmental Authority.

**"Hazardous Materials"** means any material defined as a hazardous material under the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq., as amended, and the regulations of the U.S. Department of Transportation made thereunder, or other similar Laws, or any material, substance, chemical, waste, product, derivative, compound, mixture, solid, liquid, mineral or gas, in each case, whether naturally

occurring or manmade, that is hazardous, acutely hazardous, toxic, or words of similar import or regulatory effect under any Laws relating to pollution (or the cleanup thereof) or the protection of natural resources, endangered or threatened species, human health or safety, or the environment (including ambient air, soil, surface water or groundwater, or subsurface strata), concerning the presence of, exposure to, or the management, manufacture, use, containment, storage, recycling, reclamation, reuse, treatment, generation, discharge, transportation, processing, production, disposal, or remediation of any such materials.

**"Indemnified Party"** has the meaning set forth in Section 16.1.

**"Indemnifying Party"** has the meaning set forth in Section 16.1.

**"Individual Shipment Transaction"** means any Shipment Request that has been accepted by Carrier under [Section 3.1](#).

**"[Initial Term]"** has the meaning set forth in [Section 12.1](#).]

## INITIAL TERM

Parties should include this definition if they include optional [Section 12.2](#).

**"Intellectual Property Rights"** means all industrial and other intellectual property rights comprising or relating to: (i) Patents; (ii) Trademarks; (iii) internet domain names, whether or not Trademarks, registered by any authorized private registrar or Governmental Authority, web addresses, web pages, website, and URLs; (iv) works of authorship, expressions, designs, and design registrations, whether or not copyrightable, including copyrights and copyrightable works, software and firmware, [application programming interfaces, architecture, files, records, schematics,] data, data files, and databases and other specifications and documentation; (v) Trade Secrets; [(vi) semiconductor chips, mask works and the like;] and [(vi)/(vii)] all industrial and other intellectual property rights, and all rights, interests and protections that are associated with, equivalent or similar to, or required for the exercise of, any of the foregoing, however arising, in each case whether registered or unregistered and including all registrations and applications for, and renewals or extensions of, such rights or forms of protection under the Laws of any jurisdiction throughout in any part of the world.]]

## INTELLECTUAL PROPERTY RIGHTS

Parties should include this definition if they include [Section 11](#).

Unless the carrier is being retained to re-design the customer's logistics network or provide some other highly customized services, it is unlikely that the carrier will provide any information other than rates and service level terms that involve the intellectual property rights of the carrier.

The carrier might consider including a broadly defined term, which offers the carrier more protection under [Section 13](#), only if the services include customized services that involve the disclosure of or access to the carrier's proprietary technology. A broadly defined term, however, may expose the carrier to greater liability if it decides to include a dedicated intellectual property indemnification.

For an overview of the various types of intellectual property rights arising under US law, see [Practice Note, Intellectual Property: Overview](#).

**"Law"** means any statute, law, ordinance, regulation, rule, code, constitution, treaty, common law, Governmental Order, or other requirement or rule of law of any Governmental Authority.

**"Losses"** has the meaning set forth in [Section 16](#).

**"Notice"** has the meaning set forth in [Section 17.4](#).

**"Party"** has the meaning set forth in the preamble to this Agreement.

**"Patents"** means all patents (including all reissues, divisionals, provisionals, continuations and continuations-in-part, re-examinations, renewals, substitutions, and extensions thereof), patent applications, and other patent rights and any other Governmental Authority-issued indicia of invention ownership (including inventor's certificates, petty patents, and patent utility models).]

"**Payment Failure**" has the meaning set forth in [Section 12.4\(a\)](#).

"**Permitted Subcontractor**" has the meaning set forth in [Section 2.2](#).

"**Person**" means any individual, partnership, corporation, trust, limited liability entity, unincorporated organization, association, Governmental Authority, or any other entity.

"**Personnel**" means agents, employees or Permitted Subcontractors, if any, engaged or appointed by Carrier or Customer.

"**Pick-up Location**" means the street address of the location specified in the applicable Shipment Request where Customer requests that Carrier takes possession of the Goods in order to render the Transportation Services.

"**Price**" has the meaning set forth in [Section 8.1](#).

"**Receiving Party**" has the meaning set forth in [Section 13](#).

"**[Renewal Term]**" has the meaning set forth in [Section 12.2](#).]

## RENEWAL TERM

Parties should include this definition if they include optional [Section 12.2](#).

"**Representatives**" means a Party's Affiliates, employees, officers, directors, partners, shareholders, agents, attorneys, third-party advisors, successors, and permitted assigns.

"**Shipment**" means the shipment of Goods made under an Individual Shipment Transaction.

"**Shipment Request**" means Customer's shipment request or purchase order for transportation services issued to Carrier hereunder, including all terms and conditions attached to, or incorporated into, such shipment request.

"**Survival Period**" has the meaning set forth in [Section 17.3](#).

"**Term**" has the meaning set forth in [Section 12.2](#).

"**Trademarks**" means all rights in and to US and foreign trademarks, service marks, trade dress, trade names, brand names, logos, trade dress, corporate names, and domain names, and other similar designations of source, sponsorship, association, or origin, together with the goodwill symbolized by any of the foregoing, in each case whether registered or unregistered and including all registrations and applications for, and renewals and extensions of, such rights and all similar or equivalent rights or forms of protection in any part of the world.]

"**Trade Secrets**" means all inventions, discoveries, trade secrets, business and technical information and know-how, databases, data collections, patent disclosures, and other confidential and proprietary information and all rights therein.]

"**Transportation Services**" means delivery and inland truck [parcel/less-than-truckload/full truckload] transportation services, including, but not limited to, the collection, loading, transportation[, customs clearance where applicable], unloading, and delivery of the Shipment from the Pick-up Location to the Delivery Location.

## TRANSPORTATION SERVICES

This Standard Document sets out a basic definition of the services to be provided by the carrier. The parties must revise this definition (or use a different form of agreement) if the carrier will provide additional or specialized services, for example:

- Temporary warehouse services.
- Rail transportation.
- Air transportation.
- Waterway transportation.

- Pipeline transportation.
- Refrigerated transportation.
- Expedited service.

If the parties want to further specify the details of the transportation services, they can set them out in a schedule to be attached to the agreement. Any description should be clear and unambiguous. While service providers generally prefer to limit the scope of any statements about the services to be performed because such statements can be interpreted as an express warranty, most service providers recognize that customers typically insist on a documenting clear and unambiguous deliverables, whether it be in the body of the agreement or set out in a schedule to be attached to the body of the agreement. However, it may not be necessary to include a schedule of services if the parties use this Standard Document to document their agreement for the provision of "plain vanilla" transportation services.

Carriers generally should be careful not to readily agree to include covenants to comply with licensing or hazardous materials handling requirements in any schedule of services. It may be more prudent to include compliance covenants with the other covenants in the body of the agreement to ensure:

- Drafting consistency, including the consistent application of qualifiers such as materiality and knowledge.
- That whatever limitation of liability negotiated by the carrier for the carrier's other obligations also apply to the compliance covenants.

This Standard Document contemplates that the carrier will provide general inland truck transportation services, but the parties can select from the bracketed language to specify if the carrier will only provide:

- Parcel transportation services. Parcel carriers such as UPS and FedEx usually handle small packages that do not exceed their specified weight limit, which is typically less than 150 pounds.
- Less-than-truckload (LTL) transportation services (see [Less-Than-Truckload Services](#)).
- Full truckload (FTL) transportation services (see [Full Truckload Services](#)).

This Standard Document contemplates transportation services within the US, but the parties can add the bracketed language if the carrier will provide customs clearance services for imported goods at the port of entry into the US before engaging in inland transportation of the goods to the specified destination in the US.

## **Less-Than-Truckload Services**

LTL carriers move goods from many different customers on one truck. LTL carriers collect shipments that:

- Weigh more than their specified maximum parcel weight but less than their specified maximum LTL limit, typically 20,000 pounds.
- May consist of large machinery or multiple parcels stacked together on a pallet or multiple pallets.
- Do not occupy an entire truck container.
- Are locally picked up and unloaded at regional terminals, where the shipments are weighed, sorted, and consolidated with other shipments destined for the same geographic area.
- Are loaded together with other shipments and delivered to regional terminals, where they are unloaded, sorted, and loaded onto trucks for delivery to their final destinations.

## **Full Truckload Services**

A FTL carrier moves full containers or trucks of one product or products from one shipper to its final destination. The goods are typically loaded onto a large semi-trailer, where they remain until the shipment reaches its final destination. FTL shipping is only economical if the shipper is able to ship a tremendous amount of product at one time.

## **2. Agreement to Transport Goods.**

### **2.1 Transportation Services.**



(a) Subject to [Section 8](#), Carrier shall provide, at its sole cost and expense, Transportation Services from time to time during the Term in the form of Individual Shipment Transactions.

## PROVISION OF TRANSPORTATION SERVICES

In this Standard Document, the customer engages the carrier to provide transportation services for multiple shipments over the term of the agreement. This Standard Document specifies the basic order and acceptance procedure for individual shipments in [Section 3](#).

This Standard Document acknowledges that carriers employ a variety of order and acceptance procedures, which may include:

- Manually implemented systems utilizing the customer's shipment request and carrier's acceptances.
- Either the carrier's or customer's electronic data platform.

When the carrier agrees to provide the transportation services at its cost and expense, it is agreeing to assume all costs and expenses incident to the transportation of shipments. This includes all costs of fuel and insurance, as well as incident to or arising out of the maintenance, repair or operation of its trucks and other equipment. If there are any out-of-pocket or other costs that are not covered as overhead by the purchase price of the transportation services, and which the carrier would like to pass along to the customer (for example, any fuel surcharge), it must be sure to clarify the allocation in [Section 8](#).

(b) Carrier shall provide all necessary equipment, maintained in good repair, to enable Carrier to perform the Transportation Services safely. Carrier shall monitor compliance with the Federal Motor Carrier Safety Administration's Compliance, Safety and Accountability safety program (including amendments thereto), and agrees to source transportation resources in a manner that promotes the highest standards of public safety. Customer may suspend some or all Transportation Services if Customer [reasonably] determines that Carrier's equipment poses a safety hazard.

## SAFETY MAINTENANCE

The customer should expect the carrier to object to the third sentence, which allows the customer the discretion to suspend shipments due to safety issues.

### 2.2 Subcontractors.

(a) Carrier may [subject to Customer's prior written consent [which consent shall not be unreasonably withheld or delayed/which consent may be given or withheld in Customer's sole discretion,]] subcontract with [any Person, other than Carrier's employees/the persons set forth on Exhibit [EXHIBIT REFERENCE]] to perform Transportation Services for Customer (each such [approved] subcontractor or other third party, a "**Permitted Subcontractor**").

## SELECTION OF SUBCONTRACTORS

The parties must negotiate:

- Whether to allow the carrier to subcontract some or all of the transportation services.
- If the parties allow the carrier to subcontract:
  - how much discretion the carrier has in its choice of subcontractor; and
  - the conditions that must be satisfied.

In an agreement for the provision of generic transportation services, many customers do not have an issue if the carrier subcontracts part or all of the transportation services, provided that the carrier remains liable to the customer for subpar performance, for example,

by including [Section 2.2\(c\)](#). In some cases, transportation customers are satisfied if the carrier limits any subcontracting to a preselected list of subcontractors.

Subcontracting is riskier when the customer retains the carrier to provide specialized or customized services, for example, the transportation of hazardous materials, time-sensitive goods, or high-value-added goods like automobiles. In this case, the customer should consider whether to negotiate either to prohibit subcontracting or to restrict subcontracting to allow the carrier to subcontract only if specific conditions are met, for example:

- Receipt of written consent from, or delivery of notice to, the customer.
- Selection of subcontractors with a certain degree of care.
- Selection of subcontractors that have the requisite skills and equipment to perform any subcontracted obligations in accordance with the terms of the transportation agreement.
- Entry into a subcontract with terms that are back-to-back with the main contract.
- Obligation to re-source business away from any permitted subcontractor that demonstrates a material decline or degradation in Federal Motor Carrier Safety Administration's Compliance, Safety, Accountability (CSA) safety program safety ratings.
- Notification of the customer in the event of a material decline or degradation in CSA safety ratings for any permitted subcontractor.

For more information about subcontracting and a sample subcontracting provision, see [Standard Clause, General Contract Clauses: Subcontracting](#).

(b) Prior to the commencement of any work by any subcontractor, Carrier shall enter into a written agreement with such subcontractor that binds the subcontractor to terms that are at least as protective of the rights and information of Customer under [Section[s] [SECTION REFERENCES] of] this Agreement.

## SUBCONTRACT BACK-TO-BACK WITH TRANSPORTATION CONTRACT

This provision conditions subcontracting on coordination of certain terms of the subcontract and the main transportation agreement. This is referred to as a "back-to-back" condition. The goal of a back-to-back condition is to avoid:

- Leaving critical provisions of the transportation contract out of the subcontract.
- Creating conflicts between the terms of the subcontract and the terms of the transportation contract.

The parties can apply the back-to-back condition to all terms of the contract or can limit the condition to only specific key provisions, such as those relating to:

- Key covenants and obligations regarding:
  - the scope and quality of services;
  - the provision of properly licensed drivers and other personnel necessary to perform the services;
  - the provision, operation, and maintenance of all facilities, motor vehicles, trailers, and related equipment necessary to perform the services; and
  - confidentiality.
- Contractual remedies, including:
  - indemnification; and
  - limitation of liabilities.

(c) Carrier's engagement of a Permitted Subcontractor does not relieve Carrier of its obligations under this Agreement. Carrier shall remain fully responsible for the performance of each such Permitted Subcontractor and its employees and for their compliance with all of the

terms and conditions of this Agreement as if they were Carrier's own employees. Nothing contained in this Agreement creates any contractual relationship between Customer and any subcontractor.

## LIABILITY OF CARRIER

This provision affirms that, to the extent the carrier has the right to subcontract, it assumes complete responsibility for the actions of, and payments to, any subcontractors. This pro-shipper provision actually reflects a commonly accepted principal in subcontracting, and including this provision can provide helpful clarification of the parties' intent in the event of a future dispute on the matter.

### 2.3 Relationship of the Parties.

(a) Nothing in this Agreement creates any agency, joint venture, partnership, or other form of joint enterprise, employment or fiduciary relationship between the Parties. Carrier is an independent contractor under this Agreement. Neither Party has any express or implied right or authority to assume or create any obligations on behalf of or in the name of the other Party or to bind the other Party to any contract, agreement, or undertaking with any third party.

(b) Carrier shall have sole and exclusive control over the manner in which Carrier Personnel perform the Transportation Services. Customer acknowledges that Carrier Personnel are deemed employees or subcontractors of Carrier only and are subject to employment and engagement, discharge, discipline and control, solely and exclusively by Carrier.

## RELATIONSHIP OF THE PARTIES

This clause aims to minimize the risk of an agreement creating an unwanted employment, partnership, joint venture, or agency relationship between the parties. For more information about drafting and negotiating relationship of the parties provisions, see [Standard Clause, General Contract Clauses: Relationship of the Parties](#).

2.4 No Annual Minimum Commitment. The Parties agree that Customer is not obligated to purchase any minimum amount of Transportation Services from Carrier under this Agreement.

## NO ANNUAL MINIMUM COMMITMENT

This Standard Document contemplates the provision of transportation services by the carrier to the customer on a non-exclusive basis where:

- The customer is free to purchase transportation services from other carriers.
- The carrier is free to provide transportation services to other customers.

Exclusive arrangements can have antitrust law implications. For more information, see [Practice Note, US Antitrust Laws: Overview](#).

### 3. Shipment Request Procedure.

## SHIPMENT REQUEST PROCEDURE

This agreement includes provisions that address:

- The process for requesting individual shipments and the carrier's right to reject these requests in certain situations.
- The terms under which the goods are to be shipped.

- The carrier's rights and the customer's remedies for any shipping delays or cancellations.
- The customer's obligation to inspect the goods and to make any claims for damaged goods within a defined period of time.

The terms provided in [Section 3](#) are illustrative and should be tailored to reflect the customer's operational needs.

**3.1 Shipment Requests.** Customer shall initiate all Shipment Requests in written form via facsimile or e-mail. Carrier's acceptance of Shipment and issuance of a receipt for that Shipment shall serve as Carrier's acknowledgement that its Transportation Services are governed by the terms of this Agreement.

## SHIPMENT REQUESTS

The parties should include clear instructions on how shipment requests are to be delivered. While some companies prefer to use traditional methods of delivery, such as US mail, facsimile or e-mail, others now use electronic systems and software tools to manage order submission (for example, electronic data interchange (EDI)). If the parties want to use EDI instead of the more traditional methods, they must confirm that they have compatible systems and revise this provision. Furthermore, they should enter into an electronic data interchange agreement, setting out the:

- Basis on which the parties will exchange electronic messages.
- Circumstances in which such exchanges will result in an enforceable contract.

The second sentence of [Section 3.1](#) reinforces the concept that the terms and conditions of this agreement are intended to prevail over the provisions included in the customer's shipment request. Most commercial agreements, including transportation agreements, also contain an integration or entire agreement provision, such as the provision set out in [Section 17.2](#), and the parties should ensure that these provisions are drafted consistently with each other.

### Carrier's Right to Reject Shipment Requests

This pro-customer Standard Document does not give the carrier the right to reject shipment requests. The customer can expect the carrier to negotiate the right to accept or reject shipment requests. If the customer agrees to give the carrier the right to reject shipment requests, it should negotiate to restrict the carrier's discretion based on objective criteria, for example:

- The customer's credit status.
- The size of the request.
- Whether the carrier has the capacity.

In addition, the customer may want to require the carrier to:

- Accept the shipment request within a certain period of time.
- Notify the customer in writing of any rejection or cancellation within a certain period of time.

The customer may also try to negotiate materiality and other qualifications to the carrier's right to reject. For more information on materiality and other qualifiers, see [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Limiting the Scope and Effect of Covenants and Rights](#).

For a sample provision giving the carrier the right to reject shipment requests, see [Standard Document, Transportation Agreement \(Pro-Carrier\): Section 3.2](#).

### 3.2 Bills of Lading and Delivery Receipts.

(a) Each Shipment under this Agreement shall be evidenced by a delivery receipt in the form specified by Customer, which shall be signed by Carrier or its agent or employee showing the kind and quantity of Goods received by Carrier at the Pick-up Location, but the absence or loss of such receipt shall not relieve Carrier of its obligations and responsibilities under this Agreement.

## PICK-UP LOCATION DELIVERY RECEIPT

This provision requires the carrier to give to the customer a receipt for all property received and accepted by the carrier for transportation under the agreement. The carrier will likely insist that the agreement include language that states that any such receipt be prima facie evidence of receipt of such property in good order and condition, unless otherwise noted upon the face of the receipt.

(b) In the event that Carrier elects to use a bill of lading, manifest, or other form of freight receipt or contract (collectively, a "**Bill of Lading**"), any terms and conditions of such Bill of Lading shall be subject to [Section 3.3](#).

## BILL OF LADING

In many cases, the parties will also rely on a bill of lading to provide evidence of the goods' delivery.

The carrier or its agent signs the bill of lading and issues it to the shipper. The shipper, who is the consignor, then typically sends the consignee or its agent the bill of lading through mail or another means of communication.

This provision avoids confusion or conflict by stating that any bill of lading used in the transaction is subordinate to the provisions of the agreement because parties that enter into transportation arrangements frequently use pre-printed bills of lading that contain similar terms and conditions that are found in long-form transportation contracts.

For more information about bills of lading, see [Practice Note, Bills of Lading](#).

(c) Upon delivery of each Shipment to the corresponding Delivery Location, Carrier shall obtain a delivery receipt, in a form specified by Customer, showing the kind and quantity of Goods delivered to the recipient of such Shipment at the Delivery Location and the time of such delivery, and Carrier shall cause such receipt to be signed by such recipient or its agent or employee at such destination.

## DELIVERY LOCATION DELIVERY RECEIPT

This provision requires that the carrier obtain a delivery receipt from the recipient of the shipment, in a form specified by the customer, showing the kind and quantity of goods delivered to the recipient at the delivery location specified in the basic shipment terms, as well as the time of such delivery.

**3.3 Terms of Agreement Prevail Over Carrier's Documentation.** The Parties intend for the express terms and conditions contained in this Agreement (including any Schedules and Exhibits hereto) and the Basic Shipment Terms contained in the applicable Shipment Request to exclusively govern and control each of the Parties' respective rights and obligations regarding the subject matter of this Agreement, and this Agreement is expressly limited to such terms and conditions. Without limitation of the foregoing, any additional, contrary or different terms contained in any Shipment Request, Bill of Lading or other request or communication by Carrier pertaining to the Transportation Services, and any attempt to modify, supersede, supplement or otherwise alter this Agreement, will not modify this Agreement or be binding on the Parties unless such terms have been fully approved in a signed writing by authorized Representatives of both Parties.

## TERMS OF AGREEMENT PREVAIL OVER CARRIER'S DOCUMENTATION

In a one-off or spot-buy commercial transaction (including the provision of transportation services) where the parties are relying solely on price quotations, or carrier or customer documentation, each party may use its own standard pro-party terms of sale. If both parties impose their own separate standard terms into the contract, difficulties arise in determining which terms prevail.

This conflict is known in sale of goods transaction as the battle of the forms, but is also prevalent in service transactions, including transportation transactions. When negotiating a master transportation agreement such as this Standard Document, the parties commonly

aim to avoid this conflict by:

- Restricting all contractual terms to those contained in the master agreement.
- Limiting the operative terms of each party's standard terms and conditions, for example, the bill of lading to order-specific and other related ministerial provisions.

This pro-shipper form aims to be reasonable by giving the customer the opportunity to anticipate the carrier's desire to clarify that the agreement not only prevails over any carrier documentation, but also prevails over any customer documentation, such as the customer's shipment request.

In addition to including a standard entire agreement provision (see [Section 17.2](#)), this Standard Document includes language stating that the agreement of the parties is expressly limited to:

- The terms and conditions of the written contract and its attached schedules and exhibits.
- The Basic Shipment Terms, which are limited to:
  - identifying the goods to be shipped;
  - stating the quantity of goods to be shipped;
  - identifying the buyer's requested shipment or delivery date;
  - identifying the street address for the pick up of the goods; and
  - identifying the street address for the delivery of the goods.

#### 4. Shipment and Delivery.

4.1 Shipment and Delivery. [Unless otherwise expressly agreed to by the Parties in any Individual Shipment Transaction,] Carrier shall deliver the Shipment to the Delivery Location [[by/no later than [NUMBER] days after] the delivery date specified in the Basic Shipment Terms]. [Any time quoted by Carrier for [pick-up and] delivery [are/is an] estimate[s] only.]

[If Carrier anticipates that it will not be able to provide any portion of the Transportation Services on the agreed upon schedule, Carrier shall immediately notify Customer of the delay in delivery and the proposed revised delivery schedule, which shall not be deemed a waiver by Customer of any available remedies with respect to the delay in delivery.]

### SHIPMENT AND DELIVERY

In this pro-shipper agreement, the customer has the option to negotiate a provision imposing on the carrier an obligation to deliver the shipment by the delivery date specified in the basic shipment terms. By imposing a deadline for delivery, the customer effectively renders any delay of delivery a breach of agreement.

To facilitate contract negotiations, the customer may choose to soften the provision by:

- Insisting on a deadline for delivery but adding a grace period, although adding this type of qualifier:
  - effectively grants the carrier the implicit right to delay the actual deadline for delivery without penalty until the end of the specified grace period; and
  - may increase the risk of internal drafting inconsistencies as this provision relates to any other provision in the agreement containing a qualifier, for example, the agreement's indemnification provision.
- Adding the bracketed paragraph requiring the carrier to notify the customer of any delays and giving the carrier an opportunity to submit a new revised schedule.

Unless the customer agrees to pay a premium for expedited delivery service, the carrier is highly unlikely to agree to:

- Be bound to an absolute deadline for pick up or delivery.
- Make the failure to meet the deadline a breach of contract.

- Make the time of pick up or delivery to be of the essence.

For more information about time of the essence, see [Practice Note, Time of the Essence in Commercial Contracts](#). For a sample time of the essence provision, see [Standard Clause, General Contract Clauses: Time of the Essence](#).

Rather, the carrier typically insists that:

- Any times quoted for pick-up and delivery are estimates only.
- It is not liable for any delay in delivery, whether caused by:
  - factors within its control; or
  - *force majeure* events.

The parties should carefully review [Section 17.20](#) because any event listed in that provision excuses the carrier from delayed performance.

If the customer successfully negotiates an absolute obligation to deliver the goods by the requested delivery date and provide that late delivery is a breach, the carrier should mitigate its exposure by:

- Negotiating a grace period for delivery.
- Limiting its liability.
- Negotiating to liquidate damages based on either:
  - a fixed dollar amount for each specified period of delay; or
  - a percentage of the service fee for the individual shipment transaction.

For more information about liquidated damages, see [Standard Clause, General Contract Clauses: Liquidated Damages](#).

- Shifting the risk to the customer of any delay caused by acts or omissions of the customer, including the customer's failure or delay to have the goods available for shipment at the designated pick-up location.

If the customer cannot negotiate an absolute obligation to deliver the goods by the requested delivery date and provide that late delivery is a breach, the customer may want to:

- Require expedited or premium shipment (at the carrier's sole cost) for late deliveries.
- Insist on including the right to cancel any shipment that the carrier has not picked up by the specified date.
- If the customer negotiates the right to cancel, resist making cancellation the sole remedy for late delivery.

In any case, the customer may want to:

- Include a contractual termination right if there are a stated number of late deliveries during a specified time period.
- Narrow the scope of the carrier's *force majeure* rights in [Section 17.20](#).

For more information about *force majeure*, see [Practice Note, Force Majeure Clauses: Key Issues](#). For a sample *force majeure* provision, see [Standard Clause, General Contract Clauses: Force Majeure](#).

**4.2 Customer Responsibilities.** Customer shall properly pack and mark the Goods and provide Carrier with shipment documentation showing the purchase order number, Carrier's identification number for the Individual Shipment Transaction, the quantity in the Shipment (including weight, volume, and the number of cartons or pallets), consignee's name and the country of origin.

## CUSTOMER RESPONSIBILITIES

This Standard Document aims to be reasonable by including a provision that sets out the customer's minimum responsibility to properly pack and document the goods for shipment. The customer should expect the carrier to negotiate stricter customer responsibilities, for example, the obligation to give the carrier prior notice if the goods contain any hazardous or dangerous materials.

Other types of restrictions and requirements the carrier might negotiate include, for example:

- Weight restrictions.
- Volume restrictions.
- Value restrictions.
- Restrictions on the types of goods shipped, for example:
  - hazardous materials;
  - perishable goods;
  - temperature-sensitive goods;
  - liquids; or
  - goods that might taint other goods being shipped.
- Packaging requirements relating to, for example:
  - labelling;
  - shrink-wrapping; or
  - palletization.

## 5. Risk of Loss.

5.1 Carrier Bears Risk of Loss. Carrier shall be liable to Customer for the full actual loss, damage or injury to the Goods occurring while in the custody, possession or control of Carrier, or resulting from Carrier's performance of or failure to perform the Transportation Services, incurred by Customer as a result thereof; provided, however, that Carrier shall not be liable for loss of or damage or injury to the Goods if such loss, damage or injury was caused by any [Force Majeure Event, except [LIST OF EXCEPTIONS]/acts of God, flood, fire, earthquake or explosion, war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest], or [was solely/to the extent] the fault of Customer.]

### CARRIER BEARS RISK OF LOSS

In this provision, the carrier undertakes to bear the entire risk of loss, damage or injury to the goods.

Since the carrier bears the risk of loss, it must compensate the customer for any loss either:

- Directly.
- Through the proceeds of any cargo insurance maintained by the carrier under [Section 6.1\(b\)](#).

The bracketed language anticipates that the carrier will attempt to limit its liability by excluding loss, damage or injury resulting from acts beyond its control. The parties can define the acts beyond the carrier's control either by:

- Referencing to the definition of Force Majeure Event.
- Listing the acts specifically.

If the parties define the acts beyond the carrier's control by reference to the definition of Force Majeure Event, the customer must consider whether to list any exceptions because the customer may not want all of the events that excuse the carrier's performance under [Section 17.20](#) to exculpate the carrier from liability for risk of loss. Because this provision purports to make the carrier responsible for all losses, the carrier should review this provision together any provisions in this agreement that purport to limit the liability of the parties.

The parties to a transportation agreement sometimes require that all liability standards and burdens of proof be governed by the common law applicable to common carriers and by the Carmack Amendment to the Interstate Commerce Act (Carmack Amendment) ([49 U.S.C. § 14706](#)), which governs the liability of carriers under bills of lading. If the parties decide to use the Carmack Amendment as a benchmark,



the customer should include a provision that states that the terms and conditions of the agreement prevail in the event that the agreement calls for a higher degree of responsibility.

If the carrier has great negotiating power, the customer should, before agreeing to eliminate or dilute its rights under this provision, research applicable common law and statutory law to determine the extent the carrier bears the risk of loss:

- If the parties do not include this provision.
- Even if the carrier attempts to shift some or all of the risk of loss to the customer.

### Allocation of Risk of Loss Between the Customer and the Consignee

This [Section 5](#) allocates the risk of loss between the carrier and its customer, the shipper. Note that the shipper (typically a seller of goods) and the consignee (typically a buyer of goods) allocate the risk of loss between themselves in the sale of goods agreement by either:

- Specifying the commercial terms that define when risk of loss transfers from the seller to the buyer.
- Overriding the commercial terms relating to risk of loss by separately specifying when risk of loss transfers from the seller to the buyer.

For more information about allocation of risk of loss between the seller and customer of goods, see [Standard Documents, Sale of Goods Agreement \(Pro-Buyer\): Drafting Note: Title and Risk of Loss](#) and [General Purchase Order Terms and Conditions \(Pro-Buyer\): Drafting Note: Shipping Terms](#). For a sample risk of loss provision, see [Standard Clause, General Contract Clauses: Risk of Loss](#).

5.2 Loss Amount. Subject to [Section 5.1](#), if a Shipment or any part thereof is lost, damaged, or injured, Carrier shall pay to Customer the price charged by Customer to its customers for the kind and quantity of Goods lost, damaged, or injured and all taxes, fees, and other charges of any kind or nature which Customer may have paid or may be required to pay or collect in respect of such Goods or their manufacture, storage, distribution, transportation, or sale. Customer shall deduct from any invoice to Carrier the reasonable salvage value of any damaged Goods that have been returned to Customer; provided, however, that Customer shall not be obligated to make any such deduction for, or to surrender to Carrier, any Shipment or portion thereof which Customer has destroyed or agrees to destroy because[, pursuant to the provisions of any applicable Law or any written or unwritten trade or industry standard or practice/in Customer's [sole/reasonable] judgment], the Goods have been rendered unfit or unsuitable for sale, use, or consumption due to spoilage, contamination, or adulteration in transit or a reasonable suspicion thereof.

## LOSS AMOUNT

By requiring the carrier to reimburse the customer the gross sales amount to downstream customers, including sales tax and other fees, this pro-customer provision essentially requires the carrier to reimburse the customer for the lost profits that a sale of the goods would have generated had the goods not been lost, damaged, or injured. The carrier will likely negotiate to reduce the amount of its exposure, for example, by negotiating not to be responsible to reimburse the customer for the lost profit portion.

If the carrier agrees to reimburse the customer for losses, it should negotiate that the reimbursement is the customer's exclusive remedy for the loss, and exclude any language that provides that the reimbursement is:

- Cumulative and in addition to any other rights or remedies provided by law or equity.
- Without prejudice to any other rights or remedies provided by law or equity.

The carrier should also include a carve-out in [Section 17.10](#) that confirms the exclusive nature of the customer's remedy under [Section 5.2](#).

5.3 Claim Procedure. Customer shall submit to Carrier a written claim for loss, damage, or injury to any Shipment within [NUMBER] days after delivery at the Delivery Location of the Shipment with respect to which such claim is made or, in case of failure to make such delivery, within [NUMBER] months after a reasonable time for delivery has elapsed. Carrier agrees to pay each such claim within [NUMBER] days of its receipt thereof or, within such period, to notify Customer in writing that such claim is disallowed and setting forth in reasonable detail the reasons for such disallowance.

[This provision shall survive the expiration or earlier termination of this Agreement for a period of [NUMBER] months after such expiration or termination. Notwithstanding any right under any applicable statute of limitations to bring a claim under this [Section 5](#), no Action based on or arising in any way out of this provision may be brought by either Party after the expiration of the applicable survival or other period set forth in this provision and the Parties waive the right to file any such Action after the expiration of the applicable survival or other period.]]

Note: [Claim Procedure](#)

## 6. [Insurance](#).

6.1 [Requirement to Obtain Insurance](#). Carrier shall procure and keep in force continuously [during the Term] the following types of insurance:

### REQUIREMENT TO OBTAIN INSURANCE

Insurance coverage enables:

- The carrier to mitigate its financial exposure to the specified risk by shifting the risk to its insurer, in exchange for an insurance premium that usually represents a fraction of the total coverage the policy provides.
- The customer to limit its risk that the carrier does not have the financial capacity to cover its liabilities under the contract.

This Standard Document assumes that the carrier is a contract carrier, which is not required to maintain all types of insurance. However, this Standard Document aims to be reasonable by imposing the contractual requirement that the carrier procure and maintain at least:

- Liability insurance (see [Section 6.1\(a\)](#)).
- Property insurance (see [Section 6.1\(b\)](#).)

A customer that has great negotiating leverage can try to negotiate that the carrier maintain all or some insurance coverages for longer than the term of the agreement.

The provision should specify the types of insurance coverage and coverage minimums of the required insurance policies. The customer can also try to negotiate the parameters of some of the other important terms and conditions of the required insurance policies. For example, the customer should review the amount of any deductible or self-insurance retention because the customer will rely on the creditworthiness of the carrier, rather than the insurance company, to fulfill the obligation pay any losses covered by a deductible or self-insurance retention (see [Deductibles and Self-Insured Retentions](#)).

The carrier should determine the appropriate types of insurance coverage and policy limits for a particular transaction in consultation with its risk management department and insurance specialists. When drafting and negotiating this provision, the carrier should consider its respective transaction-based risks. A carrier with great negotiating leverage can negotiate to self-insure many of the risks covered by the third-party insurance policies required by this provision (see [Self-Insurance](#)).

### Deductibles and Self-Insured Retentions

Primary insurance policies typically contain either a deductible or self-insured retention (SIR) provision. These provisions initially shift the responsibility back to the policyholder (the carrier) for a specified amount of the insured loss, by requiring the policyholder to pay or otherwise satisfy the specified initial amount before the insurance company will be liable under the policy. Although both shift a portion of a covered loss back to the policyholder, a deductible and SIR differ significantly regarding the total amount of coverage provided by a policy's:

- **Deductibles.** A policy that has a deductible reduces the total amount of coverage provided by the policy by the amount of the deductible. For example, an insurance policy providing \$200,000 in coverage with a \$10,000 deductible would cover \$190,000 worth of any loss suffered by the policyholder in excess of the \$10,000 deductible.
- **SIRs.** A SIR does not reduce policy limits, but must be satisfied before the policy limits can be tapped. A policy that has a SIR requires the policyholder to incur a loss in excess of the SIR amount before coverage is triggered, but will then cover up to the full amount of coverage. For example, a \$200,000 insurance policy with a \$10,000 SIR would provide a full \$200,000 worth of coverage after the policyholder had paid \$10,000 to satisfy the SIR.

Because the customer relies on the creditability of the transportation service provider, rather than the insurance company, to pay the amount of any covered losses up to the applicable deductible or SIR, the customer can negotiate the right to approve the amount of the deductible or SIR. For example, the customer can negotiate the right to approve any deductible or SIR in excess of a specified percentage (for example, 5% of the aggregate limit of insurance).

## Other Insurance Coverages

In addition to the contractual obligation to maintain liability insurance and property insurance, the customer can also negotiate other insurance coverages, for example:

- **Workers' compensation.** For an optional workers' compensation provision, see [Section 6.1\(c\)](#).
- **Automobile insurance.** For an optional automobile insurance provision, see [Section 6.1\(d\)](#).
- **Umbrella (excess) liability insurance.** For an optional umbrella (excess) liability insurance provision, see [Section 6.1\(e\)](#).

## Self-Insurance

The carrier can negotiate to retain the right to self-insure all or part of the insurance required under the agreement. Self-insurance is a risk management method in which the insured, in this case, the carrier, sets aside the specified amount of money to satisfy its insurance obligations to third parties, in this case, the customer. In many situations, the parties to a commercial transaction agree to some combination of third party provided "commercial" insurance and self-insurance, typically:

- Allowing the insured to self-insure the predictable losses.
- Requiring the insured to purchase commercial insurance for losses in excess of the retained amounts.

The parties should research federal and state law to determine the types of losses that can be self-insured. For a sample self-insurance provision in a transportation agreement, see [Standard Document, Transportation Agreement \(Pro-Carrier\): Section 7.3](#).

(a) Commercial general liability insurance, including blanket contractual coverage, for bodily injury and property damage in the amount of US\$[AMOUNT] combined single limit per occurrence.

## LIABILITY INSURANCE

Corporate policyholders like carriers commonly purchase commercial general liability (CGL) insurance to cover liabilities to third parties like the customer resulting from the carrier's normal business operations, including:

- Property damage.
- Bodily injury.
- Advertising injury.

(b) Primary cargo insurance in an amount equal to the full value of the maximum quantity of Goods expected to be transported at any one time under this Agreement, but in no event in an amount less than US\$[AMOUNT] per shipment, to compensate Customer, its vendors, suppliers, and/or customers, or the consignor, consignee, or owner of the Goods for any and all loss or damage to property or from property which was placed in the possession or control of Carrier in connection with the Transportation Services.

## PROPERTY (CARGO) INSURANCE

Unlike a common carrier, a contract carrier is not required to carry property insurance, which is insurance to cover loss to the goods while in the carrier's custody and control. However, under this provision, the customer requires the carrier to maintain property

insurance so that it has a basis for a breach of contract claim for failing to procure or maintain the required insurance in addition to any claim that the customer might have under any compliance with law provision.

This property insurance is frequently called:

- Cargo insurance.
- Inland transit insurance.
- Marine insurance (even if the goods are being transported overland by truck or rail).

The parties can negotiate whether the insurance covers either:

- All risks.
- Certain risks on a named-perils basis.

The parties can also negotiate whether the insurance reimburses only for either:

- Total loss.
- Partial loss.

Some of the covered perils include:

- Vehicle overturn and collision.
- Fire or explosion involving the vehicle.

Regular cargo insurance typically does not cover loss or damage attributable to:

- Inherent defects in the goods.
- The transportation of explosives or other dangerous goods.
- Insufficient or unsuitable packing of the goods.
- Mildew.
- Vermin.
- Strikes or lockouts.
- War, terrorism, or civil commotion.
- Willful misconduct or willful negligence of the insured.

(c) [Workers' compensation with limits no less than the greater of (i) \$[AMOUNT], or (ii) the minimum amount required by applicable law; [and]]

## WORKERS' COMPENSATION

The carrier may already be required to maintain workers' compensation insurance because most states have enacted statutes that require private employers to maintain this insurance. Adding this optional provision, however, provides the customer with the basis for a breach of contract claim for failure to procure or maintain the required workers' compensation insurance in addition to any claim that the customer might have under any compliance with law provision.

Workers' compensation is generally the employee's exclusive remedy against the employer for on-the-job injuries and occupational diseases, with certain state law exceptions.

Workers' compensation benefits typically include some or all of the following:

- Lost wages.

- Medical expenses.
- Disability benefits.
- Lump-sum payments for permanent effects of an injury.
- Vocational rehabilitation.
- Death benefits.

If the carrier engages independent contractor truck drivers, these workers may not be eligible for coverage because [independent contractors](#) generally are not eligible for workers' compensation. For more information about independent contractors, see [Practice Note, Independent Contractor Classification](#).

For more information about workers' compensation, see [Practice Note, Workers' Compensation: Common Questions](#) and [Managing Workers' Compensation Costs Checklist](#).

(d) [Automobile liability insurance covering owned, non-owned, and hired automobiles in the amount of US\$[AMOUNT] combined single limit [for shipments of non-hazardous waste and US\$[AMOUNT] combined single limit for shipments of hazardous waste]].

## AUTOMOBILE INSURANCE

While carriers are required to procure and maintain vehicle liability insurance by law, the customer can negotiate this optional provision to provide the basis for a breach of contract claim for failure to procure or maintain the required insurance in addition to any claim that the customer might have under any compliance with law provision.

(e) [Umbrella (excess) liability for the coverage in [Section 6.1\(a\)](#) and [Section 6.1\(d\)](#)], with limits no less than \$[AMOUNT].]

## UMBRELLA OR EXCESS INSURANCE

Insurance policies may be purchased in varying amounts and layers. Primary coverage provides the first layer of coverage for a claim made under a policy. Primary policies:

- Often contain a deductible or self-insured retention that first must be satisfied before policy limits can be tapped.
- Defines the basic coverages, limitations, and scope of that particular insurance.

The customer can negotiate this optional provision to require the carrier to purchase additional layers of insurance coverage regarding general liability and automobile insurance. These additional layers, which insure against large or catastrophic financial risks, are generally categorized as:

- Umbrella coverage.
- Excess coverage.

The policies in each successive excess layer of coverage typically pay claims only after the limits of the underlying policy have been fully paid out or exhausted. When the primary coverage is exhausted, the first-layer excess policy pays the rest of the claim up to its policy limit. Then, a second-layer excess policy pays once the first-layer excess has been exhausted, and so on until all purchased policies have been exhausted or the entirety of the claim has been paid.

An umbrella policy generally is purchased to fill gaps in the primary policy coverage. An umbrella policy overlying the primary policy typically:

- Provides broader coverage than the underlying primary policy.
- Insures against losses above and in addition to those covered by the primary policy.

When these losses occur, the umbrella policy drops down to cover gaps in the primary policy coverage.

In contrast, pure excess policies generally do not contain their own terms or conditions. Instead, excess policies follow the terms of the underlying primary policy. Insurance companies refer to these policies as providing following-form coverage.

For more information about umbrella and excess insurance coverage, see [Practice Note, Insurance Policies and Coverage: Overview: Umbrella and Excess Coverage](#).

## 7. Insurance Contract Requirements and Certificates.

### 7.1 Insurance Contract Requirements. Carrier shall ensure that all insurance policies required under [Section 6](#):

- (a) be issued by insurance companies [reasonably acceptable to Customer/with a Best's Rating of no less than [A-VII/[OTHER RATING]]];
- (b) provide that such insurance be primary insurance and any similar insurance in the name of or for the benefit of Carrier shall be excess and non-contributory;
- (c) regarding [Section 6.1\(a\)](#), name Customer [and Customer's Affiliates], including[, in each case,] all successors and permitted assigns, as additional insureds; [and]
- (d) regarding [Section 6.1\(b\)](#), name Customer [and Customer's Affiliates], including[, in each case,] all successors and permitted assigns, as loss payees; and
- (e) waive any right of subrogation of the insurers against Customer [or any of its Affiliates].

## INSURANCE CONTRACT REQUIREMENTS

Insurance provisions typically require the insured party (carrier) to:

- Provide evidence of insurance.
- Name the other party (customer) as an additional insured under the liability insurance policy. This enables the customer to enjoy protection under the policy arising out of the carrier's conduct or operations.
- Name the customer as loss payee under the cargo insurance policy required under [Section 6.1\(b\)](#). This enables the customer to receive payment directly from the insurance company in case of a total or partial loss of the Goods.

### Subrogation

Subrogation is the substitution of one creditor (subrogee, in this case the insurance company) for another (subrogor, in this case the customer) either by operation of law or by agreement. When the insurance company is subrogated to the rights of the customer, it is allowed to "step into the shoes" of the customer and exercise the rights and remedies of the customer against the carrier.

[Section 7.1\(e\)](#) requires all liability insurance policies to contain a waiver of subrogation by the insurance company. However, insurance companies typically do not agree to waive their subrogation rights. Therefore, the parties may not be able to include [Section 7.1\(e\)](#).

For more information about insurance contract requirements including subrogation, see [Standard Clause, General Contract Clauses: Insurance Covenant \(Sale of Goods\)](#).

7.2 Cancellation or Non-renewal. [Carrier shall maintain these insurance coverages in full force and effect, during the Term. If for any reason any insurance policy required by this Agreement is cancelled, not renewed, or the general aggregate is eroded such that the minimum policy limits required in this Agreement are not available, Carrier shall promptly notify Customer in writing and purchase a replacement policy containing the same terms and conditions as such cancelled or non-renewed policy and provide evidence of the replacement policy to Customer.

OR

Carrier shall ensure that all insurance policies required under this Agreement provide that such insurance carriers give Customer at least 30 days' prior written Notice of cancellation or non-renewal of policy coverage.]

## CANCELLATION OR NON-RENEWAL

This pro-customer first alternative version of the provision requires the carrier to:

- Maintain the required insurances throughout the term of the agreement.
- Promptly notify the customer of any cancellation, non-renewal, or general erosion of the minimum policy limits.
- Replace the cancelled, non-renewed, or eroded policies with replacement policies that meet the requirements of the agreement.

The carrier will likely resist and negotiate the less onerous second alternative language requiring all insurance policies to provide that such insurance carriers give the customer at least 30 days' prior written notice of cancellation or non-renewal of policy coverage.

7.3 Insurance Certificates. On the written request of Customer, Carrier shall provide Customer with copies of the certificates of insurance and policy endorsements for all insurance coverage required by [Section 6.1\(a\)](#) and [Section 6.1\(b\)](#), and shall not do anything to invalidate such insurance. This [Section 7.3](#) shall not be construed in any manner as waiving, restricting, or limiting the liability of either party for any obligations imposed under this Agreement (including but not limited to, any provisions requiring a party hereto to indemnify, defend, and hold the other harmless under this Agreement).

## INSURANCE CERTIFICATES

In [Section 7.3](#) the carrier covenants to provide the customer with evidence that:

- The carrier has obtained and maintained the required insurance.
- The customer is an additional insured on the liability insurance policy.
- The customer is a loss payee on the cargo insurance policy.

The customer's counsel should carefully review a draft of the insurance certificate to ensure that:

- All the insurance policies are correctly listed.
- The customer's interests appear properly on the certificate.

The customer should be aware that an insurance certificate only certifies information as of the date of the certificate. For example, the policy could lapse after the carrier furnishes the certificate. Since the carrier has 30 days to notify the customer of any change under [Section 7.2](#), the customer must be aware of any circumstances that may give rise to a termination or modification of the insurance policies, for example, a deterioration of the carrier's credit rating.

## 8. Price and Payment.

8.1 Price. As compensation for the Transportation Services provided by Carrier pursuant to this Agreement, Customer shall pay Carrier in accordance with the rates, charges, and provisions set forth on Schedule A, which is attached and made a part of this Agreement, and a fuel surcharge as per attached Appendix A, which is attached and made a part of this Agreement. Carrier acknowledges and agrees that the rates and charges set forth in this provision are the only remuneration that Carrier is entitled to receive in exchange for the provision of the Transportation Services, regardless of the actual number of hours spent providing the Transportation Services.

## PRICE

In this pro-customer form, the customer purchases transportation services based on the carrier's negotiated price list, which the carrier attaches to the agreement and can amend but only if the parties agree to amend the agreement.

The carrier's prices typically are based on:

- The size of the shipment.
- The distance from the pick-up location to the delivery location of each shipment.

This Standard Document follows industry convention by allowing the carrier to collect a fuel surcharge from the customer per shipment. A fuel surcharge is a variable fee charged by the carrier to compensate the carrier to cover its costs resulting from changes in fuel prices. A fuel surcharge typically rises and falls in line with movements in fuel prices.

The parties must revise this provision if they negotiate for prices:

- To vary based on different factors, such as quantity or frequency of shipments.
- If prices are fixed, to be adjusted periodically during the contract term to reflect changes in the carrier's costs, such as labor costs.

This Standard Document does not contemplate the provision of expedited services, such as overnight delivery, which typically entail increased costs for the carrier that the carrier usually passes along to the customer in the form of higher rates. The parties must revise this agreement if they contemplate:

- The availability of expedited services.
- That the carrier will charge higher rates for expedited services.

## Customer

The customer may want to negotiate provisions that:

- Allow the customer to benchmark other similar transportation carriers and require the carrier to decrease its prices to match any more competitive pricing.
- Require the carrier to pass along any reductions in fuel or labor costs in the form of a price decrease.
- Place a cap on any price increases (for example, adding language that restricts the carrier from increasing prices higher than by a specific percentage during a defined period).

The customer may also want to negotiate a most favored customer provision (MFC), (commonly referred to as a [most favored nations provision](#) (MFN)), which is predominantly used in sale of goods agreements. Under an MFC, the vendor, in this case, the carrier, agrees that it will not sell to another customer at a lower price without offering that price to that customer. A customer, however, typically will not have the negotiating leverage to demand this kind of provision unless it agrees to engage the carrier on an exclusive basis and to purchase a significant amount of services. For more information about MFCs, see [Standard Clause, General Contract Clauses: Most Favored Customer](#).

MFCs can implicate US antitrust laws. For more information about antitrust laws in the US, see [Practice Note, US Antitrust Laws: Overview](#). For more information on the application of US antitrust law to vertical and price-related agreements between a vendor and its customers, see [Practice Note, Vertical Price Restraints](#).

## Carrier

The carrier must consider whether to negotiate:

- The right to change its prices either unilaterally or on mutual agreement;
- Automatic price increases based on inflation or some other index; or
- That any automatic renewal under [Section 12.2](#) be subject to its right to change its prices for the renewal term.

In most cases, the carrier desires the flexibility to amend its prices at any time. Therefore, the carrier may try to negotiate rates that are the carrier's then-current standard prices, which the carrier can change from time to time without requiring any amendment to the agreement.



Subject to any implied duty to deal in good faith, the carrier can increase prices from time to time by changing its standard price list without the consent of the customer. If the carrier negotiates the right to base its prices on its then-current standard price list:

- The carrier's then current standard prices would also apply during any renewal term, if the parties negotiate optional Section 11.2.
- The customer should consider negotiating the right to terminate the agreement if it does not agree with any price changes.

8.2 **Taxes.** Customer is responsible for all sales, use, and excise taxes, and any other similar taxes, duties, and charges of any kind imposed by any federal, state, or local governmental entity on any amounts payable by Customer hereunder; *provided, that*, in no event shall Customer pay or be responsible for any taxes imposed on, or regarding, Carrier's income, revenues, gross receipts, personnel, or real or personal property, or other assets.

## TAXES

Unless the customer is in a strong bargaining position, the customer is typically responsible for the payment of all sales and use taxes imposed regarding its purchase and use of the services from the carrier. The customer should ensure that the agreement expressly excludes responsibility for any taxes relating to carrier's income, revenues, gross receipts, personnel or assets, or amounts paid by the carrier for its own purchase of supplies or services.

For a sample tax provision, see [Standard Clauses, General Contract Clauses: Taxes](#).

8.3 **Payment Terms.** Carrier shall dispatch its invoice within [NUMBER] [days/Business Days] [from the date of delivery of each Shipment to the Delivery Location/after the end each calendar month for all Shipments [dispatched from the Pick-up Location/delivered to the Delivery Location] during the immediately preceding calendar month. Customer shall pay all such invoices [within [NUMBER] [days/Business Days] from [the date/Customer's receipt]] of such invoice. [[For purposes of clarification,] [if/If] Customer makes payment within [NUMBER] [days/Business Days] from [the date/Customer's receipt]] of such invoice, Customer shall be entitled to deduct [NUMBER] percent from the amount of the invoice ("**Early Payment Discount**"), and Carrier acknowledges that any such payment after deducting the Early Payment Discount constitutes payment in full of the invoiced amount.] Carrier's invoice shall set forth in reasonable detail the calculation of the rates and charges arising [from the corresponding Shipment/during the period of time covered by the invoice]. In addition, at Customer's request, each invoice submitted to Customer shall be accompanied by a copy of all delivery receipts, Bills of Lading, manifests or other receipts or documentation pertaining thereto. Customer shall make all payments in [US dollars] by check or wire transfer [in accordance with the following wire instructions:

ABA Number:

Account Number:

Bank Address:

Attn: [NAME/CONTACT INFORMATION]].

## PAYMENT TERMS

[Section 8.3](#) addresses:

- Invoicing (frequency of invoices).
- Payment terms (when payments are due).
- Payment mechanics (method of making payment).

This pro-customer provision requires the carrier to send its invoice to the customer. This means that if the carrier fails to issue an invoice:

- The carrier is in breach of the agreement.
- The customer can use the carrier's breach as an excuse not to pay any amount due.

The customer can expect the carrier to object to any provision obligating the carrier to issue an invoice. The carrier typically will negotiate that the provision:

- Not obligate the carrier to issue an invoice.
- Not make the carrier's issuance of an invoice a condition to payment.
- Obligate the customer to pay all amounts due, even if the carrier does not issue an invoice.

The parties should consider whether to:

- Issue invoices after each shipment or on a periodic basis, for example, weekly, monthly, or quarterly. In a long-term transportation agreement, parties often find it convenient to issue itemized invoices periodically, rather than for each shipment.
- Negotiate strict or extended payment terms, depending on the bargaining power and creditability of the customer, for example:
  - pro-carrier strict payment terms that require full or partial advance payment, payment upon receipt of the invoice or limited extended payment terms of no more than net 10, 15, or 30 days; and
  - pro-customer extended payment terms of at least net 30, 60, or 90 days.
- Include an early payment discount (see [Early Payment Discount](#)).
- Require payment within the specified number of days from the day:
  - the carrier picks up the goods from the pick-up location, which accelerates the invoice due date;
  - the carrier delivers the goods to the delivery location, which delays the invoice due date;
  - the customer receives the invoice.
- Accept paper-based checks or require electronic payment, and if so, whether to allow the customer to pay by automated clearing house (ACH) instead of wire transfer.
- Include the pro-customer right to withhold payment on inaccurate or otherwise incorrect invoices (see [Section 8.4](#)).
- Include the pro-carrier right to charge interest in case the customer is late in making payment (see [Late Payments](#)).
- Include the pro-carrier right to take action if the customer's creditworthiness deteriorates (see [Unsatisfactory Credit Status](#)).
- Include the pro-customer right of set-off (see [Section 8.5](#)).

For examples of different payment term provisions, see [Standard Clauses, General Contract Clauses: Payment Terms](#).

## Early Payment Discount

This pro-customer provision grants the customer the right to pay a reduced amount if it makes early payment. The parties should exclude an early payment discount if the payment terms require the customer to make payment upon receipt of the invoice. Many carriers will accept an early payment discount even though it reduces its profit because an early payment discount increases the likelihood that the customer will pay. The carrier can make up any shortfall by investing the funds in interest-bearing accounts.

There are several ways to include an early payment discount:

- **Use language customary to the trade.** Customary language includes, for example:
  - one percent ten net 30 (1% 10 net 30) (allows the Customer to take a 1% discount off the invoice amount if it makes payment within ten days of the due date); or
  - two percent ten net 30 (2% 10 net 30) (more aggressive version and allows the customer to take a 2% discount if it makes payment within ten days of the due date).
- **Add long-form language.** The parties can insert the number of days, for example, 30 days for regular payment, but include the bracketed language that specifically allows the customer to take the early payment discount if it makes payment within the specified early time frame.
- **Use customary language and long-form language.** In this case, the parties should add the bracketed language "for purposes of clarification."

- For more information about drafting and negotiating early payment discount provisions, see [Standard Clause, General Contract Clauses: Payment Terms \(Early Payment Discount\)](#).

## Late Payments

The carrier will most likely try to negotiate a late payment provision that (without waiving the right to pursue its other remedies) requires the customer to:

- Pay interest on all late payments, calculated at the specified rate, which the parties should cap at the maximum rate permitted by law.
- Reimburse the carrier for the cost of collecting late payments, including attorneys' fees.

While [usury](#) laws generally apply only to loan transactions, the carrier negotiates this provision to ensure that late payments are not illegal if a court determines that the transaction is subject to a security interest under UCC Article 9 to secure any amounts owed.

The customer wants to minimize the impact of its failure to timely pay under the agreement. Therefore, if the customer agrees to include a late payment provision, it may want to:

- Limit the customer's liability for the carrier's costs in collecting late payment to those that are reasonably incurred.
- Require the carrier to provide notice of and an opportunity to cure a payment breach before the carrier has the right to suspend shipments or reject or cancel any shipment requests.

It should also include the first bracketed language if it is able to successfully negotiate an invoice dispute provision (see [Drafting Note, Invoice Disputes](#)).

## Unsatisfactory Credit Status

An aggressive carrier may attempt to negotiate a provision that provides the carrier with several remedies if it determines that the customer has inadequate or unsatisfactory creditworthiness, including, for example, taking action to:

- Accelerate all amounts owed by the customer to the carrier under the agreement and any individual shipment transaction.
- Modify the payment terms for outstanding and future individual shipment transactions.
- Cancel any previously accepted shipment requests.
- Delay any further shipments.

Remedies for inadequate or unsatisfactory creditworthiness are especially important when a customer:

- Has extended payment terms.
- Is a major customer of the carrier.

The carrier should attempt to give itself the sole discretion to determine if the customer's financial condition or creditworthiness is inadequate or unsatisfactory. It should resist attempts by the customer to qualify this right (noting that in most jurisdictions the carrier is obligated to exercise this right in good faith).

The customer should resist this provision, but if it has no choice, should negotiate a:

- Reasonableness or other more stringent standard that modifies the carrier's unilateral determination.
- Requirement that the creditworthiness determination be made by an independent third party.

For a sample unsatisfactory credit provision, see [Standard Document, Sale of Goods Agreement \(Pro-Seller\): Section 8.04](#).

8.4 [Invoice Disputes](#). Customer shall Notify Carrier of any dispute with any invoice within [NUMBER] [days/Business Days] from Customer's receipt of such invoice. Customer will be deemed to have accepted all invoices for which Carrier does not receive timely Notification of disputes. The Parties shall seek to resolve all such disputes expeditiously and in good faith [in accordance with the dispute resolution provisions set forth in [Section 17.15](#)]. Notwithstanding anything to the contrary, Carrier shall continue performing its obligations under this Agreement during any such dispute.

## INVOICE DISPUTES

Invoices are a likely area of dispute between the parties. Therefore, pro-customer transportation agreements commonly give the customer a means to dispute an invoice without penalty.

In a long-term exclusive arrangement, the parties sometimes impose a mandatory negotiation period to settle invoice and other disputes before filing a lawsuit, which escalates the potential resolution of a dispute to executives who may be:

- Better positioned to evaluate the dispute within the bigger picture of the parties' overall business arrangement.
- More objective about the incident triggering the dispute.

The customer may want to negotiate the right to maximize the number of days the customer has to make payment by including a right to send notice of the dispute after a significant number of business days, counted starting from the date on which the customer receives the invoice. The carrier should ensure that it receives adequate notice and justification if the customer disputes an invoice. Therefore, the carrier should insist on:

- Requiring the customer to provide documentation to substantiate the dispute.
- Minimizing the number of days (as compared to business days) in which the customer must give notice of a dispute, counted starting from the date of the invoice.

For more information about special dispute resolution provisions that mandate negotiation periods in the context of a manufacturing agreement, see [Standard Document, Manufacturing Supply Agreement \(Pro-Seller\): Drafting Note: Dispute Resolution](#).

8.5 [Setoff Permitted]. Notwithstanding anything to the contrary in this Agreement, and without prejudice to any other right or remedy it has or may have, [Customer/a Party] may, [without/with [NUMBER] [days/Business Days] prior] Notice to [Carrier/other Party], set off or recoup any liability it owes to [Carrier/other Party] against any liability for which [Customer/the Party] determines [in good faith] [Carrier/the other Party] is liable to [Customer/such Party] [or its Affiliates], whether either liability [is matured or unmatured] [././ or] [is liquidated or unliquidated][./ or] [arises under this Agreement].]

## SETOFF PERMITTED

Parties can use optional [Section 8.5](#) as a self-help remedy to cancel cross-demands (mutual debts) and eliminate the superfluous exchange of money between the parties.

The parties may still have setoff rights granted under common law or state statute. However, these rights are often limited (see [Practice Note, Setoff and Commercial Contracts: Common Law Setoff Rights](#)).

### Customer

Since the customer is the party due to pay more overall during the business relationship, the customer typically seeks to include contractual setoff rights that broaden and clarify the customer's setoff rights existing at law. For example, the customer has the optional right to set-off and recoup against both the carrier and the carrier's affiliates. (The right of setoff by one party to a contract against the other party's affiliate is sometimes referred to as a "triangular setoff.")

The customer must consider as a negotiating tactic whether to include this optional set-off provision in its first draft because that will most likely trigger the carrier's counterproposal expressly prohibiting set-off, which may supersede any common law set-off rights that the customer might have had if the agreement is silent about set-off.

### Carrier

Carriers rarely allow set-off rights because they know that many customers are quick to assert a colorably plausible claim and withhold the payment while taking its time to resolve the claim, especially if the agreement contains:

- An invoice dispute provision (see [Section 8.4](#)).
- A dispute resolution provision that requires the parties to first negotiate before commencing legal action (see [Section 17.15](#)).

The carrier typically tries to include language that expressly prohibits any setoff by the customer (see [Standard Clause, General Contract Clauses: No Setoff](#)).

For more information about setoff rights, see [Practice Note, Setoff and Commercial Contracts](#). For more information comparing the right of setoff versus other self-help remedies, see [Practice Note, Setoff, Recoupment, and Counterclaim under Commercial Law](#). For a sample provision allowing setoff rights, see [Standard Clause, General Contract Clauses: Setoff](#). For a sample provision prohibiting setoff rights, see [Standard Clause, General Contract Clauses: No Setoff](#).

9. [Compliance with Laws](#). Carrier shall at all times comply with all Laws applicable to this Agreement and its obligations under this Agreement, including Carrier's provision of the Transportation Services [except to the extent that failure to comply therewith [could/would] not, in the aggregate, reasonably be expected to have a Material Adverse Effect]. Without limiting the generality of the foregoing, Carrier shall (a) at its own expense, maintain all certifications, credentials, licenses and permits necessary to conduct its business relating to the Transportation Services; and (b) not engage in any activity or transaction involving any Shipment that violates any Law.

Note: [Compliance with Laws](#)

10. [\[Special Compliance with Laws Provisions\]](#).

## SPECIAL COMPLIANCE WITH LAWS PROVISIONS

Depending on the negotiating leverage of the parties and the nature of the transportation services, the customer can also negotiate compliance with laws covenants to comply with specific subsets of laws and regulations, for example, laws dealing with:

- Environmental matters.
- The transportation and handling of hazardous materials.
- Wages, hours, and conditions of employment.
- Subcontractor selection.
- Motor carrier safety.
- Occupational health and safety.
- Data protection.
- Licenses and permits.
- Anti-corruption.

If the parties include special compliance with laws provisions, they must draft them consistently with the general compliance with laws covenant contained in [Section 9](#). Otherwise, the provisions could conflict (for example, relating to materiality qualifiers and licensing requirements), therefore causing confusion and conflict.

As the customer contemplates whether to include some or all of these special compliance with laws provisions, it must consider whether its rights and remedies specified in other parts of the agreement adequately address the relevant risks. For more information to help the customer consider whether it has sufficient alternative remedies under the contract or law if the parties limit or exclude any remedial rights, see [Practice Note, Remedies: Adequate Liability Coverage](#).

10.1 [\[Licenses and Permits\]](#). Without limiting the generality of [Section 9](#), Carrier, at its own expense, shall secure and maintain throughout the Term, all federal, state, and local licenses and permits that are necessary to provide the Transportation Services, including the Federal Motor

Carrier Safety Administration. Carrier also shall ensure that its employees, subcontractors, and equipment are properly licensed and permitted as required by all jurisdictions where the Transportation Services are provided.]

## LICENSES AND PERMITS

In [Section 10.1](#), the carrier undertakes, at its own expense, secure, and maintain throughout the term of the agreement, all federal, state, and local licenses and permits that are necessary to provide the transportation services, for example:

- Federal laws administered by the Federal Motor Carrier Safety Administration (FMCSA), which requires interstate for-hire carriers (common carriers and contract carriers) to register with the FMCSA by filing a Form OP-1.
- State laws that define common carriers very broadly to include, for example, any company or person who is transporting property other than household goods for compensation within the specified state.

It also covenants to ensure that its employees, subcontractors, and equipment are properly licensed and permitted as required by all jurisdictions where the transportation services are provided.

10.2 [\[Hazardous Materials\]](#). Without limiting the generality of [Section 9](#), Carrier shall at all times comply with all Laws applicable to the transportation of Hazardous Materials [except to the extent that failure to comply therewith [could/would] not, in the aggregate, reasonably be expected to have a Material Adverse Effect]. Without limiting the generality of the foregoing, Carrier shall (a) at its own expense, maintain all certifications, credentials, licenses, and permits necessary to transport Hazardous Materials; and (b) not engage in any activity or transaction involving any Shipment of Hazardous Materials that violates any Law.]

Note: [Hazardous Materials](#)

10.3 [\[Anti-corruption\]](#). Without limiting the generality of [Section 9](#), Carrier shall, and shall cause its Representatives to, comply with all federal, state, and local anti-corruption related Laws, and where applicable, the U.S. Foreign Corrupt Practices Act of 1977, as amended, including maintaining and complying with all policies and procedures to ensure compliance with these Laws.]

## ANTI-CORRUPTION

Optional [Section 10.3](#) anticipates the perception among customers, whether warranted, that the transportation industry may have elements of corruption. Therefore, in many cases, transportation service customers include a special covenant in their first draft of agreement, which requires the carrier to agree to comply with anti-corruption laws, even if:

- The carrier will provide only domestic transportation services.
- The [Foreign Corrupt Practices Act of 1977](#) (FCPA) ([15 U.S.C. §§ 78dd-1, 2, 3 and 78ff](#)) does not apply.
- The carrier already undertakes to comply with anti-corruption laws generally in [Section 9](#).

For more information about the Foreign Corrupt Practices Act, see [Practice Note, The Foreign Corrupt Practices Act: Overview](#).

10.4 [\[Immigration Laws\]](#). Without limiting the generality of [Section 9](#), Carrier shall ensure that all Personnel who will perform Transportation Services have the legal right to work in the United States.]

## IMMIGRATION LAWS

Although the immigration status of the carrier's drivers or workers is mainly the carrier's problem, immigration problems could jeopardize or delay shipment. By including optional [Section 10.4](#), the customer ensures that the carrier's failure to comply with immigration law also creates a cause of action for breach of contract.

Employment-based status is divided into three categories:

- Citizen-based, which allows US citizens to work in the US without restriction from US immigration law.
- Immigrant based, which:
  - results in [lawful permanent resident](#) status (the ability to live and work in the US permanently); and
  - is distributed through a preference system giving priority to foreign workers with certain skill levels and more desirable professions.
- Nonimmigrant based, which:
  - allows a foreign national to work in the US for a particular US employer for a temporary period of time; and
  - identifies by various letters and numbers the activities individuals may engage in while in the US.

For more resources to help employers comply with the legal requirements of employment eligibility verification and other immigration-related obligations, see [Immigration Compliance Toolkit](#).

10.5 [\[Harassment Laws\]](#). Without limiting the generality of [Section 9](#), Carrier shall comply with all sexual harassment prevention Laws and provide sexual harassment prevention training and such additional training as may be required to comply with all sexual harassment prevention Laws to all workers who will perform the Transportation Services. Carrier shall implement such training on an annual basis during the Term. Carrier agrees to provide documentation of compliance to Customer upon ten (10) days' Notice.]

Note: [Harassment Laws](#)

10.6 [\[Export Regulation\]](#). The Goods that are the subject of this Agreement may be subject to U.S. export control laws and regulations. Without limiting the generality of [Section 9](#), Carrier shall not export, re-export, resell, ship or divert or cause to be exported, re-exported, resold, shipped, or diverted, directly or indirectly, any Goods provided pursuant to or derived from this Agreement to any prohibited country specified by U.S. export control laws and regulations or to any foreign national, country, end-use, or end-user that requires an export license or other approval [without first obtaining such license or approval].]

## EXPORT REGULATION

This agreement assumes that the customer is engaging the carrier to provide inland domestic US trucking services. Depending on the perceived risk that the carrier will route the goods outside of the US, and the types of goods being shipped, however, the customer can include this optional provision to make any export of the goods in contravention of the US export regulation laws a breach of agreement.

## 11. [\[Intellectual Property Rights\]](#).

Neither party shall acquire any license, title, or other rights in or to any Intellectual Property Rights of the other party under this Agreement.]

## INTELLECTUAL PROPERTY RIGHTS

The customer can include this optional provision to clarify that neither party acquires any intellectual property rights of the other party. Transportation service agreements contemplating the provision of general transportation services typically do not include a detailed intellectual property license grant because the customer:

- Is merely engaging the carrier to provide general transportation services.
- Does not use the carrier's trademarks.
- Does not use or have access to the carrier's technology, except to the extent that the customer will be using any off-the-shelf system to:
  - place shipment requests; or

- track the shipments.

In some cases, the carrier might still be concerned about protecting its intellectual property even if it is not granting a license. If so, the carrier can require the customer to acknowledge the carrier's ownership of:

- Intellectual property rights used to provide in the transportation services including any inventions relating to the provision of the transportation services;
- Goodwill derived from the customer's use of the carrier's intellectual property rights; and
- Intellectual property rights in or relating to any services purchased under the agreement that the customer acquires by operation of law or otherwise.

If the carrier must extensively rely on its intellectual property to provide the transportation services (for example, if the carrier is engaged to redesign the customer's logistics network), it can negotiate to impose restrictions on the customer's activities that could affect the carrier's intellectual property rights. For example, the carrier can prohibit the customer from:

- Taking any action that might interfere with any of the carrier's intellectual property rights, including the carrier's ownership or exercise thereof.
- Challenging any right, title, or interest of the carrier in or to the carrier's intellectual property rights.
- Making any claim or taking any action adverse to the carrier's ownership of the carrier's intellectual property rights.
- Registering or applying for registrations, anywhere in the world, for the carrier's intellectual property rights.
- Engaging in any action that tends to disparage, dilute the value of, or reflect negatively on the carrier or its transportation services.
- Misappropriating any of the carrier's trademarks for use as a domain name without the carrier's prior written consent.

## 12. Term; Termination.

12.1 [Initial] Term. The term of this Agreement commences on [the Effective Date/[DATE]] and continues for a period of [NUMBER] [month[s]/year[s]], unless and until earlier terminated as provided under this Agreement (the ["**Initial Term**"/"**Term**"]).

### INITIAL TERM

If the parties provide for one or more successive renewal terms in [Section 12.2](#), they should include the word "Initial" before "Term" to distinguish the initial term of the agreement from the renewal term.

12.2 [Renewal Term. On expiration of the Initial Term, this Agreement automatically renews for additional successive [NUMBER] [month/year] terms unless and until [either Party/both Parties/Carrier/Customer] provide[s] written Notice of nonrenewal at least [NUMBER] days prior to the end of the then-current term, or unless and until earlier terminated as provided under this Agreement (each a "**Renewal Term**" and together with the Initial Term, the "**Term**"). In the event [either Party/both Parties/Carrier/Customer] provide[s] timely Notice of [its/their] intent not to renew this Agreement, then, unless earlier terminated in accordance with its terms, this Agreement terminates on the expiration of the then-current Term.]

### RENEWAL TERM

Parties can use this optional provision to extend the agreement term for additional consecutive periods using an automatic renewal with an option to cancel (also known as semi-automatic renewal). The right to cancel can be held by:

- The carrier.
- The customer.
- Both parties.

Semi-automatic renewal has several benefits. For example, it provides the parties with:



- An opportunity to review the terms of the agreement (including pricing) on a regular basis and renegotiate unfavorable terms.
- The motivation to evaluate the transaction on a regular basis, because the other party has the option to terminate the agreement.
- A regularly occurring means of escape.

## Customer

The carrier should expect a customer with any degree of negotiating leverage to use this leverage, when deciding whether not to renew, to renegotiate the terms of the contract, including fixed reduced pricing, if:

- Prices of fuel and labor and other factors relevant to the cost of providing the services have decreased.
- There is excess capacity for the type of services being provided.
- Other transportation companies have quoted competitive rates.

Alternatively, the customer can negotiate a provision that states that the agreement will not renew unless the customer provides a notice of renewal. By negotiating such a provision, the agreement will automatically expire at the end of the initial term (or any renewal term) if the customer does not send an affirmative notice to renew the agreement. If the customer negotiates this provision, it can expect the carrier to negotiate to make it reciprocal.

## Carrier

Most carriers also want the right to cancel any particular automatic renewal of the contract term if the business arrangement is not lucrative or is otherwise unsuccessful. In this agreement, because the carrier has little discretion over the decision to reject or cancel individual purchase orders and individual transactions, having the right to cancel the renewal is more significant. The carrier must consider the impact of renewals on its pricing structure.

If the carrier is successful in negotiating that the prices are based on the carrier's standard rates then currently in effect, then these will also apply during any renewal term. However, [Section 8.1](#) of this pro-customer Standard Document contemplates that prices will be based on the rates set forth on an attached schedule. If prices are based on a fixed schedule attached to the agreement, then the carrier must consider whether it wants these prices to carry over into the renewal term. The carrier may want to negotiate a price increase provision for renewal terms. If the parties negotiate a price increase provision for renewal periods they must craft these provisions to reflect the particular facts of the arrangement, including:

- The volatility of the fuel market, even if the carrier can capture some of the volatility in fuel prices in its fuel surcharge.
- The volatility of labor costs and the labor market in general.
- The intended length of the contract.
- The specific services being provided.
- Applicable industry norms.
- The customer's historical shipment trend and its estimated shipments during the renewal period.

Price increase mechanisms are sometimes tied to:

- An index, for example, related to the cost of fuel or labor or both.
- A set percentage.
- A formula based on changes in the overall cost of providing the services, including:
  - fuel;
  - maintenance of vehicles; and
  - labor.
- Volume estimates or commitments.

For more information on price adjustments (but in the context of the sale of goods), see [Standard Clauses, General Contract Clauses: Pricing Terms \(Sale of Goods, Pro-Seller\): Section 1.4](#).

**12.3 Customer's Right to Terminate the Agreement**. Customer may terminate this Agreement (including all related Individual Shipment Transactions), on Notice to Carrier:

## CUSTOMER'S RIGHT TO TERMINATE THE AGREEMENT

This provision sets out the circumstances in which the customer may terminate the agreement before the term expires. In this pro-customer agreement, the customer has a termination right even though it:

- Has no obligation to purchase minimum quantities or any frequency of transportation services.
- Can refuse to renew the agreement for any or no reason if the parties include optional renewal rights in [Section 12.2](#).

The termination provision is one of the most heavily negotiated provisions as the parties determine whether a party may terminate the agreement for either:

- **Cause.** The terminating party must identify a specific breach by the other party to end the arrangement (see [Section 12.3\(a\)](#)).
- **Convenience.** A party may terminate at any time without providing a reason to the other party (see [Section 12.3\(e\)](#)).

The customer should consider the extent it should negotiate hard to include any of these provisions based on, among other factors:

- **The customer's exposure to the specified risk.** For example, the customer may be more likely to be concerned about the carrier's breach than a potential business combination involving the carrier. If so, the customer should insist on including [Section 12.3\(a\)](#), but may have more room to negotiate [Section 12.3\(e\)](#).
- **The likelihood that the carrier will insist that the agreement contain a reciprocal provision giving the carrier the right to terminate.** This pro-customer Standard Document contains a variety of optional reciprocal and other provisions giving the carrier the right to terminate (see [Section 12.4](#)).

This pro-customer Standard Document also allows the customer to terminate the agreement if a *force majeure* event continues for an extended period of time. While the customer may include such a provision in this [Section 12.3](#), this document includes the *force majeure* termination right directly in the *force majeure* provision (see [Section 17.20](#)).

For more information generally about termination clauses, see [Standard Clauses, General Contract Clauses: Term and Termination](#).

### Termination for Cause

While the customer clearly needs protection for the carrier's failure to deliver the requested shipments, because of the time required to identify, negotiate and enter into a successor arrangement, the customer also typically tries to include termination provisions that address other situations that increase the likelihood of future carrier default (for example, if the carrier threatens to repudiate or becomes an economic risk).

When drafting [Section 12.3](#), the customer should note that the carrier is likely to seek similar contractual termination rights under [Section 12.4](#).

The carrier should insist on including a reciprocal termination provision triggered by:

- The customer's failure to make a timely payment.
- The customer's breach of the agreement.
- The customer's insolvency.

(a) except as otherwise specifically provided under this [Section 12.3](#), if Carrier is in [material] breach of, or threatens to breach, any representation, warranty, or covenant of Carrier under this Agreement and either the breach cannot be cured or, if the breach can be cured, it

is not cured by Carrier within a commercially reasonable period of time under the circumstances, in no case exceeding [NUMBER] [days/Business Days] following Carrier's receipt of Notice of such breach;

## TERMINATION FOR BREACH OF THE AGREEMENT

The carrier's breach of the agreement gives the customer the right to:

- If uncured, terminate the agreement under this [Section 12.3](#).
- Seek indemnification remedies under [Section 16.1](#).
- Seek other remedies for breach of contract (except for any claims covered by indemnification if it is designated the exclusive remedy for those claims).

### Customer

Under [Section 12.3\(b\)](#), the parties negotiate the grace period (sometimes called a cure period). The customer generally wants a short grace period. However, if the customer receives a short grace period in this provision, the carrier will likely seek an equally short or shorter grace period in optional [Section 12.4](#).

Some customers try to negotiate a more specific provision that gives the customer the right to terminate the agreement if the carrier fails to timely deliver the goods. However, most carriers will not agree to any deadline for shipments unless the customer agrees to pay additional fees for expedited service.

Depending on the nature of the transportation services and the customer's negotiating leverage, the customer should consider expanding the scope of the carrier's covenants because the carrier's breach of any of them will trigger the customer's right to terminate for cause. For example, the customer can include the carrier's obligation to:

- Procure and maintain all permits and licenses required to transport hazardous materials.
- Implement and enforce a code of conduct of legal and ethical procedures.
- Conduct periodic vehicle inspections according to code or a higher standard.
- Conduct periodic drug testing of vehicle operators and other workers according to code or a higher standard.

### Carrier

The carrier aims to reduce its exposure by negotiating to:

- Replace the customer's right of termination with a more limited right to cancel an affected shipment request.
- Broaden the scope of the *force majeure* clause (see [Section 17.20](#)), which excuses the carrier's non-performance under covered circumstances.
- Provide for either:
  - a grace period for breach; or
  - a specified number of excusable instances of breach.
- Include materiality qualifications in this provision. For more information on materiality and other qualifiers, see [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Limiting the Scope and Effect of Covenants and Rights](#).

### Cross-default

This agreement assumes that the parties will be entering one contract for the provision of general transportation services, and do not have any other contracts between them. If the parties have entered into multiple contracts, each party should consider whether to negotiate a [cross-default](#) provision that permits a party to terminate this agreement if the other party triggers a termination under any other agreement between the parties or one of its affiliates.

Cross-default termination provisions are used primarily to allow a party to terminate the agreement if:

- The parties have entered into a series of related contracts and the overall relationship is breaking down.
- A party's default under another agreement indicates a deterioration of the party's general creditworthiness.

For a sample cross-default provision triggered by the customer's cross-default, see [Standard Document, Transportation Agreement \(Pro-Carrier\): Section 11.3\(e\)](#).

(b) if Carrier:

- (i) becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due;
- (ii) files or has filed against it, a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency Law;
- (iii) makes or seeks to make a general assignment for the benefit of its creditors; or
- (iv) applies for or has appointed a receiver, trustee, custodian, or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business;

## TERMINATION FOR INSOLVENCY OR BANKRUPTCY

This provision (often referred to as an [ipso facto clause](#)) gives the customer the right to terminate the agreement due to the carrier's bankruptcy, insolvency, or financial distress. Although a clause allowing a party to terminate an agreement due to the other party's bankruptcy is generally unenforceable against a debtor during bankruptcy, this clause should still be included because it can be triggered by events outside of bankruptcy (such as the inability to pay debts as they become due). Also, the clause is enforceable again once the bankruptcy case is closed if the debtor commits a new act described in the clause.

(c) if Carrier (i) repudiates, or threatens to repudiate, any of its obligations under this Agreement; or (ii) fails to provide Customer, within a commercially reasonable time after Customer's request (but in no case exceeding [NUMBER] [days/Business Days] after such request) with adequate and reasonable assurance of Carrier's financial and operational capability to perform timely any of Carrier's obligations under this Agreement;

## TERMINATION FOR REPUDIATION OR FAILURE TO PROVIDE ADEQUATE ASSURANCES OF PERFORMANCE

[Section 12.3\(c\)](#) permits the customer to terminate the agreement if the carrier takes action that may not appear to rise to the level of breach, but rather repudiates or threatens to repudiate the agreement, for example, the carrier:

- Makes a statement that it will not deliver any goods unless the customer pays a price increase.
- Suspends the shipment of goods and dedicates capacity to other customers.

The provision also allows the customer to terminate the agreement if the customer does not receive adequate assurance of the carrier's ability to perform the agreement.

The Uniform Commercial Code (UCC), which governs the sale of goods, permits an aggrieved party to treat a repudiation that substantially impairs the value of the contract as a breach of the underlying contract ([UCC § 2-610\(b\)](#)). The UCC also provides that if a party has reasonable grounds for insecurity about the other party's performance but is not sure whether the other party will or cannot perform, it can demand adequate assurance of due performance ([UCC § 2-609](#)). If the party receiving the demand does not provide adequate assurances within a reasonable amount of time not to exceed 30 days, the party making the demand (assuming it had reasonable grounds for insecurity) may treat the failure as a repudiation.

While the UCC does not govern contracts for the provision of services, including transportation services, the customer can include this provision to set out its intent because courts sometimes apply UCC principles to service contracts by analogy. This provision goes further than the UCC and permits the customer to terminate the contract if the carrier repudiates or threatens to repudiate any of its obligations under the agreement, even if it does not substantially impair the value of the contract.

When drafting the parenthetical in [Section 12.3\(c\)](#), the customer must specify an appropriate number of days for the carrier to provide its response or the default provision of [Section 2-609 of the UCC](#) will apply. In many commercial situations, 30 days is too long for the customer to wait. Therefore, pro-customer agreements commonly use a turn-around time of either:

- Seven calendar days.
- Five business days.

For more information on anticipatory repudiation in a sale of goods arrangement, see [Practice Note, Anticipatory Repudiation and Adequate Assurances of Future Performance](#).

(d) if, without obtaining Customer's prior written consent, (i) Carrier sells, leases or exchanges a material portion of Carrier's assets, (ii) Carrier merges or consolidates with or into another Person, or (iii) a change in Control of Carrier occurs, in any case, without Customer's prior written consent; or

## TERMINATION FOR A CHANGE OF CONTROL OR TRANSFER OF THE CARRIER'S ASSETS

This optional provision allows the customer to terminate the agreement if a change of control in the carrier occurs or if the carrier transfers a material portion of its assets. This provision is often used by the customer when:

- The carrier is a closely held business and the buyer has a relationship with particular members of its owner-management team.
- The customer has concerns about the carrier's creditworthiness and wants to be able to terminate the agreement if a merger or asset transfer occurs.

The carrier should consider:

- Qualifying the customer's right to terminate the agreement if the seller merges into another entity if the resulting entity has a net worth greater than or equal to the carrier's net worth before the merger. For example, adding language to the end of [Section 12.3\(d\)](#):

" , unless in the case of a merger or consolidation of Carrier with another Person, Carrier is the surviving entity and has a net worth greater than or equal to its net worth immediately prior to the merger or consolidation."

- Obtaining the same rights as the customer has under this provision.

(e) at its option, at any time and for any reason.

Any termination under this [Section 12.3](#) is effective on Carrier's receipt of Customer's Notice of termination or any later date set out in the Notice.

## CUSTOMER'S RIGHT TO TERMINATE FOR CONVENIENCE

Customers commonly insist on having the right to terminate the agreement for convenience. To ensure adequate consideration for the right to terminate, when the customer terminates for convenience it is customary for the customer to pay the carrier a termination fee (which is a form of liquidated damages). Termination fee provisions can be structured in various ways, including:

- A fixed termination fee payment as a termination condition.
- A variable termination fee that compensates the carrier for:

- all of the carrier's actual costs and expenditures triggered by termination; and
- a share of lost profits.

For a sample liquidated damages provision, see [Standard Clause, General Contract Clauses: Liquidated Damages](#).

If the carrier charges a termination fee, then it should exclude termination fees from the application of:

- The phrase "without liability or penalty" under any right of either party to terminate individual shipment transactions.
- The disclaimer of liability for termination provision in [Section 12.5\(c\)](#).

If the customer agrees to pay a variable termination fee, it should:

- Ensure that the agreement clearly and explicitly defines termination fees and, if relevant, require the carrier to provide supporting documentation to substantiate charges.
- Obtain the right to audit and confirm the amount of the termination fees as a condition to payment. In this case, the customer should expect the carrier to reject this approach and limit the customer's recourse to a post-termination claim for any overpayment.

If the customer agrees to pay any kind of termination fee, whether liquidated or variable, it should:

- Ensure that the termination fee is the carrier's exclusive remedy for the customer's termination for convenience.
- Limit the ability of the carrier to pursue cumulative remedies after it receives its exclusive remedy.

12.4 [\[Carrier's Right to Terminate\]](#). Carrier may terminate this Agreement on written Notice to Customer:

## CARRIER'S RIGHT TO TERMINATE

The customer may feel compelled to exclude the carrier termination right in this pro-customer Standard Document. However, since the carrier is likely to insist on including the reciprocal right to terminate that mirrors the customer's termination rights under [Section 12.3](#), this Standard Document gives the customer the option to include the carrier's right to terminate due to:

- The customer's breach of the agreement, including a special provision giving the carrier the right to terminate in case of the customer's payment default (see [Section 12.4\(a\)](#)).
- The customer's insolvency (see [Section 12.4\(c\)](#)).

This pro-customer agreement does not contain an optional carrier termination right for convenience, which is typically a customer-requested provision, but if the contract includes a semiautomatic renewal provision (see optional [Section 12.2](#)), the carrier can elect not to renew the agreement. The customer should expect the carrier to negotiate for additional termination triggers (see [Standard Document, Sale of Goods Agreement \(Pro-Seller\): Section 11.03](#)).

For a sample termination provision, see [Standard Clauses, General Contract Clauses: Term and Termination](#).

(a) if Customer fails to pay any amount when due under this Agreement ("**Payment Failure**") [and such failure continues for [NUMBER] days after Customer's receipt of written Notice of nonpayment];

## TERMINATION FOR PAYMENT FAILURE

If the customer agrees to give the carrier the right to terminate, it should insist on adding the bracketed language as a condition to the carrier's right to terminate. The customer should expect the carrier to insist on including a provision that permits termination without a right to cure for payment failures because including a cure right:

- Merely extends the customer's payment terms.

- Places a burden on the carrier to notify the customer of its breach.

If the carrier excludes the bracketed notice requirement and cure right language in [Section 12.4\(a\)](#), the carrier can terminate the agreement if the customer fails to make any payment when due. If the carrier accepts the bracketed language, it should insist on adding a provision that permits the carrier to terminate if there are multiple payment failures during a selected period of time. For a sample multi-payment failure termination provision, see [Standard Document, Transportation Agreement \(Pro-Carrier\): Section 11.3\(b\)](#).

(b) if Customer [materially] breaches any provision of this Agreement or any Individual Shipment Transaction (other than a Payment Failure), and either the breach cannot be cured or, if the breach can be cured, it is not cured by Customer within [NUMBER] days after Customer's receipt of written Notice of such breach; [or]

## TERMINATION FOR BREACH OF THE AGREEMENT

The customer's breach of the agreement gives the carrier the right to:

- If uncured, terminate the agreement under this [Section 12.4\(b\)](#).
- Seek indemnification remedies under Section 16.1.
- Seek other remedies for breach of contract (except for any claims covered by indemnification if it is designated the exclusive remedy for those claims).

### Customer

The customer should include materiality qualifications in this provision. For more information on materiality and other qualifiers, see [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Limiting the Scope and Effect of Covenants and Rights](#).

### Carrier

Under [Section 12.4](#), the parties negotiate the grace period. The carrier wants a short grace period, especially for breach of important provisions.

However, if the carrier receives a short grace period in this provision, the customer will likely seek an equally short or shorter grace period in [Section 12.3\(a\)](#).

(c) if Customer:

- (i) becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due;
- (ii) files or has filed against it, a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency Law;
- (iii) makes or seeks to make a general assignment for the benefit of its creditors; or
- (iv) applies for or has appointed a receiver, trustee, custodian or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.]

## TERMINATION FOR INSOLVENCY OR BANKRUPTCY

Optional [Section 12.4\(c\)](#) is an [ipso facto clause](#) that mirrors [Section 12.3\(b\)](#). It gives the carrier the right to terminate the agreement due to the customer's bankruptcy, insolvency or financial distress. Although a clause allowing a party to terminate an agreement due to the other party's bankruptcy is generally unenforceable against a debtor during bankruptcy, this clause should still be included because it can be triggered by events outside of bankruptcy (such as the inability to pay debts as they become

due). Also, the clause is enforceable again once the bankruptcy case is closed if the debtor commits a new act described in the clause.

## 12.5 Effect of Termination.

### EFFECT OF TERMINATION

The parties include this [Section 12.5](#) to clarify the rights and obligations of the parties upon the expiration or termination of this agreement. While [Section 12.5\(a\)](#) sets out the parties' rights and responsibilities for winding down the overall commercial arrangement, [Section 12.5\(b\)](#) also governs the effect of expiration or termination on individual shipment transactions.

#### Acceleration of Indebtedness

The carrier will likely insist on including a provision that provides that, on expiration or termination for any reason, all indebtedness of the customer to the carrier under the agreement, including for any transportation services rendered, becomes immediately due and payable. If the carrier successfully includes an acceleration of indebtedness provision, the customer should negotiate to limit acceleration to situations where the carrier terminates for cause (if the parties negotiate optional [Section 12.4](#) to give the carrier this right) but not to situations where:

- The agreement term expires in the normal course.
- The customer terminates for cause under [Section 12.3](#).

(a) Expiration or termination of the Term will not affect any rights or obligations of the Parties that:

- (i) come into effect on or after expiration or earlier termination of this Agreement; or
- (ii) otherwise survive the expiration or earlier termination of this Agreement under [Section 17.3](#) and were incurred by the Parties prior to such expiration or earlier termination.

(b) Any Notice of termination under this Agreement [(i)] automatically operates as a cancellation of any Shipments that are scheduled to be picked-up after the effective date of termination, whether or not Carrier had accepted any Shipment Request [and (ii) does not impact the Carrier's obligation to complete delivery and fulfill all of its obligations with respect to any Shipments that have already been picked-up by the Carrier].

### CANCELLATION OF PENDING ORDERS

[Section 12.5\(b\)](#) cancels any open shipment requests that have not been accepted or picked up by the carrier. The carrier may try to negotiate to require cash or certified check for payment of shipments in transit. If the carrier makes this counterproposal, the customer should negotiate to limit any requirement to make cash or certified check payment to only situations where the carrier terminates for cause. For a sample provision giving the carrier the right to require cash or certified check payments for shipments in transit, see [Standard Document, Transportation Agreement \(Pro-Carrier\): Section 11.4\(c\)](#).

(c) On the expiration or earlier termination of this Agreement, Carrier shall promptly:

- (i) [return to Customer/destroy] all documents and tangible materials (and any copies) containing, reflecting, incorporating, or based on Customer's Confidential Information;
- (ii) permanently erase all of Customer's Confidential Information from its computer systems[, except for copies that are maintained as archive copies on its disaster recovery and/or information technology backup systems. Carrier shall destroy any such copies on the normal expiration of its backup files]; and



(iii) certify in writing to Customer that it has complied with the requirements of this clause.

## RETURNING OR DESTROYING CONFIDENTIAL INFORMATION ON EXPIRATION OR TERMINATION

While the confidentiality provision in this agreement (see [Section 13](#)) can be drafted unilaterally or mutually, this [Section 12.5\(d\)](#) only requires the carrier, not the customer, to return or destroy confidential information on expiration or earlier termination. However, depending on the nature of the confidential information disclosed by the carrier under this agreement and the carrier's negotiating leverage, the carrier may want to make this provision mutual.

For more information on returning or destroying confidential information, see [Standard Clauses, General Contract Clauses: Confidentiality \(Long Form\): Drafting Note: Return or Destruction of Confidential Information \(Optional Provision\)](#).

(d) Subject to [Section 12.5\(a\)](#), the Party terminating this Agreement, or in the case of the expiration of this Agreement, each Party, shall not be liable to the other Party for any damage of any kind (whether direct or indirect) incurred by the other Party by reason of the expiration or earlier termination of this Agreement. Termination of this Agreement will not constitute a waiver of any of [the terminating Party's rights or remedies/either Party's rights, remedies, or defenses] under this Agreement, at law, in equity or otherwise.

## TERMINATING PARTY NOT LIABLE FOR PERMITTED EARLY TERMINATION

If the carrier requires the customer to pay a termination fee, for example, in consideration of the customer's right to terminate for convenience under [Section 12.3\(e\)](#), then these fees should be excluded from this provision.

13. Confidentiality. From time to time during the Term, [Carrier/Customer/either Party] (as "**Disclosing Party**") may disclose or make available to [Customer/Carrier/other Party] (as "**Receiving Party**") information about its business confidential [Intellectual Property/intellectual property], [Trade Secrets/trade secrets], third-party confidential information, and other sensitive or proprietary information[, whether orally or in written, electronic or other form or media][, and] [whether or not marked, designated, or otherwise identified as "confidential"] (collectively, "**Confidential Information**"). Confidential Information shall not include information that, at the time of disclosure [and as established by documentary evidence]: (i) is or becomes generally available to and known by the public other than as a result of, directly or indirectly, any breach of this Section [NUMBER] by Receiving Party or any of its Representatives; (ii) is or becomes available to Receiving Party on a non-confidential basis from a third-party source, provided that such third party is not and was not prohibited from disclosing such Confidential Information; (iii) was known by or in the possession of Receiving Party or its Representatives prior to being disclosed by or on behalf of Disclosing Party; (iv) was or is independently developed by Receiving Party without reference to or use of, in whole or in part, any of Disclosing Party's Confidential Information; or (v) is required to be disclosed pursuant to applicable federal, state, or local law, regulation, or a valid order issued by a court or governmental agency of competent jurisdiction. Receiving Party shall: (A) protect and safeguard the confidentiality of Disclosing Party's Confidential Information with at least the same degree of care as Receiving Party would protect its own Confidential Information, but in no event with less than a commercially reasonable degree of care; (B) not use Disclosing Party's Confidential Information, or permit it to be accessed or used, for any purpose other than to exercise its rights or perform its obligations under this Agreement; and (C) not disclose any such Confidential Information to any person or entity, except to Receiving Party's Representatives who need to know the Confidential Information to assist Receiving Party, or act on its behalf, to exercise its rights or perform its obligations under the Agreement. Receiving Party shall be responsible for any breach of this Section [NUMBER] caused by any of its Representatives. [[On the expiration or termination of the Agreement/At any time during or after the term of this Agreement, at the Disclosing Party's written request], Receiving Party and its Representatives shall promptly return to Disclosing Party all copies, whether in written, electronic or other form or media, of Disclosing Party's Confidential Information[, or destroy all such copies and certify in writing to Disclosing Party that such Confidential Information has been destroyed].] [Disclosing Party may seek equitable relief (including injunctive relief) against Receiving Party and its Representatives to prevent the breach or threatened breach of this Section [NUMBER] and to secure its enforcement, in addition to all other remedies available at law.]

## CONFIDENTIALITY

This confidentiality provision allows for confidentiality obligations to apply to one or both parties. Its definition of "Confidential Information" is party neutral and relatively broad in scope. This provision can be revised to reflect the particular circumstances of the transaction, as well as the parties' respective negotiation positions. This Standard Document contemplates the provision of general transportation services, which typically entails the exchange of a moderate amount of information, for example:

- The carrier's rates and service level terms.
- The customer's personally identifiable information such as:
  - its name and address; and
  - personally identifiable employee information.

Depending on the nature of any information exchanged and the relative bargaining power of the parties, the parties can negotiate:

- A unilateral provision obligating only the customer to maintain confidentiality. This Standard Document is a pro-shipper form, so this form does not contain a unilateral provision obligating only the customer.
- A unilateral provision obligating only the carrier to maintain confidentiality. However, the customer should consider the extent to which including this type of provision will likely provoke the carrier to negotiate a reciprocal provision.
- A mutual provision obligating both parties to maintain confidentiality.

For more information on the drafting and negotiation of confidentiality provisions, see [Standard Clauses, General Contract Clauses: Confidentiality \(Long Form\)](#).

#### 14. Representations and Warranties.

## REPRESENTATIONS AND WARRANTIES

Most commercial contracts include standard representations and warranties that relate to:

- A party's legal status, for example:
  - its existence and due organization; and
  - its qualification to do business in the specified jurisdictions.
- The validity and enforceability of the contract, for example, relating to:
  - the authority of the parties executing the specified contract;
  - the due execution of the specified contract;
  - the legal, binding and valid nature of the specified contract; and
  - the enforceability of the specified contract against the party making the representation.

Many commercial contracts also include representations and warranties that relate to the subject matter of the particular transaction (see [Drafting Note, Other Carrier Representations and Warranties](#)).

This Standard Document contains many commonly negotiated representations and warranties. Depending on the transaction, each party may want to:

- Delete or limit inapplicable or undesirable representations and warranties.
- Add additional representations and warranties.
- Make the existing representations and warranties more comprehensive to address its specific concerns.
- Make the existing representations and warranties into covenants, so that they protect the beneficiary beyond the effective date and throughout the contract's term. For more information on ongoing representations and warranties, see [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Disguised Covenants](#).

Parties to a commercial contract sometimes focus heavily on representations and warranties because of their impact on other sections of the agreement, including:

- **Indemnification.** For example, see [Section 16](#), under which the indemnifying party indemnifies for breach of the agreement's representations, warranties and covenants.
- **Termination.** For example, see [Section 12.3\(a\)](#) under which the customer, and [Section 12.4\(a\)](#) and [Section 12.4\(b\)](#), under which the carrier, has the right to terminate for breach of the agreement.

For more information on standard representations and warranties in a sale of goods or services agreement, see [Standard Clauses, General Contract Clauses: Representations and Warranties](#). For more information on representations and warranties generally, see [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions](#). For more information about the interplay between representations and warranties and other provisions in the agreement, see [Practice Note, Relationship between Representations, Warranties, Covenants, Rights, and Conditions](#).

14.1 Carrier's Representations and Warranties. Carrier represents and warrants to Customer that:

## CARRIER'S REPRESENTATIONS AND WARRANTIES

In this pro-customer agreement, the carrier's standard representations and warranties are included as mandatory provisions. However, the customer should expect the carrier to insist on including:

- Reciprocal standard representations and warranties (see [Section 14.2](#)).
- Transaction-specific representations and warranties, primarily related to the customer's creditworthiness.

### Other Carrier Representations and Warranties

While carriers may resist making standard representations and warranties, they instead may be amenable to include:

- Transportation service-related representations and warranties, relating to, for example:
  - the carrier's qualification and authorization to perform the transportation services, including the transportation of hazardous materials under federal, state, or local law; or
  - the training that the carrier has provided its drivers and other employees relating to the transportation of hazardous materials.

(See [Section 14.1\(h\)](#).)

- A limited service warranty (see [Section 15](#)).

(a) it is a [corporation/limited liability company/[TYPE OF ENTITY]] duly organized, validly existing, and in good standing in the jurisdiction of its [incorporation/organization/formation];

(b) it is duly qualified to do business and is in good standing in every jurisdiction in which such qualification is required [for purposes of this Agreement][,] [except where the failure to be so qualified, in the aggregate, would not reasonably be expected to adversely affect its ability to perform its obligations under this Agreement];

(c) it has the full right, [corporate] power and authority to enter into this Agreement, to grant the rights and licenses granted under this Agreement and to perform its obligations under this Agreement;

(d) the execution of this Agreement by its Representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action of the Carrier;

(e) the execution, delivery, and performance of this Agreement by Carrier will not violate, conflict with, require consent under or result in any breach or default under:

- (i) any of Carrier's organizational documents (including its [MAJOR ORGANIZATIONAL DOCUMENTS]);

(ii) any applicable Law; or

(iii) with or without notice or lapse of time or both, the provisions of any [material] contract of Carrier; and

(f) when executed and delivered by each of Customer and Carrier, this Agreement will constitute the legal, valid, and binding obligation of Carrier, enforceable against Carrier in accordance with its terms[, except as may be limited by any applicable bankruptcy, insolvency, reorganization, moratorium, or similar laws and equitable principles related to or affecting creditors' rights generally or the effect of general principles of equity]; and

(g) it is in compliance with all Laws applicable to this Agreement, the Transportation Services and the operation of its business [except to the extent that failure to comply therewith [could/would] not, in the aggregate, reasonably be expected to have a Material Adverse Effect].

## GENERAL COMPLIANCE WITH LAWS REPRESENTATION AND WARRANTY

[Section 14.1\(g\)](#) is the carrier's representation that it is in compliance with laws. It tracks much of the language of the first alternative version of the carrier's general compliance with laws covenant in [Section 9](#). While the covenant contains an undertaking that the carrier shall comply with laws, this representation is a statement that the carrier is in compliance with laws.

The representation under [Section 14.1\(g\)](#) is broad and potentially subjects the carrier to significant liability, particularly for carriers that are large corporations with diverse business units subject to diverse laws and liabilities, and especially if an aggressive customer negotiates the representation to make the representation apply to prior time periods. To mitigate its risks, the carrier can soften the obligation by:

- Ensuring that the applicable laws are defined for the purposes of this provision as those applicable only to the transportation services furnished by the carrier to the customer by deleting "and the operation of its business" because the phrase may subject the carrier to governing laws unrelated to the transaction.
- Including a materiality qualifier, such as the bracketed language. For more information on materiality qualifiers, see [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Limiting the Scope and Effect of Covenants and Rights](#).
- Including a knowledge qualifier. For example, the carrier may want to revise this representation to read:

"Carrier represents and warrants to Customer that to the best of its knowledge it is in compliance with all Laws applicable to this Agreement, the Transportation Services and the operation of its business."

(h) it is fully qualified and authorized to transport Hazardous Materials, and its Personnel, including drivers, have been trained and instructed in the proper method of transporting Hazardous Materials.

## HAZARDOUS MATERIALS

The customer can also include an optional covenant in [Section 10.2](#) that the carrier must comply with all laws regarding the transportation of hazardous materials.

For more information about the relationship between representations and warranties and covenants, see [Practice Note, Relationship between Representations, Warranties, Covenants, Rights, and Conditions](#).

14.2 [\[Customer's Representations and Warranties\]](#). Customer represents and warrants to Carrier that:

(a) it is a [corporation/limited liability company/[TYPE OF ENTITY]] duly organized, validly existing, and in good standing in the jurisdiction of its [incorporation/organization/formation];

(b) it is duly qualified to do business and is in good standing in every jurisdiction in which such qualification is required [for purposes of this Agreement][, except where the failure to be so qualified, in the aggregate, would not reasonably be expected to adversely affect its ability

to perform its obligations under this Agreement];

(c) it has the full right, [corporate] power and authority to enter into this Agreement, to grant the rights and licenses granted under this Agreement and to perform its obligations under this Agreement;

(d) the execution of this Agreement by its Representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action of the Party;

(e) the execution, delivery, and performance of this Agreement by Customer will not violate, conflict with, require consent under, or result in any breach or default under:

(i) any of Customer's organizational documents (including its [MAJOR ORGANIZATIONAL DOCUMENTS]);

(ii) any applicable Law; or

(iii) with or without notice or lapse of time or both, the provisions of any [material] contract that the customer is a party to; and

(f) when executed and delivered by each of Carrier and Customer, this Agreement will constitute the legal, valid, and binding obligation of Customer, enforceable against Customer in accordance with its terms[, except as may be limited by any applicable bankruptcy, insolvency, reorganization, moratorium, or similar laws and equitable principles related to or affecting creditors' rights generally or the effect of general principles of equity].]

## CUSTOMER'S REPRESENTATIONS AND WARRANTIES

Optional [Section 14.2](#) contains standard customer representations and warranties, which are reciprocal versions of the standard carrier representations set out in [Section 14.1\(a\)](#) through [Section 14.1\(f\)](#). When it prepares the first draft, the customer should consider excluding these customer representations and warranties from the draft, especially if its only obligation under the agreement is to pay for the services. However, the customer should anticipate that the carrier will insist that the customer include these reciprocal representations if the customer includes the standard carrier representations and warranties set out in Sections 14.1(a) through (f).

### Customer

If the customer includes these representations, it should negotiate to qualify and otherwise limit them. The customer should note that the carrier will likely seek to add the same qualifications and other limitations that the parties add to the carrier's representations and warranties under [Section 14.1](#). For more information about limiting the scope of representations, see [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Limiting the Scope and Effect of Representations and Warranties](#).

### Carrier

When negotiating [Section 14.2](#), the carrier should try to exclude any of the bracketed materiality or other qualifiers (for example, in [Section 14.2\(b\)](#)).

If the carrier is concerned about the customer's ability to pay, it can try to negotiate the customer's representations regarding:

- The customer's solvency and creditworthiness.
- The accuracy and adequacy of any financial information provided by the customer to the carrier.

## 15. [Service Warranties](#).

Note: [Service Warranties](#)

Carrier warrants to Customer that it shall perform the Services using personnel of required skill, experience, and qualifications and in a professional and workmanlike manner in accordance with [generally recognized/commercially reasonable] industry standards for similar services and shall devote adequate resources to meet its obligations under this Agreement.

Note: [Limited Warranty](#)

16. **Indemnification.** Subject to the terms and conditions of this Agreement, [Carrier/each Party] ("**Indemnifying Party**") shall indemnify, defend, and hold harmless [Customer/the other Party] and its [Representatives/officers, directors, employees, agents, [affiliates/Affiliates], successors, and permitted assigns] (collectively, "**Indemnified Party**") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including [reasonable] attorneys' fees, fees, and the costs of enforcing any right to indemnification under this Agreement and the cost of pursuing any insurance providers, [incurred by Indemnified Party/awarded against Indemnified Party [in a final [non-appealable] judgment]] (collectively, "**Losses**"), [relating to/arising out of or resulting from] any Claim of a third party [or Party] alleging:

## INDEMNIFICATION

Indemnification provisions are important risk allocation mechanisms and are typically heavily negotiated. They should be read in conjunction with the representations, warranties and covenants of the parties, as well as any limitations on liability and other remedial provisions, to determine the indemnity provision's scope and limitations.

In this pro-customer Standard Document, the general indemnification provision is unilateral (requiring the carrier to indemnify the customer) because the carrier bears most of the obligations under the agreement. The customer must decide, as a matter of negotiating strategy, whether to include in its first draft a mutual or unilateral indemnification provision, noting that the carrier will mostly likely insist on a mutual indemnification provision even though:

- The customer's main obligation in an agreement for the provision of generic transportation services is the obligation to make payment for services rendered.
- The carrier's right to receive payment for services rendered may be adequately protected even without an indemnification provision.

This Standard Document includes a general indemnification provision that covers all third-party claims. The parties can negotiate to make the indemnification provision limited to third-party claims or also cover direct claims (see [Third-Party versus Direct Claims](#)).

For more information on drafting and negotiating indemnification provisions, see:

- [Practice Note, Indemnification Clauses in Commercial Contracts](#).
- [Standard Clauses, General Contract Clauses: Indemnification](#).
- [Practice Note, Relationship between Representations, Warranties, Covenants, Rights, and Conditions: Relationship between Representations and Warranties, Covenants, and Indemnification](#).

## Third-Party Beneficiaries

[Section 16](#) identifies indemnified parties who are not parties to the contract. If a related person has indemnification rights but is not a party to the contract, that person is a third-party beneficiary. Therefore, if the indemnified party wants to ensure that all indemnified parties who are third-party beneficiaries can seek remedies under this section, it should exclude the related indemnified parties from [Section 17.14](#). For a broad definition of "Indemnified Party," the parties should consider using the alternative term "Representatives" instead of listing the types of covered persons and entities.

## Third-Party versus Direct Claims

The parties also have to decide whether to include the last bracketed language ("[or Party]") of the provision because:

- Including the bracketed language means that the parties intend to allow the indemnified party to pursue direct claims, which are claims that the indemnified party has against the indemnifying party that do not arise from any third-party claim against the indemnified party. To create an enforceable indemnity of direct claims, parties must ensure that the language of the provision unequivocally reflects the intent of the parties to cover direct claims (*Hooper Assocs. v. AGS Computers*, 74 N.Y.2d 487 (1989)).
- Not including the bracketed language means that the parties intend to limit indemnification claims to cover third-party claims only. These are claims that a third party has against the indemnified party.

Parties should be aware that when an indemnity for direct claims is uncapped and covers breach of the agreement, the indemnified party may be able to recover amounts under the indemnity over the agreed on limitation of liability. Therefore, in most commercial transactions, parties

limit indemnification by:

- Covering only third-party claims in the indemnification provision.
- Addressing liability for direct damages elsewhere in the agreement, for example, in the limitation of liability clause.

For a sample limitation of liability clause, see [Standard Clauses, General Contract Clauses: Limitation of Liability](#).

## Carrier

The carrier generally wants to limit its indemnity obligation, for example, by:

- Qualifying certain provisions, for example, by using reasonableness to qualify attorneys' fees.
- Including the bracketed language to limit payment to losses that are finally adjudicated.
- Limiting the definition of "Indemnified Party."
- Limiting the indemnity obligation to losses and liabilities that are not covered by:
  - insurance proceeds received by the indemnified party (see [Standard Clauses, General Contract Clauses: Indemnification: Section 2.4](#)); and
  - tax benefits received by the indemnified party (see [Standard Clauses, General Contract Clauses: Indemnification: Section 2.5](#)).
- Replacing the broad nexus phrase "relating to" with a narrower nexus phrase, which excludes damages unrelated to the indemnifying party's own acts or omissions, for example:
  - "caused by";
  - "result from";
  - "solely result from"; or
  - "to the extent they arise out of."
- Limiting the scope of third-party claims to those caused by actual inaccuracies or breaches and not merely those caused by "alleged" inaccuracies or breaches (which may eliminate the obligation to defend (and reimburse or pay attorneys' fees) for third-party claims adjudicated in favor of the indemnified party).
- Including a carve-out for other exclusive remedies. For a sample carve-out provision, see the last bracketed sentence of [Standard Document, Transportation Agreement \(Pro-Carrier\): Section 14.1](#).
- Including an exception for the customer's own negligence. For a sample exceptions provision, see [Section 14.2](#).
- Including an exclusive remedy provision to render any amounts recovered under the indemnification provision the exclusive remedy for covered losses. For more information on exclusive remedy provisions, see [Practice Note, Indemnification Clauses in Commercial Contracts: Sole Remedy Provisions](#).
- Capping the amount of its liability. For more information on drafting and negotiating limitation of liability provisions, see [Standard Clauses, General Contract Clauses: Limitation of Liability](#). For additional information on structuring a contractual liability cap, see [Standard Clauses, General Contract Clauses: Indemnification: Drafting Note: Maximum Liability](#).
- Restricting the ability of the customer to recover consequential and incidental damages.

The carrier should try to make this provision mutual, especially if:

- It has the requisite negotiating power.
- The goods are potentially dangerous or consist of hazardous materials.
- The customer is a likely credit risk.

(a) [material] breach or non-fulfillment of any [material] [representation, warranty, or covenant under/representation or warranty set forth in Section[s] [NUMBER] of/covenant set forth in Section[s] [NUMBER] of/representation or warranty set forth in Section[s] [NUMBER] or

covenant set forth in Section[s] [NUMBER] of] this Agreement by Indemnifying Party or Indemnifying Party's Personnel;

Note: [Indemnification for Breach](#)

(b) any [grossly] negligent or more culpable act or omission of Indemnifying Party or its Personnel (including any recklessness or willful misconduct) in connection with the performance of its obligations under this Agreement; [or]

Note: [Indemnification for Non-Breach Events](#)

(c) any bodily injury, death of any Person, or damage to real or tangible personal property caused by the [willful or [grossly]] negligent acts or omissions of Indemnifying Party or its Personnel[./; or]

Note: [Indemnification for Bodily Injury or Property Damage](#)

(d) any failure by Indemnifying Party or its Personnel to [materially] comply with applicable Laws.

## INDEMNIFICATION FOR FAILURE TO COMPLY WITH LAW

In [Section 16\(d\)](#), the customer wants the carrier to expressly indemnify it for claims based on the carrier's breach of applicable law, particularly if the carrier has successfully negotiated to remove or heavily qualify the carrier's obligation to comply with applicable laws under [Section 9](#) and [Section 10](#).

The customer should consider its exposure if the carrier insists that any indemnification be mutual. In an agreement for the provision of generic transportation services, however, the customer's main obligation is the payment for any transportation services rendered.

### 17. [Miscellaneous](#).

## MISCELLANEOUS

Miscellaneous provisions commonly include certain standard contractual clauses (often referred to as boilerplate provisions) that are found in most commercial agreements. These clauses are usually not controversial and do not relate to the substantive parts of the agreement. However, they are necessary for the effective enforcement of each party's rights under the agreement and can have significant practical and legal implications. For more information on drafting and negotiating miscellaneous provisions, see [Standard Clauses, Boilerplate Clauses](#). For a list of links to resources on drafting and negotiating these types of provisions, see [General Contract Clauses Toolkit](#).

17.1 [Further Assurances](#). On [Customer's/a Party's] reasonable request, [Carrier/the other Party] shall, at its sole cost and expense, execute and deliver all such further documents and instruments, and take all such further acts, necessary to give full effect to this Agreement.

Note: [Further Assurances](#)

### 17.2 [Entire Agreement](#).

Subject to [Section 3.3](#), this Agreement, including all related exhibits[, schedules, attachments and appendices], together with the Basic Shipment Terms, constitutes the sole and entire agreement of the Parties regarding the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, regarding such subject matter.

## ENTIRE AGREEMENT



This provision (also known as a merger or integration provision) is used to prevent the parties from being liable for any understandings, agreements, or representations and warranties other than those expressly set out in the agreement. For more information on drafting and negotiating entire agreement provisions, see [Standard Clause, General Contract Clauses: Entire Agreement](#).

In addition to including a standard entire agreement provision, this agreement contains language in [Section 3.3](#) stating that the agreement of the parties is expressly limited to:

- The terms and conditions of the written contract and its attached schedules and exhibits.
- The Basic Shipment Terms (see [Basic Shipment Terms](#)).

Section 3.4 helps to solidify the parties' agreement that the master contract and the Basic Shipment Terms are the complete expression of the parties' agreement, intended to avoid:

- A battle of the forms (see [Drafting Note, Terms of Agreement Prevail Over Carrier's Documentation](#)) in addition to any more general claims that an oral or separately written agreement governs the particular contractual arrangement.
- Any more general claims that an oral or separately written agreement governs the particular contractual arrangement.

### 17.3 [Survival](#).

(a) Subject to the limitations and other provisions of this Agreement: (a) the representations and warranties of the Parties contained herein will survive the expiration or earlier termination of this Agreement [for a period of [12/[NUMBER]] months after such expiration or termination]; and (b) [SECTIONS] of this Agreement, as well as any other provision that, in order to give proper effect to its intent, should survive such expiration or termination, will survive the expiration or earlier termination of this Agreement for the period specified therein[, or if nothing is specified for a period of [12/[NUMBER]] months after such expiration or termination]. [All other provisions of this Agreement will not survive the expiration or earlier termination of this Agreement.]

## SURVIVAL; STATUTE OF LIMITATIONS

Parties may use a survival clause to either or both:

- Limit the time period during which an actionable breach could occur or be discovered.
- Serve as a contractual statute of limitations to shorten the amount of time one party has to file an action against the other for breach of representation and warranty.

The survival clause in this [Section 17.3](#) is intended to limit the time period during which an actionable breach could occur or be discovered. It does not purport to function as a contractual statute of limitations, although courts in some states may interpret a survival provision that does not contain explicit contractual language to shorten the statute of limitations as a contractual statute of limitation.

In this provision, the parties negotiate:

- The surviving provisions.
- The term of survival.

For more information on survival, see:

- [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Survival of Representations and Warranties](#).
- [Standard Clause, General Contract Clauses: Survival](#).

(b) [The parties agree that [Section 17.3](#) shall not apply to any claim of the parties arising from [Section 5](#). Any claim arising from [Section 5](#) shall be subject to the survival and statute of limitations provisions of [Section 5.3](#).]

## SURVIVAL AND STATUTE OF LIMITATIONS RELATING TO RISK OF LOSS CLAIMS

If the parties include the optional contractual statute of limitations paragraph in [Section 5.3](#), they can add this optional provision to help ensure that any claims arising under [Section 5](#) are subject to contractual statute of limitations provisions of [Section 5.3](#) and not the general survival provision contained in [Section 17.3](#).

17.4 Notices. All notices, requests, consents, claims, demands, waivers, and other communications under this Agreement (each, a "**Notice**") must be in writing and addressed to the other Party at its address set forth below (or to such other address that the receiving Party may designate from time to time in accordance with this Section). All Notices must be delivered by personal delivery, nationally recognized overnight courier or certified or registered mail (in each case, return receipt requested, postage prepaid). [Notwithstanding the foregoing, for the purposes of Section[s] [NUMBER(S)], Notice given by facsimile or e-mail (with confirmation of transmission)[, and for the purposes of Section[s] [NUMBER(S)], Notice given by posting to such Party's website below will satisfy the requirements of this [Section 17.4](#).] Except as otherwise provided in this Agreement, a Notice is effective only (a) on receipt by the receiving Party, and (b) if the Party giving the Notice has complied with the requirements of this Section.

Notice to Carrier:

[CARRIER ADDRESS]

Facsimile: [FAX NUMBER]

E-mail: [E-MAIL ADDRESS]

Website: [WEBSITE ADDRESS]

Attention: [TITLE OF OFFICER TO RECEIVE NOTICES]

Notice to Customer:

[CUSTOMER ADDRESS]

Facsimile: [FAX NUMBER]

E-mail: [E-MAIL ADDRESS]

Website: [WEBSITE ADDRESS]

Attention: [TITLE OF OFFICER TO RECEIVE NOTICES]

## NOTICES

This provision governs the manner in which any notice under the agreement must be given and the time at which the notice is deemed to be formally given.

A contract party may be required to send the other contract party notice of various events related to the contract, including notice that:

- One party is:
  - assigning the contract, if assignment is permitted by [Section 17.12](#) (for a sample notice of assignment, see [Standard Document, Notice of Assignment](#));
  - terminating the contract under [Section 12.3](#) or [12.4](#) (for sample notices of termination, see [Standard Documents, Notice of Termination for Cause](#) and [Notice of Termination for Convenience](#);
  - notifying the other party that it chooses not to renew the agreement under optional [Section 12.2](#); or
  - sending a communication demanding performance in response to the other party's anticipatory repudiation (for more information about anticipatory repudiation, including links to sample notices, see [Practice Note, Anticipatory Repudiation and Adequate Assurances of Future Performance](#)).
- The carrier is subcontracting its obligations under [Section 2.2](#).

- There has been a breach of the underlying agreement (for a sample notice of breach of contract, see [Standard Document, Notice of Breach of Contract](#)).

This notices provision does not generally permit the delivery of formal notice by facsimile, e-mail or website posting (to protect the receiving party from being bound by a notice that it does not actually see). However, the bracketed language allows the parties to specify certain sections of the agreement under which formal notice may be delivered by either facsimile, e-mail, or web postings. This section can be revised if the parties agree to accept facsimile, e-mail, or website posting notices in all instances.

For more information and a sample notice provision, see [Standard Clause, General Contract Clauses: Notice](#).

**17.5 Interpretation.** For purposes of this Agreement, (a) the words "include," "includes" and "including" are deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; (c) the words "herein," "hereof," "hereby," "hereto," and "hereunder" refer to this Agreement as a whole; (d) words denoting the singular have a comparable meaning when used in the plural, and vice-versa; and (e) words denoting any gender include all genders. Unless the context otherwise requires, references in this Agreement: (x) to sections, exhibits, schedules, attachments, and appendices mean the sections of, and exhibits, schedules, attachments, and appendices attached to, this Agreement; (y) to an agreement, instrument, or other document means such agreement, instrument, or other document as amended, supplemented, and modified from time to time to the extent permitted by the provisions thereof; and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. The Parties drafted this Agreement without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted. The exhibits, schedules, attachments, and appendices referred to herein are an integral part of this Agreement to the same extent as if they were set forth verbatim herein.

## INTERPRETATION

This provision is designed to reduce repetition within the body of the document, making it shorter and easier to read. For more information on drafting and negotiating interpretation clauses, see [Standard Clauses, General Contract Clauses: Interpretation](#).

**17.6 Headings.** The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

## HEADINGS

For more information on headings, see [Standard Clauses, General Contract Clauses: Headings](#).

**17.7 Severability.** If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction[; provided, however, that if any fundamental term or provision of this Agreement (including without limitation [FUNDAMENTAL TERMS]), is invalid, illegal, or unenforceable, the remainder of this Agreement shall be unenforceable]. [On a determination that any term or provision is invalid, illegal, or unenforceable, [the Parties shall negotiate in good faith to/the court may] modify this Agreement to effect the original intent of the Parties as closely as possible in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible].

## SEVERABILITY

The purpose of a severability clause is to do one or both of the following:

- Establish the independence of contract terms, so that one term can be severed without effect on the others.
- Provide for reform of a contract that includes invalid, illegal, or unenforceable terms.

Preserving a severed contract is usually preferable to voiding the entire contract as a result of deficiencies in a specific term. Some terms, however, are so essential that if voided, the contract has minimal or no residual value. Parties should carve out from a severability clause any fundamental contract terms to ensure that the severability clause does not inadvertently preserve a contract stripped of its value. Include the bracketed language in the first sentence to carve out specific fundamental terms.

For more information on drafting and negotiating severability provisions, see [Standard Clause, General Contract Clauses: Severability](#).

17.8 **Amendment and Modification**. No amendment to or modification of [or rescission, termination, or discharge of] this Agreement is effective unless it is in writing[, identified as an amendment to [or rescission, termination, or discharge of] this Agreement] and signed by [an authorized Representative of] each Party.

## AMENDMENT AND MODIFICATION

For more information on amendment and modification, see [Standard Clause, General Contract Clauses: Amendments](#).

### 17.9 **Waiver**.

- (a) No waiver under this Agreement is effective unless it is in writing[, identified as a waiver to this Agreement] and signed by [an authorized representative of] the Party waiving its right.
- (b) Any waiver authorized on one occasion is effective only in that instance and only for the purpose stated, and does not operate as a waiver on any future occasion.
- (c) None of the following constitutes a waiver or estoppel of any right, remedy, power, privilege or condition arising from this Agreement:
- (i) any failure or delay in exercising any right, remedy, power, or privilege or in enforcing any condition under this Agreement; or
  - (ii) any act, omission, or course of dealing between the Parties.

## WAIVER

Parties may draft a no-waiver provision using either:

- **Conditional provisions.** Conditional provisions contain "unless in writing" or similar language. The effectiveness of the waiver is conditioned on the parties entering into a written agreement.
- **Directive provisions.** Directive provisions contain "may," "may not" or similar language. For example, "The rights and remedies under this Agreement **may** only be waived by a writing" or "The parties **may not** waive any right or remedy under this agreement, except by written agreement." Therefore, any attempt to modify the agreement other than by writing is then a breach.

Conditional language is usually clearer than directional language, and therefore provides more certainty. The Standard Clause in this resource incorporates conditional language.

For more information on drafting and negotiating waiver provisions, see [Standard Clauses, General Contract Clauses: Waivers](#).

17.10 **Cumulative Remedies**. All rights and remedies provided in this Agreement are cumulative and not exclusive, and the exercise by either Party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently be available at law, in equity, by statute, in any other agreement between the Parties, or otherwise. [Notwithstanding the previous sentence, the Parties intend that Customer's right under [Section 15](#) and [Section 16](#) are Customer's exclusive remedies for the events specified therein.]

## CUMULATIVE REMEDIES

This pro-customer Standard Document contemplates that the customer is entitled to pursue cumulative remedies, and does not contemplate any exclusive remedies. The carrier should include an exception to the customer's right to pursue cumulative remedies if the carrier successfully negotiates an exclusive remedy for:

- Breach of service warranties under [Section 15](#).
- Claims covered under the indemnification provision under [Section 16](#) is mutual).

For more information on drafting and negotiating cumulative remedies provisions, see [Standard Clauses, General Contract Clauses: Cumulative Remedies \(with Exclusive Remedies Carve-Out\)](#).

17.11 **Equitable Remedies.** [Carrier/Each Party] acknowledges and agrees that (a) a breach or threatened breach by [Carrier/such Party] of any of its obligations under [Section 13](#) [and Section[s] [NUMBER(S)]] would give rise to irreparable harm to the other Party for which monetary damages would not be an adequate remedy and (b) in the event of a breach or a threatened breach by [Carrier/such Party] of any such obligations, [Customer/the other Party] shall, in addition to any and all other rights and remedies that may be available to [Customer/such Party] at law, at equity, or otherwise in respect of such breach, be entitled to equitable relief, including a temporary restraining order, an injunction, specific performance, and any other relief that may be available from a court of competent jurisdiction, without any requirement to post a bond or other security, and without any requirement to prove actual damages or that monetary damages will not afford an adequate remedy. [Carrier/Each Party] agrees that [Carrier/such Party] will not oppose or otherwise challenge the appropriateness of equitable relief or the entry by a court of competent jurisdiction of an order granting equitable relief, in either case, consistent with the terms of this [Section 17.11](#).

## EQUITABLE REMEDIES

Many contracts contain an equitable remedies clause. These clauses:

- State the parties' intention that monetary relief is inadequate to fully compensate either or both parties for losses suffered due to breach of the agreement by the other party.
- Grant the non-breaching party the right to obtain equitable remedies in addition to any remedies available at law.

The customer negotiates to include an equitable remedies provision to cover the carrier's breach of delivery obligations. The carrier must consider whether it may be appropriate to negotiate a mutual provision even though the customer's main obligation in a transportation agreement is to make payment for services rendered, and this obligation typically is adequately remedied by the payment of monetary damages. The carrier therefore must determine whether it might be more appropriate to negotiate an alternative provision that restricts the ability of the customer to obtain equitable relief (see [No Equitable Relief Alternative](#)).

For more information on equitable remedies and equitable remedies provisions, see [Practice Note, Contracts: Equitable Remedies](#) and [Standard Clause, General Contract Clauses: Equitable Remedies](#).

### No Equitable Relief Alternative

Equitable remedies are purely discretionary and courts are never required to grant equitable relief. Judges generally favor monetary damages but award equitable relief if monetary damages are unavailable or inadequate to compensate the non-breaching party for its losses.

A court is likely to respect the parties' intent to limit equitable relief, especially if the provision is narrowly tailored to address the circumstances of greatest concern. However, because a court can order equitable remedies in its sole discretion, it is always possible that the court will not enforce the no-equitable-relief provision, particularly if the situation is one in which courts regularly award equitable relief and all of the supporting factors are present.

For more information on provisions restricting equitable remedies, see [Standard Clause, General Contract Clauses: No Equitable Relief](#).

17.12 **Assignment.** [Carrier may not/Neither party may] assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of [Customer/the other party]. Any purported assignment or delegation in violation of this Section is null and void. No assignment or delegation relieves the assigning or delegating Party of any of its obligations under this Agreement.

## ASSIGNMENT

[Section 17.12](#) addresses the parties' respective rights to assign and delegate rights and obligations under the agreement.

The parties must negotiate:

- Each party's right to assign or delegate any of its rights and obligations (and the scope of that right).
- Any reasonableness requirements for a party that has the right to consent to an assignment or delegation.
- Any limitations on a party's general right to assign or delegate without the consent of the other party.

This Standard Document aims to be reasonable by adding optional language imposing the restriction on both parties.

The parties can draft the agreement to allow assignment and delegation without the other party's consent to an affiliate or non-affiliate acquiring all or substantially all of the party's assets.

However, the parties should also review the bracketed language of this provision regarding the carrier's right to delegate its obligations to ensure consistency with [Section 2.2](#).

The customer should be aware that even if the customer negotiates to limit the carrier's right of assignment, the carrier is still permitted to assign its receivables to its lender or other beneficiary.

For more information on drafting and negotiating assignment provisions, see [Standard Clause, General Contract Clauses: Assignment and Delegation](#).

**17.13 Successors and Assigns.** This Agreement is binding on and inures to the benefit of the Parties to this Agreement and their respective permitted successors and permitted assigns.

## SUCCESSORS AND ASSIGNS

A successors and assigns clause, sometimes also referred to as a binding effects clause, states the contracting parties' intention that their respective successors and assigns be entitled to the benefits of, and subject to the obligations created by, the contract. The clause is a common provision in commercial agreements, often included in the miscellaneous section of the contract.

Contracting parties commonly use the clause with the purpose of binding:

- A successor or assign to perform in favor of the continuing contract party.
- The continuing contract party to perform in favor of the successor or assign.

For more information on successors and assigns, see [Standard Clause, General Contract Clauses: Successors and Assigns](#).

### **17.14 No Third-party Beneficiaries.**

(a) Subject to [Section 17.14\(b\)](#), this Agreement benefits solely the Parties to this Agreement and their respective permitted successors and assigns and nothing in this Agreement, express or implied, confers on any other Person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

(b) The Parties hereby designate [CLASS OF INDEMNIFIED PERSONS] as third-party beneficiaries of [Section 16](#) [having the right to enforce [Section 16](#)].

## NO THIRD-PARTY BENEFICIARIES

Many agreements expressly state that no non-parties to the agreement have rights under the agreement. In [Section 16](#), indemnified parties include persons who are not parties to the agreement, including parents, officers, directors, partners, members, shareholders, employees, agents, affiliates, successors, and permitted assigns.

These related persons usually do not sign the agreement unless they have joint or several obligations under the agreement. Therefore, these related persons are third-party beneficiaries to the agreement and the parties must ensure that they carve out these third-party beneficiaries from the restriction under [Section 17.14](#).

For more information on drafting and negotiating no-third-party-beneficiaries provisions, see [Standard Clause, General Contract Clauses: Third-Party Beneficiaries](#).

#### 17.15 [\[Dispute Resolution\]](#).

(a) The parties shall resolve any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination, or invalidity hereof (each, a "**Dispute**"), under the provisions of this [Section 17.15](#). The procedures set forth in Sections 17.15(a) through 17.15(d) shall be the exclusive mechanism for resolving any Dispute that may arise from time to time.

(b) The parties shall first attempt in good faith to resolve any Dispute by negotiation and consultation between themselves. In the event that such Dispute is not resolved on an informal basis within [NUMBER] Business Days after one party provides notice to the other party of such Dispute ("**Dispute Notice**"), either party may, by written notice to the other party ("**Escalation to Executive Notice**"), refer such dispute to the executives of each party set forth below (or to such other person of equivalent or superior position designated by such party in a written Notice to the other party, "**Executive(s)**").

Executive of Customer:

[EXECUTIVE NAME], [TITLE]

[ADDRESS]

[E-mail: [E-MAIL ADDRESS]]

Executive of Carrier:

[EXECUTIVE NAME], [TITLE]

[ADDRESS]

[E-mail: [E-MAIL ADDRESS]]

If the Executives cannot resolve any Dispute during the time period ending [NUMBER] [days/Business Days] after the date of the Escalation to Executive Notice (the last day of such time period, the "**Escalation to Mediation Date**"), either party may initiate mediation under [Section 17.15\(c\)](#).

(c) Subject to [Section 17.15\(b\)](#), the parties may, at any time after the Escalation to Mediation Date, submit the Dispute to any mutually agreed to mediation service for mediation by providing to the mediation service a joint, written request for mediation, setting forth the subject of the dispute and the relief requested. The parties shall cooperate with the mediation service and with one another in selecting a neutral mediator and in scheduling the mediation proceedings. The parties covenant that they will use commercially reasonable efforts in participating in the mediation. The parties agree that the mediator's fees and expenses and the costs incidental to the mediation will be shared equally between the parties.

The parties further agree that all offers, promises, conduct, and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator and any employees of the mediation service, are confidential, privileged and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

(d) If the Parties cannot resolve for any reason, including, but not limited to, the failure of either party to agree to enter into mediation or agree to any settlement proposed by the mediator, any Dispute within [NUMBER] [days/Business Days] after the Escalation to Mediation Date, either Party may file suit in a court of competent jurisdiction in accordance with the provisions of [Section 17.17](#) [and [Section 17.18](#) hereunder.]]

## DISPUTE RESOLUTION

Some parties may not want to include this dispute resolution provision and instead retain their ability to litigate disputes at any time. However, this Standard Document includes a multi-tiered alternative dispute resolution (ADR) clause, also known as an escalation clause. Escalation clauses either require or permit the parties to pursue some form of non-binding ADR mechanism, such as [mediation](#), before embarking on the binding mechanism ([arbitration](#) or, in the case of this Standard Document, litigation) they have chosen.

These clauses usually require the parties to:

- Negotiate among themselves at the operations level to resolve any dispute.
- Submit the dispute to negotiations at the designated senior executive level if the parties cannot resolve the dispute at the operations level.
- Submit the dispute to mediation if the parties cannot amicably resolve the dispute by negotiations.
- Submit the dispute to either litigation or arbitration if the parties:
  - choose to continue the dispute; and
  - cannot resolve the dispute by mediation.

For more information on drafting and negotiating escalation clauses, see [Standard Clause, General Contract Clauses, Alternative Dispute Resolution \(Multi-Tiered\)](#).

17.16 [Choice of Law](#). This Agreement, including all Individual Shipment Transaction documents and exhibits, schedules, attachments, and appendices attached to this Agreement and thereto[, and all matters arising out of or relating to this Agreement,] are governed by, and construed in accordance with, the Laws of the State of [STATE], United States of America, without regard to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the Laws of any jurisdiction other than those of the State of [STATE].

## CHOICE OF LAW

In this provision, the contract parties choose the substantive law of the appropriate state to apply to the contract. If the parties do not properly draft the clause, or fail to stipulate any governing law, the forum court unilaterally applies its choice of law rules to determine the appropriate substantive law.

This provision allows parties to choose the substantive law of an appropriate state to apply to the contract. For more information on drafting and negotiating choice of law provisions, see [Standard Clauses, General Contract Clauses: Choice of Law](#).

17.17 [Choice of Forum](#). Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all Individual Shipment Transaction documents and exhibits, schedules, attachments, and appendices attached to this Agreement and thereto, and all contemplated transactions[, including contract, equity, tort, fraud, and statutory claims], in any forum other than [NAME OF US DISTRICT COURT] or[, if such court does not have subject matter jurisdiction,] the courts of the State of [STATE] sitting in [POLITICAL SUBDIVISION], and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in [NAME OF US DISTRICT COURT] or[, if such court does not have subject matter jurisdiction,] the courts of the State of [STATE] sitting in [POLITICAL SUBDIVISION]. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by Law.

Note: [Choice of Forum](#)

17.18 [Waiver of Jury Trial](#). Each Party acknowledges and agrees that any controversy that may arise under this Agreement, including any Individual Shipment Transaction documents or exhibits, schedules, attachments, and appendices attached to this Agreement, is likely to involve complicated and difficult issues and, therefore, each such Party irrevocably and unconditionally waives any right it may have to a trial by jury in



respect of any legal action arising out of or relating to this Agreement, including any Individual Shipment Transaction documents, exhibits, schedules, attachments, or appendices attached to this Agreement, or the transactions contemplated hereby. [Each Party certifies and acknowledges that (a) no Representative of the other Party has represented, expressly or otherwise, that such other Party would not seek to enforce the foregoing waiver in the event of a legal action, (b) such Party has considered the implications of this waiver, (c) such Party makes this waiver voluntarily, and (d) such Party has been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section.]]

Note: [Waiver of Jury Trial](#)

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

## COUNTERPARTS

A counterparts clause provides that each party need not sign the same copy of the document to have a legally enforceable agreement.

The parties should include the bracketed language that addresses the confirmation of actual receipt if facsimile and e-mail are not accepted as means of sending notices under [Section 17.4](#) (see [Standard Clauses, Boilerplate Clauses: Section 22](#)). For more information generally on drafting and negotiating counterparts provisions, see [Standard Clause, General Contract Clauses: Counterparts](#).

17.20 **[Force Majeure.]** Carrier shall not be liable or responsible to Customer, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement [(except for any obligations to make payments to the other Party under this Agreement)], when and to the extent such failure or delay is caused by or results from acts beyond the affected Party's reasonable control, including: (a) acts of God; (b) flood, fire, earthquake or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest; (d) Law; (e) actions, embargoes, or blockades in effect on or after the date of this Agreement; (f) action by any Governmental Authority; and (g) national or regional emergency (each a "**Force Majeure Event**"). Carrier shall give notice [within [NUMBER] days of the Force Majeure Event] to Customer, stating the period of time the occurrence is expected to continue. Carrier shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized. Carrier shall resume the performance of its obligations as soon as reasonably practicable after the removal of the cause. In the event that Carrier's failure or delay remains uncured for a period of [NUMBER] days following written notice of a Force Majeure Event given by it under this Section 17.20, Customer may thereafter terminate this Agreement upon [NUMBER] days' written notice.]

## FORCE MAJEURE

This Standard Document aims to be reasonable by giving the customer the option to include a unilateral *force majeure* provision because:

- *Force majeure* protection is more significant for the carrier than it is for the customer in a transportation agreement.
- This is a provision that the carrier will almost always insist on.
- The customer may want to include the provision because it prefers *force majeure* rights to be governed by contract, rather than by the common law.
- The carrier will most likely negotiate to exclude the customer's principal obligation in a transportation agreement, that of paying for the services, from the scope of excused obligations.

A *force majeure* clause is designed to excuse parties from performance obligations if that performance is prevented by extreme circumstances outside of the non-performing party's control. For more information on drafting and negotiating *force majeure* provisions, see [Standard Clause, General Contract Clauses: Force Majeure](#).

### Customer

Customers often try to narrow or pare down the number and types of events that give rise to *force majeure* protection (for example, excluding a strike, lockout or other labor dispute involving the carrier's own workforce).

Furthermore, unlike *force majeure* clauses in many supply of goods agreements where suppliers of goods frequently list the lack of transportation services as a *force majeure* event, this pro-customer Standard Document excludes "the lack of transportation services" as a *force majeure* event because a carrier:

- Controls whether it provides transportation services in the absence of other *force majeure* events.
- Can protect itself by negotiating a broader *force majeure* event list to cover events that are outside of its control that might prevent it from performing the transportation services.

In addition, this provision includes:

- A carrier obligation to notify the customer in writing of any *force majeure* event.
- A carrier obligation to use best or reasonable efforts to:
  - recommence performance as soon as possible; and
  - otherwise limit the effect of the *force majeure* event on its performance under the contract.
- The right to terminate the agreement if the *force majeure* event continues for an extended period of time (see [Termination for Ongoing Force Majeure Event](#)).

In some cases, the customer can also negotiate:

- In an exclusive agreement, the right to purchase services from an alternate source if the *force majeure* event lasts for more than a brief time.
- A carrier requirement to allocate limited resources (for example, trucks) during a *force majeure* event equally or ratably among its customers.

If the customer negotiates some or all of these limitations, the carrier may try to negotiate a provision that restricts the customer from either:

- Purchasing services elsewhere.
- Terminating the agreement if the *force majeure* event affects:
  - the entire transportation industry; or
  - the entire country.

A customer with negotiating leverage may also try to negotiate carrier obligations to prevent a supply interruption during a *force majeure* event by including a requirement to:

- Take necessary actions to ensure that the carrier will have an uninterrupted supply of goods for some specified period of time following the commencement of a *force majeure* event.
- Notify the customer at some point before the expiration of any collective bargaining or other labor agreement that relates to:
  - the supply of raw materials like fuel; or
  - the transportation of the goods.

### **Termination for Ongoing Force Majeure Event**

The most likely obligation to be impacted by a *force majeure* event is the carrier's ability to deliver the goods. Because the carrier's obligation to deliver is excused if the delay is caused by a *force majeure* event, inability to deliver could negatively impact the customer's business. Therefore, many customers insist on having a termination right for an extended *force majeure* event.

If the carrier cannot delete the customer's termination right in [Section 17.20](#), the carrier should try to negotiate to allow the customer to terminate the agreement only if the *force majeure* event affects:

- The entire industry in which the parties operate; or
- The entire country.

The customer should note that during a *force majeure* event, instead of terminating this agreement, the customer can obtain its transportation services for shipments not already in transit from another source because this agreement:

- Is non-exclusive.
- Does not impose a minimum quantities requirement on the customer.

## Carrier

Service providers desire broadly drafted *force majeure* provisions that list a wide range of events that give rise to excused performance. They also prefer a provision that merely excuses performance without including any remedies for performance that is generally excused. [Section 17.20](#) is drafted broadly to include events that may be impacted by acts within the carrier's control, including:

- Strikes, labor stoppages or slowdowns.
- Shortages of or delays in receiving raw materials like fuel.

17.21 **No Public Announcements.** [Customer shall not/Neither Party shall] make any statement (whether oral or in writing) in any press release, external advertising, marketing, or promotion materials regarding [Carrier/the other Party] or its business unless: (a) it has received the express written consent of [Carrier/the other Party]; or (b) it is required to do so by Law [or under the rules of any stock exchange to which it is subject].

## NO PUBLIC ANNOUNCEMENTS

A public announcements clause (also known as a publicity clause) is used to control the dissemination of information regarding a commercial contract and its terms by preventing each party from issuing press releases, making any public announcements or communicating with the media without the consent of the other party.

[Section 17.21](#) can be drafted unilaterally or mutually. The restricted party or parties requires the carve out for legal compliance, which typically includes the bracketed language if it is a public company.

For more information on drafting restrictions on public announcements, see [Standard Clause, General Contract Clauses: Public Announcements](#).

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

[CARRIER NAME]

By \_\_\_\_\_

Name:

Title:

[CUSTOMER NAME]

By \_\_\_\_\_

Name:

Title:

## PRODUCTS

PLC US Commercial Transactions, PLC US Law Department

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