

RESPECTING BOILERPLATE

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by Robert A. James



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Boilerplate

refers to the legal clauses of general application typically found at the very front and very end of complex agreements (or the flip side of printed forms, or the “click-through” screens of online forms). This pejorative term comes from the days when big-city publishers would mold lead plate or paper mats—similar in appearance to the iron or steel plates riveted together to encase boilers—bearing raised type (“stereotype,” another pejorative term) with the fixed text of articles and advertisements. Smaller newspapers would print the boilerplate without change.

“Boilerplate” therefore connotes both the *strength* and the *unchangeability* of the metal that contains a pressure vessel. Neither meaning is truly applicable in the legal setting. First, many terms leave significant *vulnerabilities*, with opportunities for vagueness, ambiguity and uncovered cases. Second, there is a surprising degree of *variation* in even the most standard clauses—between drafters, across industries, and among contract types.

For all but contracts of adhesion, no clause need be accepted as is. However, the pace of today's negotiations usually means that scant attention is paid to the boilerplate. Most time in dealmaking is consumed first in establishing the price, the asset or scope description, and the representations and warranties, and then in defining and satisfying the conditions precedent. The paradox is

that if a transaction is successful, little of that hard work has ongoing value—the final price and asset or scope definitions are what they are; the conditions go away when the deal closes; and the reps expire shortly afterwards. Instead, it is the lowly boilerplate and the questions it may or may not answer—can you assign the contract to an affiliate? can you disclose the contract to a prospective buyer?—that have enduring relevance, whether or not the parties gave any active thought to them.

Boilerplate writers and readers usually work from a form and their own recollections of prior contracts. They may not have exposure to the issues and language choices that are most relevant to the transaction at hand. They almost always look at a document that just happens to contain some variants of some boilerplate clauses and just happens to omit others. It is much easier to critique the sentence in front of you than it is to envision the alternatives, or to conceive the sentences that should be there—but are not.

The following chart is intended to facilitate the process of drafting, reviewing, negotiating, and above all *respecting* boilerplate provisions. The common topics are illustrated in the first column by a “reference” clause—which is assuredly *not* a universally recommended text, and which is neither the most simple nor the most complex possible provision, but one that illustrates the basic purposes. For each reference clause, the second

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column identifies questions or other comments to consider.

These reference clauses are neither necessary nor sufficient for any particular deal, and the comments are far from exclusive (this sentence sounds like boilerplate itself). In many cases the background law makes inclusion of these provisions unnecessary. Moreover, the chart intentionally omits dispute resolution, indemnity and other clauses identified in the appendix that some might

consider boilerplate (I believe they often require more customization or client or specialist input). But taken *together*, the chart and appendix may help the user select an appropriate subset of general clauses for a specific transaction.

Many outstanding lawyers have offered their thoughts on boilerplate, and this chart builds on fine precedents. See, e.g., Marvin D. Heileson, "Know Your Boilerplate" (Cal. Bus. L. Section 1979); *ABA Model*

Asset Purchase Agreement with Commentary (2001); Tina L. Stark, ed., *Negotiating and Drafting Contract Boilerplate* (2003); Steven O. Weise & Mikel R. Bistrow, "Boilerplate Provisions in Transactional Documents," 20 Cal. Bus. L. Practitioner 33 (Summer 2005); Kenneth L. Adams, *Adams on Contract Drafting* (<http://adamsdrafting.org>); Eric Fishman, *The Sanity Clause* (<http://www.pillsburylaw.com/publications/the-sanity-clause>).

REFERENCE CLAUSE	COMMENTS
I. PREAMBLE	Good negotiators distinguish style from substance. Some drafters may choose to follow time-honored conventions, while others might select a contemporary approach. Reviewers should courteously edit within the confines of the drafter's selected mode, not overturn the choice or try to use elements of different styles in the same document.
THIS ____ AGREEMENT (the "Agreement") is entered into as of [date] (the "Effective Date") by _____, a [state] [legal entity] ("[defined term]"), and _____, a [state] [legal entity] ("[defined term]").	Contemporary style is for this preamble to be a complete sentence. Traditional style employs a noun clause, ending in a comma, and a new paragraph consisting of the centered and often letter-spaced word "WITNESSETH:". Pay attention to "as of" dates. Watch especially for backdating, an effective date prior to execution and delivery of the agreement. Would third parties be prejudiced by establishing a date earlier (or later) than the date on which the parties actually execute the agreement? Some preambles include addresses or states of residence, or descriptors like "and a wholly-owned subsidiary of X" in a party's defined name. If the current or ongoing truth of that description is important to a Party, it should consider using a representation or covenant. Addresses may be less reliable than other forms of identification in some parts of the world. For example, customary practice in Oman is to include a national identification number in place of an address when identifying an individual.
This Agreement is made with respect to the following recitals:	Contemporary style is for this full-sentence introduction to precede full-paragraph recitals (often identified by capital letters A, B, C for each recital paragraph); the entire passage is sometimes entitled "RECITALS" or "BACKGROUND." Traditional style uses paragraph clauses each ending in a semicolon (or colon for the last clause), with each recital opening with the impressive "WHEREAS." Recitals often recount prior history needed to understand the current transaction and provide a brief statement of motivation (especially if the Parties desire some particular tax or regulatory treatment of their deal). Watch for substantive information in a recital that, if false, would matter to your client. In many states, recitals in a written contract (other than of consideration) are conclusively presumed to be correct as between the parties (e.g., California Evidence Code § 622).

REFERENCE CLAUSE	COMMENTS
[In consideration of the mutual promises made herein, and intending to be legally bound,] the Parties [therefore] agree as follows:	Contemporary style has the agreement proper open in this manner. Traditional style culminates in the florid “NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties, intending to be legally bound, hereby agree as follows:”.
<p>II. DEFINITIONS</p> <p>Capitalized terms used in this Agreement have the following respective meanings.</p> <p>“Affiliate” means, with respect to a specified Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with the Person specified. [For purposes of this definition, control of a Person means the power, directly or indirectly through intermediaries, to direct or cause the direction of the management and policies of such Person whether through ownership of voting securities or ownership interests, by contract, or otherwise.] [With respect to a corporation, partnership or limited liability company, control includes direct or indirect ownership of more than 50% of the voting securities in such corporation or of the voting interest in a partnership or limited liability company.]</p> <p>“Business Day” means a day other than Saturday, Sunday or any day on which banks located in the State of _____ are authorized or obligated to close.</p> <p>“Contract” means any agreement, contract or lease, whether written or oral and whether express or implied.</p> <p>“Government Authority” means any court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of the United States or any state, county, city or other political subdivision or similar governing entity. [Government Authority includes any governmental, quasi-governmental or non-governmental body administering, regulating or having general oversight over [gas, electricity, or other relevant markets].]</p>	<p>Avoid use of uncapitalized defined terms, or terms that would have an unexpected meaning. A defined term “Contracts” that excludes government contracts, for example, might lead to misunderstandings.</p> <p>Do you have the same meaning of Affiliate in mind for all provisions where that term is used? Some contracts distinguish Affiliates from Wholly-Owned Affiliates or from Subsidiaries.</p> <p>Is there any reason to define or treat one Party’s Affiliates differently than those of another?</p> <p>In determining who has “control” of a joint venture, pay particular attention to arrangements where each person, with even a small percentage interest, might have veto rights or pose free-rider or holdout issues.</p> <p>An alternative is to use the percentage of equity ownership as the exclusive bright-line test, without further or alternative reference to “control.”</p> <p>The timing of actions involving more than one jurisdiction can be significantly affected by the definition. Watch for inclusion of multiple states or countries in the definition. Saturday and Sunday are not universal bank closure days, especially in Middle Eastern countries—see Wikipedia’s “Workweek and Weekend” article.</p> <p>The Uniform Commercial Code distinction between “agreement” and “contract” (§ 1-201) is not commonly observed.</p> <p>Do you intend for all purposes to include oral contracts in the “Contracts” definition? What about irrevocable bids that have been submitted to third parties?</p> <p>Is there any need to distinguish among judicial, legislative, executive or administrative Government Authorities?</p> <p>Participants in a regulated industry may be affected by actions of a non-public authority, such as a power exchange (PX) or independent system operator (ISO), and these private entities are sometimes included in such a definition.</p>

REFERENCE CLAUSE	COMMENTS
<p>"Knowledge" of [Party] means the actual awareness of a particular fact or matter by any of [names of specific persons] as of the date of a representation and warranty of that fact or matter[, in each case after [due] inquiry].</p>	<p>"Knowledge" of an organization is often limited to the actual knowledge of named individuals. Attorneys are often excluded from the list to avoid arguments about possibly waiving privileges and immunities. If the named persons will become employees of the other Party (or be terminated) following closing, they and their recollections would not necessarily be aligned with the promisor at the time that a dispute arises.</p> <p>Do you want to specify knowledge after "due," "diligent," "reasonable" or other levels of inquiry? Or to require making inquiry of direct reports, or reviewing records? Or to disclaim any such duty of inquiry whatsoever?</p>
<p>"Law" means any statute, common law or equitable principle, constitution, treaty, convention, ordinance, code, rule, regulation, order, writ, injunction, decree, executive order, or other similar authority enacted, adopted or promulgated by any Government Authority.</p>	<p>Some forms separately define specific bodies of law (e.g., Environmental Law or Antitrust Law), where the scope of those laws is relevant to contract clauses. Some also provide shorthands for Internal Revenue Code, HSR Act, WARN Act, Immigration Control and Reform Act, CFIUS Regulations, and similar statutes or regulations.</p>
<p>"Material" means of a level of significance that would affect whether a reasonable Person in the position of the [promisee] would enter into or conclude the transactions contemplated by this Agreement.</p>	<p>Distinguish between "material" as used in a MAC clause—significant enough to permit the buyer to walk away—from the level of significance required for monetary liability under a representation and warranty.</p>
<p>"Material Adverse Change" or "MAC" means a Material adverse change in the business, assets, liabilities, results of operations [or prospects] of the [Seller], regardless of the temporal duration thereof, including [list inclusions] but excluding [list exclusions such as changes in general economic conditions, industry conditions, this very transaction, or reactions of securities analysts].</p>	<p>Consider whether to quantify the amount of adverse impact required for either kind of standard, such as a net present value of the adverse effect of \$X discounted at Y% per year.</p> <p>Consider whether the clause should clarify that a MAC can result from a single source or in the aggregate of different types of adverse changes.</p> <p>An alternative to including "prospects" in the MAC definition is to refer in operative clauses to circumstances that result, or would reasonably be expected to result, in a MAC or a Material inaccuracy.</p> <p>See the discussion in Kenneth L. Adams, <i>A Manual of Style for Contract Drafting</i> (3d ed. 2013).</p>
<p>"Ordinary Course of Business" means in accordance with [Seller's historical and customary] practices with respect to the activity in question.</p>	<p>Consider specifying an industry standard, or a standard observed during a specific time period, if the Party's own historical practices are atypical. The amount of resources (dollars, time, or personnel) dedicated to a particular item or task (proportionately) could be used to define ordinary course.</p>
<p>"Party" means [Purchaser] and [Seller] [or "has the meaning set forth in the Preamble"].</p>	<p>Do you want Affiliates to be considered Parties under the agreement for any purposes?</p>
<p>"Person" means any natural person, corporation, general partnership, limited partnership, limited liability company, proprietorship, other business organization, trust, union, association or Government Authority.</p>	<p>Do you want a Governmental Authority to be considered a Person for all clauses of the agreement? Or to disclaim that inclusion?</p>

REFERENCE CLAUSE	COMMENTS
<p><u>“Reasonable Efforts”</u> means, with respect to the efforts to be expended by a Party with respect to any objective, that the level of efforts to be expended by a Party under this Agreement will be consistent with the level of reasonable, good faith efforts and resources that would normally be used by such Party (whether acting alone or through its Affiliates) to accomplish a similar objective under similar circumstances [consistent with the promisor’s past practices, or industry practices, including [list required efforts] but excluding [list non-required efforts]].</p>	<p>Cases construing “best efforts,” “reasonable efforts,” “commercially reasonable efforts” or other variants have a range of results. Rather than be a test case in linguistics, consider expressing what kinds of efforts <u>are</u> necessary, such as maintaining at least the same level of staffing as on a given date, or manufacturing 24 hours per day when necessary to fill orders; or consider expressing what kinds of effort are <u>not</u> necessary, such as paying money to third parties to obtain a consent.</p>
<p>III. RULES OF CONSTRUCTION</p>	<p>The rules of construction sometimes appear together with an opening definitions section; other times they appear in the general provisions section at the end.</p>
<p>Unless a [clearly] contrary intention applies, the following rules of construction apply to this Agreement.</p>	<p>This introduction somewhat diminishes the purpose and power of the clauses, but affords a safety hatch to avoid a materially surprising result.</p>
<p>All Article, Section, Schedule and Exhibit references in this Agreement are to components of this Agreement unless otherwise specified. The Schedules and Exhibits attached to this Agreement constitute a part of this Agreement and are incorporated herein for all purposes.</p>	<p>This subject is sometimes addressed in the Entire Agreement clause.</p>
<p>Any reference in this Agreement in the singular includes the plural where appropriate, and any reference in this Agreement in the masculine gender includes the feminine and neutral genders where appropriate.</p>	<p>Do you really need a gender/number clause? Consider correcting these matters in drafting, rather than relying on the boilerplate.</p>
<p>The headings used in this Agreement have been inserted for convenience of reference only and do not limit or exclusively define the provisions hereof.</p>	<p>Some forms purport to prohibit <u>any</u> use of the headings in construction of the contract. It may be sufficient only to provide that such headings are not exclusive definitions of scope.</p>
<p>The words “includes” or “including” mean “including without limitation”. The words “hereof,” “hereby,” “herein,” “hereunder” and similar terms in this Agreement refer to this Agreement as a whole and not any particular Article, Section, Exhibit or Schedule in which such words appear. Any reference to a Person includes any successor or permitted assignee of such Person. Any reference to a Contract includes any subsequent amendment in accordance with its terms and any exhibits or schedules thereto. Any reference to a Law includes any amendment or successor thereto and any rules and regulations promulgated thereunder.</p>	<p>Do you intend the agreement to apply to contracts and laws as later amended?</p> <p>Some forms provide that a reference to a Person in one capacity (e.g., as administrative agent) is not a reference to that Person in any other capacity (e.g., individually).</p> <p>Some agreements expressly reject the rule of <i>esjudem generis</i>—so that “including” and “other” are not limited by the nature of the specific examples given.</p>
<p>Currency amounts referenced herein are in U.S. Dollars.</p>	<p>Contemporary style uses only numerals (1, 200, \$300,000) rather than the handwriting-era convention of swinging twice at the same pitch—words followed by numerals in parentheses (one (1), two hundred (200), three hundred thousand and no-hundredths dollars (\$300,000.00)).</p> <p>In cross-border agreements, consider the need to define the consequences of currency conversion and its costs and risks.</p>

REFERENCE CLAUSE	COMMENTS
<p>[Time is of the essence of all terms of this Agreement for which a definite time is expressed.] Whenever this Agreement refers to a number of days, such number refers to calendar days unless Business Days are specified. Whenever any action must be taken hereunder on or by a day that is not a Business Day, then such action may be validly taken on or by the end of the next day that is a Business Day.</p>	<p>Do you really want time to be of the essence at all, or for all time-based provisions? What if your client is the one that is late, and the other Party is motivated to terminate? A time of essence clause may not be enforceable if a forfeiture would result (see California Civil Code § 3275).</p> <p>Try to define time periods precisely rather than relying solely on a rule of construction. A period commencing January 1 and continuing “through” March 31 is easy to draft, yet potentially clearer than “within three days,” or “by the first of the month,” or “at midnight December 1.”</p>
<p>All accounting terms used herein and not expressly defined herein have the meanings given to them under generally accepted accounting principles in the United States (“GAAP”).</p>	<p>Are you sure that the referenced financial statements and accounting concepts conform to GAAP, or are there exceptions? Some forms require GAAP to be applied consistently between iterations of a given set of financial documents.</p> <p>Some agreements further adopt terms as they are defined in the Internal Revenue Code (“IRC” or the “Code”), the International Financial Reporting Standards (“IFRS”), or “the” Uniform Commercial Code (“UCC”)—but be aware that the applicable commercial code will differ from the official UCC published from time to time..</p>
IV. GENERAL PROVISIONS	
A. SCOPE OF AGREEMENT PROVISIONS.	
<p><u>Amendment.</u> This Agreement may be amended, supplemented or modified only by a written instrument duly executed by or on behalf of each Party [to be charged with the terms of such instrument].</p>	<p>In contracts with more than two Parties, do you want Parties not affected by a change to have the right to sign (or not sign) the amendment? Is consent of any non-party required to change a contract? Compare the treatment of waivers to see if any differences are intended.</p>
<p><u>Waiver.</u> [Any term or condition of this Agreement may be waived at any time by the Party that is entitled to the benefit thereof, but no such waiver is effective unless set forth in a writing signed by or on behalf of the waiving Party.] No waiver by any Party of any term or condition is deemed to be a waiver of the same or any other term or condition on any future occasion. [No failure or delay in exercising any right or remedy under this Agreement is a waiver of such right or remedy.]</p>	<p>Do you want to require that all waivers must be in writing?</p> <p>Do you want to provide that a failure or delay in exercising a right or remedy can never operate as a waiver?</p>
<p><u>Entire Agreement.</u> [Except for [list specific agreement(s)],] this Agreement supersedes all prior oral and written discussions and agreements between the parties with respect to [the subject matter hereof], and contains and expresses the [sole and entire] [final, complete and exclusive] agreement between the Parties with respect thereto. [Without limitation, [list specific agreement(s)] are hereby superseded.]</p>	<p>Sometimes called Merger or Integrated Writing. California Code of Civil Procedure § 1856(b) uses the “final, complete and exclusive” terminology.</p> <p>Do you want expressly to supersede and disclaim reliance on specific letters of intent, other correspondence, or prior contracts? Or to leave them or ancillary contracts expressly in effect? Watch for the use of the words “excluding” and “including” in such a complex clause.</p> <p>Is “the subject matter hereof” clear, or do you want to be more specific?</p>
<p><u>Counterparts.</u> This Agreement may be executed in any number of counterparts, each of which is deemed an original, but all of which together constitute one and the same instrument. The exchange of signature pages by [facsimile/email] to all Parties constitutes execution and delivery of this Agreement.</p>	<p>Do you want to provide for electronic signatures? Do you want any security precautions for signature by facsimile, signature by email or electronic signature?</p>

REFERENCE CLAUSE	COMMENTS
<p><u>Severability</u>. If any term of this Agreement is to any extent invalid, illegal or incapable of being enforced, such term shall be excluded to the extent of such invalidity, illegality or unenforceability; all other terms hereof shall remain in full force and effect so long as the essential terms of the transactions contemplated hereby remain enforceable; and the Agreement shall be construed so as to effect the original intent of the Parties as closely as possible.</p>	<p>What if the unenforceable part is the “quid” of a “quid pro quo”—what should happen to the “quo”?</p> <p>Consider some ability for the dispute resolver to conform severed agreement as closely as possible to the Parties’ intent.</p> <p>Covenants not to compete often have a more robust severability clause.</p>
<p><u>Further Assurances</u>. Each Party shall use all Reasonable Efforts to take, or cause to be taken, all actions requested by the other Party that are necessary or desirable to consummate and make effective the transactions that this Agreement contemplates.</p>	<p>Do you want to include specific provisions for handling and paying for additional conveyances, filings, and transfer of records?</p>
<p><u>Survival of Obligations</u>. Notwithstanding anything to the contrary herein, all rights and obligations of the Parties under this Agreement cease upon the [Termination Effective Date,] except for the rights and obligations under Sections [____].</p>	<p>A survival clause is used to identify obligations under an agreement that continue after termination. Different rules may apply to different kinds of termination. Many contracts are silent on the subject of survival rather than endeavoring to cover all scenarios.</p> <p>Robust survival clauses often accompany confidentiality and indemnity obligations.</p>
<p>B. COMMUNICATIONS PROVISIONS.</p>	
<p><u>Notices</u>. Unless this Agreement specifically requires otherwise, any notice, demand or request provided for herein or served, given or made as contemplated hereby shall be in writing and either (i) delivered in person, (ii) sent by [facsimile/email], (iii) sent by [registered or certified] United States mail, postage prepaid, or (iv) sent by a nationally recognized overnight courier service that provides a receipt of delivery, in each case, to a Party at the addresses specified below (or such other address as a Party may specify by notice):</p>	<p>Does every “notice” under the agreement deserve this kind of formality? Consider whether billing, nominations, and other regular or informal correspondence should employ less formal lines of communications.</p> <p>Do you want personal delivery, email delivery or facsimile delivery to require any safeguards such as acknowledgments?</p>
<p>If to X, to:</p> <p>[legal entity name] [mailing address—not Post Office box for couriers] [Facsimile/email:] Attn: [officer title or individual name]</p> <p>With a mandatory copy, which by itself does not constitute notice, to:</p>	
<p>Notice given by personal delivery, mail or overnight courier pursuant to this Section is effective upon [physical/actual] receipt [by a Party’s employee/by the above listed representative]. Notice given by [facsimile/email] pursuant to this Section is effective as of the date of confirmed delivery if delivered before 5:00 p.m. [city] time on any Business Day, or the next succeeding Business Day if confirmed delivery is after 5:00 p.m. [city] time on any Business Day or during any day that is not a Business Day.</p>	<p>Consider whether notice should be effective when “sent” in the prescribed manner, or only when it is “physically” or “actually” received by a Party’s employee—or by the specifically named officer.</p> <p>Prefer references to “[city] time” instead of “standard time.”</p>

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REFERENCE CLAUSE	COMMENTS
<p><u>Announcements.</u> Neither Party may issue any press release or make any public announcement with respect to this Agreement without the prior written consent of the other Party, [such consent not to be unreasonably withheld,] except (a) the Parties shall issue a joint press release in the form of Exhibit [___] immediately following the execution and delivery of this Agreement, and (b) either Party may make any disclosures required by Law or applicable securities exchange.</p>	<p>Are you concerned with non-public announcements, such as internal notices to a Party's own employees?</p> <p>Do you want to regulate how Parties respond to unsolicited outside press or other inquiries? Or to govern how Parties deal with customers, suppliers, employees and other stakeholders?</p>
<p><u>Confidentiality.</u> Except as otherwise required by Law, the Party to which disclosures are made ("<u>Recipient</u>") shall not, and shall cause each of its employees, agents, and representatives (collectively, "<u>Representatives</u>") not to,</p> <p class="list-item-l1">(i) disclose any Confidential Information (as defined [below]) to any Person [other than Recipient's Representatives who need to know such Confidential Information for the purposes contemplated by this Agreement [and who agree in writing to be bound by the provisions of this Section]], or</p> <p class="list-item-l1">(ii) use the Confidential Information for any purpose other than [the purposes that this Agreement contemplates].</p> <p>Promptly upon the disclosing Party's written request [define termination or other triggering circumstances], Recipient shall, and shall cause its Representatives to, return to the disclosing Party or destroy all Confidential Information. If Recipient destroys the Confidential Information, it shall certify that it has done so in writing and promptly deliver that certificate to the disclosing Party.</p>	<p>The confidentiality provision may be superseded or supplemented by an independent Non-Disclosure Agreement ("NDA"). The NDA may be provided to others as evidence of the confidentiality obligations, rather than needing to disclose the whole transactional agreement itself.</p> <p>Do you want Representatives to have to sign confidentiality agreements? Lawyers and certain other professionals are generally subject to comparable rules of professional responsibility.</p> <p>Do you want additional disclosures to be pre-approved? Those required by a court or other Governmental Authority, after notifying the other Party and affording it an opportunity to enforce its rights in the material? Those required to enforce rights under the Agreement against third parties? Those required by applicable regulations?</p> <p>Do you want to permit disclosure to prospective buyers or lenders, at least if they sign confidentiality agreements?</p> <p>Do you want a unilateral confidentiality obligation, or a bilateral one?</p> <p>Do you want to place an outside time duration on the confidentiality obligation?</p>

REFERENCE CLAUSE	COMMENTS
<p><u>"Confidential Information"</u> means</p> <p>(A) all information relating to [the disclosing Party or its business (whether provided in writing, electronic form or otherwise)] that has been provided or shown to Recipient by or on behalf of the disclosing Party [and that is expressly designated as "Confidential"], and</p> <p>(B) all notes, analyses, compilations, studies, and other materials containing any information described in subsection (A), but</p> <p>Confidential Information excludes information that</p> <p>(W) is or becomes publicly available other than as a result of disclosure by Recipient or its Representatives; or</p> <p>(X) is, at the time of disclosure under this Agreement, already known to Recipient without restriction on disclosure; or</p> <p>(Y) is or becomes available to Recipient on a non-confidential basis from a third party that [to Recipient's Knowledge] is not bound by a similar duty of confidentiality; or</p> <p>(Z) is independently developed by Recipient without breach of this Agreement].</p>	<p>What is to be kept confidential—the Agreement itself, the fact that there is a contract, or materials provided by one Party to the other in its negotiation or performance?</p> <p>Do you want information to be marked or designated as "confidential" in order to qualify? How will information be designated "confidential," in the era of electronic information?</p> <p>Do you want the exceptions listed here, or additional exceptions?</p> <p>Some confidentiality clauses contain especially robust specific performance and injunctive relief provisions, and may confirm (rather than exclude) the exposure to consequential damages in the event of breach.</p>
<p>C. LIABILITY PROVISIONS.</p>	
<p><u>Force Majeure</u>. Except for obligations to pay money, neither Party is liable for any failure to perform or observe any of its obligations under this Agreement for, as long as and to the extent that, such performance is prevented or hindered by any circumstances beyond such Party's reasonable control (and for a reasonable period thereafter necessary for resumption of such performance) including, without limitation, declared or undeclared war, revolution, civil commotion, labor disputes, acts of public enemies, or due to any law, proclamation, regulations, ordinance, demand or requirement of any Governmental Authority. The Party whose performance is so prevented or hindered shall notify the other Party in writing of the details thereof, with reasonable specificity, within [___] days of the occurrence of such circumstances and shall take all reasonable steps to resume performance as soon as possible.</p>	<p>Force majeure really should not be treated as boilerplate at all. Parties should actively consider what grounds should constitute excuses for performance of their respective obligations in this particular agreement.</p> <p>There is background law in each state or other jurisdiction on such topics as the allocation of supplies during any outage, whether excused or unexcused. Consider whether the agreement should expressly state obligations to treat all similarly situated customers the same; the right of a manufacturer to include supply to its affiliates and itself in such allocations; or the right to treat long-term customers or customers under contract differently from short-term or spot customers.</p> <p>Should the other Party have an express termination right after some extended duration of suspension of performance?</p>
<p><u>Cumulative Remedies</u>. All rights and remedies under this Agreement or by Law are cumulative and not alternative.</p>	<p>Watch for use of this rule with liquidated damage or exclusive remedy provisions, which may in fact be intended to be exclusive of other possible claims.</p>
<p><u>Expenses</u>. Except as otherwise expressly provided in this Agreement, whether or not the transactions contemplated hereby are consummated, each Party shall pay its own [costs, fees and other expenses] incurred in anticipation of, relating to and in connection with the negotiation and execution of this Agreement and the transactions contemplated hereby.</p>	<p>Do you want exceptions for certain fees, stamp taxes, other transfer taxes or other expenses?</p> <p>Do you want a different rule if the transaction is not consummated?</p> <p>"Costs," "fees" and "expenses" may have different meanings in litigation and other contexts, even if drafters tend to use them as synonyms.</p>

REFERENCE CLAUSE	COMMENTS
<p><u>Waiver of Consequential Damages.</u> Neither Party is liable to the other Party, whether in contract or tort, for any [consequential, incidental, indirect, special or punitive] damages incurred by such other Party relating to the breach or alleged breach of this Agreement. This exclusion applies whether or not the possibility of such damages has been disclosed or could have reasonably been foreseen, but does not apply to any such damages claimed by a third party for which a Party has an indemnification obligation under this Agreement.</p>	<p>Consider what kinds of damages are possible in your type of transaction. “Consequential damages” and “incidental damages” are defined in the Uniform Commercial Code, which definitions may not fit contracts in corporate and securities or other settings. “Special damages” and “indirect damages” are affected by pleading rules and court decisions. See Glenn D. West and Sara G. Duran, <i>Reassessing the “Consequences” of Consequential Damage Waivers in Acquisition Agreements</i>, 63 The Business Lawyer 777 (May 2008).</p> <p>Consider whether lost profits or lost earnings are “consequential damages” in the context of this transaction. Some contracts expressly exclude cases of fraud or willful misconduct.</p> <p>Consequential damages for personal injury in the case of consumer goods may not be subject to waiver. Waivers might cause the remaining remedy to fail of its essential purpose or be unconscionable and thus be unenforceable (see UCC § 2-719).</p>
<p>D. PARTY PROVISIONS.</p>	
<p><u>Successors and Assigns.</u> This Agreement is binding on and inures to the benefit of each Party and its successors and permitted assigns.</p>	<p>If one of the Parties is a natural person, by background law his or her successors may include estates, executors, heirs and legatees.</p>
<p><u>No Third-Party Beneficiaries.</u> Except for the [indemnity and defense] provisions of Section [___] (which are intended to be for the benefit of the Persons identified therein), the terms of this Agreement are intended solely for the benefit of the Parties, and it is not the intention of the Parties to confer third-party beneficiary rights upon any other Person.</p>	<p>Consider expressly addressing indemnitees and benefit plan participants.</p> <p>Employee benefit provisions sometimes have a robust no-third-party-beneficiaries clause.</p>
<p><u>Assignment.</u> [Buyer may assign its rights and delegate performance of its obligations hereunder to an Affiliate and Seller may assign its rights for security purposes to a [lender]. Except as provided in the preceding sentence,] neither Party may assign its rights [or delegate performance of its obligations] under this Agreement without the prior written consent of the other party, [such consent not to be unreasonably withheld]. [Any attempt to make any assignment or delegation not in compliance with this Agreement is void.] [Unless expressly agreed otherwise, no assignment shall release the assigning Party from its obligations hereunder.]</p>	<p>Do you want to permit assignments to Affiliates? What about changes in control of a Party? What about mergers or reorganizations?</p> <p>What about the initial assignment of rights in the Agreement for security for financing purposes? What about subsequent foreclosures of such security interests?</p> <p>Should assignment be prohibited outright, or subject expressly to consent? If the latter, should a reasonableness standard be imposed, or should one be expressly disclaimed (“sole discretion”)?</p> <p>Do you want any attempted assignment to be “void,” or to just be voidable or a breach?</p> <p>Is the assignor released upon an effective assignment? If not, the assignor may be treated as a surety for its assignee’s performance, with some but not all of the traditional suretyship defenses.</p> <p>Do you want to prohibit delegation or subcontracting of obligations?</p> <p>Do you want the Parties to split net profits from any assignment?</p> <p>Do you want the Party proposing assignment to pay the other Party’s costs, including attorneys’ fees, for reviewing the assignment?</p> <p>Do you want to consider a preemptive right (a right of first refusal or right of first offer) in lieu of, or in addition to, an assignment restriction?</p>

REFERENCE CLAUSE	COMMENTS
E. <u>ENFORCEMENT PROVISIONS.</u>	
<u>Governing Law.</u> This Agreement and all rights and obligations of the Parties arising out of or relating to this Agreement or the negotiation, execution or performance hereof, including any tort obligations, are governed by and construed in accordance with the Law of the State of X, without giving effect to any conflict or choice of law provision that would result in the imposition of another state's Law.	Consider expressly addressing not only the agreement but also the negotiation process, and tort as well as contract obligations. In contracts for sale of goods, consider disclaiming applicability of United Nations Vienna Convention on the International Sale of Goods ("CISG"). In contracts that involve a mixture of goods and services, or sale and leases or licenses, consider specifying whether the UCC or another particular body of law governs.
<u>Attorneys' Fees.</u> If either Party brings any action [arising out of or relating to] this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and expenses incurred in such action from the unsuccessful party.	Do you want a fee-shifting clause? For all clauses or just some? Consider scenario planning to confirm this is in your client's interest. Some forms define what kind of victory is needed (total, or at least better than the other Party's last settlement offer) for one to be a "prevailing" Party. In some states, a one-way fee shifting clause is automatically read as a two-way fee shifting clause (e.g., California Civil Code § 1717).
V. <u>CONCLUSION</u>	Old ways die hard. The formality of the concluding paragraph is more established than that of the preamble.
IN WITNESS WHEREOF, the duly authorized representative of each Party has executed and delivered this Agreement as of the Effective Date. [legal entity name] By [signature of officer] [title of officer] -or- By [partner or member legal entity name] By [signature of officer of partner or member] [title of officer] -or- By [attorney-in-fact], its Attorney-in-Fact	Sometimes the officer's name is also printed. If the signatory's authorization is important, consider covering it in a representation, covenant or both. Is more than one signatory desired, or required by a resolution or background law? Signature dates, which may differ from the Effective Date, may not be necessary. Address authorization and execution by or on behalf of trusts, co-signers, new guarantors and co-principals; ratification by existing guarantors; and consents by spouses as to community property assets.

APPENDIX

One lawyer's boilerplate is another's deal term

The preceding concise chart necessarily excludes many provisions that may appear in a large number of contracts of a particular type. Some drafters may consider them boilerplate, while others would bring some of them up explicitly with their clients or with subject-matter specialists in the main negotiation. Just listing the following clauses here in this appendix may provoke some thoughts and serve some purpose.

DEFINITIONS AND RULES

- Priority as between agreements, between main text and exhibits, between words and numerals
- Disclaimer of purchase order or invoice terms--salvoes in the "battle of the forms"
- "Charter Documents," "Hazardous Materials," "Liabilities" (and "Environmental Liabilities"), "Liens" (and "Permitted Liens"), "Permits," "Release," "Remediation," "Taxes"

LIABILITY

- "Default," "Event of Default"
- Remedies and process for default
- Termination for default or convenience
- Consequences of termination
- Waiver or confirmation of setoff rights
- Joint and several, or several, liability
- Waiver or limitation of debtor exemptions, or guarantor and surety defenses
- Late charges, interest, usury savings clauses
- Disclaimers of warranties
- Limitations of liability
- Liquidated damages
- Passage of title and risk of loss
- Indemnification, "Claims," "Proceedings"
- Release--in California, quoting Civil Code § 1542

DISPUTE RESOLUTION

- Consent to exclusive or non-exclusive jurisdiction and forum
- Executive resolution of disputes
- Mediation
- Arbitration
- Waiver of jury trial
- Waiver of sovereign or tribal immunity
- Consent to specific performance
- Consent to temporary or permanent injunctive relief
- Change of statute of limitations

OTHER

- Disclaimers of fiduciary duties or partnership status
- Legally required disclosures, especially in consumer contexts
- Currency, conversion and non-convertibility
- Ownership, protection and infringement of intellectual property
- Handling of FOIA requests
- Compliance with laws generally, or with immigration, Equal Employment Opportunity, or other specific bodies of law
- Legal re-export of technology
- Unauthorized payments, prohibited counterparties
- Independent contractor
- No brokers or finders

Comments on *Respecting Boilerplate* are welcome. Please contact the author at rob.james@pillsburylaw.com.

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