# 13. General Provisions

## 13.1 EXPENSES

**Except as otherwise provided in this Agreement, each party to this Agreement will bear its respective fees and expenses incurred in connection with the preparation, negotiation, execution and performance of this Agreement and the Contemplated Transactions, including all fees and expense of its Representatives. Seller will pay all amounts payable to the Title Insurer in respect of the Title Commitments, copies of exceptions and the Title Policy, including premiums (including premiums for endorsements) and search fees. Buyer will pay one-half and Seller will pay one-half of (a) the HSR Act filing fee and (b) the fees and expenses of the escrow agent under the Escrow Agreement. If this Agreement is terminated, the obligation of each party to pay its own fees and expenses will be subject to any rights of such party arising from a Breach of this Agreement by another party.**

### COMMENT

The buyer and the seller often agree that fees and expenses will be paid by the party incurring the same. The Model Agreement adopts this view.

Sections 3.30 and 4.4 contain representations of Seller and Buyer to the effect that neither has incurred any obligation to any broker or finder in respect of the Contemplated Transactions. If either party had retained a broker or finder, the first sentence of Section 13.1 would require the party incurring the obligation to satisfy it unless a specific provision were added as to the responsibility for the obligation.

Although the second sentence of Section 13.1 provides that Seller will pay for the title insurance required by the Model Agreement, local custom may dictate a different result, in which case Section 13.1 should be appropriately modified. The last sentence of Section 13.1 is intended to avoid a conflict between a judgment for damages due to a breach of the acquisition agreement and any obligation to pay expenses by providing that a judgment for a breach will supersede obligations under Section 13.1.

## 13.2 PUBLIC ANNOUNCEMENTS

**Any public announcement, press release or similar publicity with respect to this Agreement or the Contemplated Transactions will be issued, if at all, at such time and in such manner as Buyer determines. Except with the prior consent of Buyer or as permitted by this Agreement, neither Seller, Shareholders nor any of their Representatives shall disclose to any Person (a) the fact that any Confidential Information of Seller or Shareholders has been disclosed to Buyer or its Representatives, that Buyer or its Representatives have inspected any portion of the Confidential Information of Seller or Shareholders, that any Confidential Information of Buyer has been disclosed to Seller, Shareholders or their Representatives or that Seller, Shareholders or their Representatives have inspected any portion of the Confidential Information of Buyer or (b) any information about the Contemplated Transactions, including the status of such discussions or negotiations, the execution of any documents (including this Agreement) or any of the terms of the Contemplated Transactions or the related documents (including this Agreement). Seller and Buyer will consult with each other concerning the means by which Seller's employees, customers, suppliers and others having dealings with Seller will be informed of the Contemplated Transactions, and Buyer will have the right to be present for any such communication.**

### COMMENT

The Model Agreement provides that Buyer will control the timing and content of public announcements. The seller may suggest that control of public announcements be at least mutual. The seller may want to have the covenant to maintain the confidentiality of the acquisition agreement be mutual as well. Because the buyer's and the seller's interests in confidentiality and controlling public announcements are nearly equal in most cases, the buyer may want to provide in the initial draft that these covenants are mutual. If the seller has a few key suppliers or customers, the buyer may want to have the right to approve communications with those suppliers or customers or even to be present during discussions with them.

The buyer sometimes will negotiate for the additional right to visit with key customers or suppliers to obtain information concerning their relationship with the seller or to gain assurances that their relationship with the seller will continue. The buyer may also want to add provisions to Section 5.4 permitting it to be present or take an active role in obtaining consents of certain key suppliers or customers to assignments.

For publicly traded companies, the timing of a public announcement regarding the acquisition may be affected by federal securities laws.

## 13.3 NOTICES

**All notices, Consents, waivers and other communications required or permitted by this Agreement shall be in writing and shall be deemed given to a party when (a) delivered to the appropriate address by hand or by nationally recognized overnight courier service (costs prepaid); (b) sent by facsimile or e-mail with confirmation of transmission by the transmitting equipment; or (c) received or rejected by the addressee, if sent by certified mail, return receipt requested, in each case to the following addresses, facsimile numbers or e-mail addresses and marked to the attention of the person (by name or title) designated below (or to such other address, facsimile number, e-mail address or person as a party may designate by notice to the other parties):**

**Seller (before the Closing):** ______________________
**Attention:** ______________________
**Fax no.:** ______________________
**E-mail address:** ______________________

**with a mandatory copy to:** ______________________
**Attention:** ______________________
**Fax no.:** ______________________
**E-mail address:** ______________________

**Seller (after the Closing):** ______________________
**Attention:** ______________________
**Fax no.:** ______________________
**E-mail address:** ______________________

**with a mandatory copy to:** ______________________
**Attention:** ______________________
**Fax no.:** ______________________
**E-mail address:** ______________________

**Shareholders:** ______________________
**Fax no.:** ______________________
**E-mail address:** ______________________

**with a mandatory copy to:** ______________________
**Attention:** ______________________
**Fax no.:** ______________________
**E-mail address:** ______________________

**Buyer:** ______________________
**Attention:** ______________________
**Fax no.:** ______________________
**E-mail address:** ______________________

**with a mandatory copy to:** ______________________
**Attention:** ______________________
**Fax no.:** ______________________
**E-mail address:** ______________________

## COMMENT

There are many varieties of notice provisions in use. The Model Agreement provides five alternative means for giving notice and sending other communications: by hand, overnight courier, facsimile, e-mail or U.S. mail.

The traditional means of giving notice has been U.S. mail, but this is no longer as common as it once was because of increasing reliance upon other more expeditious means of communication, such as facsimile and e-mail. Although use of facsimile and e-mail has become more widespread, there is a concern that these technologies are still unreliable and are susceptible to interception by other parties. This concern about reliability to some extent can be alleviated by requiring confirmation of transmission by the transmitting equipment or confirmation by telephone of receipt of a facsimile or e-mail transmission. Most facsimile equipment will print a transmission report that confirms successful transmission and identifies the facsimile number and, in some cases, the party to which the notice has been sent. Some electronic mail systems provide confirmation that the message has been delivered to the recipient's machine but, like the facsimile machines, do not indicate that the recipient has actually received the message. Third-party e-mail services exist that can provide additional message security against interception and return-receipt verification. When notice is permitted to be given by facsimile or e-mail, a requirement is sometimes added that a copy of the notice also be sent by certified or registered mail, return receipt requested.

These provisions normally specify when notice is deemed to have been given. Under the Model Agreement, notice is deemed given when sent by facsimile or e-mail, when delivered by hand or courier service and when received or rejected if sent by certified mail. A buyer will ordinarily prefer that notice be deemed given when sent because it is more likely that it will be giving notices under the acquisition agreement. On the other hand, a seller will want to be sure that a notice is received so that it can be acted upon in a timely manner. If receipt is required, however, a party wishing to forestall or avoid notice might have the opportunity to do so. In some cases, notice may be deemed given after a specified number of days or hours have elapsed from the time it is sent. This approach is often used when notice can be given by U.S. mail because of concern over possible delays.

If notice is deemed given when sent or a specified period after being sent, the party giving the notice must be prepared to prove, if required, that the notice was actually sent. If a notice is time sensitive or especially critical, a party usually will take steps to ensure that it is personally delivered, with a signed receipt, or is sent by multiple methods so that adequate proof of the giving of notice can be presented if a dispute arises.

Most notice provisions designate for a corporation or other entity a particular person by name or title to whose attention the notice is to be directed. It may be better to use an attention line than to designate a person at the beginning of the address to avoid the argument that the notice has to be given to or received by that person. The Model Agreement also contemplates that copies of notices are to be sent to counsel or others. The notice provision specifies that these copies are mandatory, meaning that notice will not be deemed effective as to a party unless the copy is also given as required. Individual shareholders often will require this if, for example, it may be difficult to contact them for extended periods of time. In some cases, the notice provision will state that sending or delivering the copy of the notice will not constitute the giving of notice to the party itself.

## 13.4 JURISDICTION; SERVICE OF PROCESS

**Any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction may be brought in the courts of the State of ____________, County of ____________, or, if it has or can acquire jurisdiction, in the United States District Court for the ____________ District of ____________, and each of the parties irrevocably submits to the exclusive jurisdiction of each such court in any such Proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the Proceeding shall be heard and determined only in any such court and agrees not to bring any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction in any other court. The parties agree that either or both of them may file a copy of this paragraph with any court as written evidence of the knowing, voluntary and bargained agreement between the parties irrevocably to waive any objections to venue or to convenience**

**of forum. Process in any Proceeding referred to in the first sentence of this section may be served on any party anywhere in the world.**

### COMMENT

In this section, the parties select an exclusive forum for actions arising out of or relating to the Model Agreement and submit to jurisdiction in that forum. The forum selected by the buyer usually will be its principal place of business, which may not be acceptable to the seller. The seller often will attempt to change the designation to a more convenient forum or simply to confer jurisdiction in the forum selected by the buyer without making it the exclusive forum. For an analysis of whether a forum selection clause is permissive or exclusive, see *Action Corp. v. Toshiba America Consumer Products, Inc.,* 975 F. Supp. 170 (D.P.R. 1997).

Clauses by which the parties consent to jurisdiction are usually given effect so long as they have been freely negotiated among sophisticated parties. Exclusive forum selection clauses are generally upheld by the courts if they have been freely bargained for, are not contrary to an important public policy of the forum and are generally reasonable. *See generally* CASAD, JURISDICTION AND FORUM SELECTION § 4.17 (1988 & Supp. 1998). Accordingly, a court in a forum other than the one selected may, in certain circumstances, elect to assert jurisdiction, notwithstanding the parties' designation of another forum. In these situations, the courts will determine whether the provision in the agreement violates public policy of that state and, therefore, makes enforcement of the forum selection clause unreasonable.

Some state statutes attempt to validate the parties' selection of a forum. For example, a California statute provides that actions against foreign corporations and nonresident persons can be maintained in California where the action or proceeding arises out of or relates to an agreement for which a choice of California law has been made by the parties and the contract relates to a transaction involving not less than $1 million and contains a provision whereby the corporation or nonresident agrees to submit to the jurisdiction of the California courts. CAL. CIV. PROC. CODE § 410.40. *See also* DEL. CODE tit. 6, § 2708; N.Y. GEN. OBLIG. LAW § 5-1402.

The parties may also want to consider the inclusion of a jury-trial waiver clause such as the following:

> **THE PARTIES HEREBY WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE CONTEMPLATED TRANSACTIONS, WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. THE PARTIES AGREE THAT ANY OF THEM MAY FILE A COPY OF THIS PARAGRAPH WITH ANY COURT AS WRITTEN EVIDENCE OF THE KNOWING, VOLUNTARY AND BARGAINED-FOR AGREEMENT AMONG THE PARTIES IRREVOCABLY TO WAIVE TRIAL BY JURY AND THAT ANY PROCEEDING WHATSOEVER BETWEEN THEM RELATING TO THIS AGREEMENT OR ANY OF THE CONTEMPLATED TRANSACTIONS SHALL INSTEAD BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY.**

The jury trial waiver may be used in conjunction with, or in substitution for, the arbitration clause discussed below in jurisdictions where the enforceability of such clauses is in question.

The Seventh Amendment to the U.S. Constitution guarantees the fundamental right to a jury trial in "suits at common law, where the value in controversy shall exceed twenty dollars," and there is, therefore, a strong presumption against the waiver of the right to a jury trial. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) ("courts indulge every reasonable presumption against waiver"). As a result, courts have held that jury-waiver clauses are to be narrowly construed and that any ambiguity is to be decided against the waiver. National Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255 (2nd Cir. 1977); Phoenix Leasing, Inc. v. Sure Broad., Inc., 843 F. Supp. 1379, 1388 (D. Nev. 1994), *aff'd without opinion*, 89 F.3rd 846 (9th Cir. 1996). *See also* Truck World, Inc. v. Fifth Third Bank, No. C-940029, 1995 WL 577521, at *3 (Ohio App. Ct. Sept. 29, 1995) ("jury waiver clause should be strictly construed and should not be extended beyond its plain meaning"). The constitutional right to a jury trial is a question to be determined as a matter of federal law, whereas the substantive aspects of the claim are determined under state law. Simler v. Conner, 372 U.S. 221 (1963) (*citing* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and other cases).

Although courts have held that this right may be waived either expressly (United States v. Moore, 340 U.S. 616 (1951)) or by implication (Commodity Futures Trading Com'n. v. Schor, 478 U.S. 833 (1986)), courts have also held that jury waiver clauses must be knowingly and voluntarily entered into in order to be enforceable. Morgan Guar. Trust Co. v. Crane, 36 F. Supp. 2d 602 (S.D.N.Y. 1999). In deciding whether a jury waiver clause was knowingly and voluntarily entered into, the court will generally consider four factors: (a) the extent of the parties' negotiations, if any, regarding the waiver provision, (b) the conspicuousness of the provision, (c) the relative bargaining power of the parties, and (d) whether the waiving party's counsel had an opportunity to review the agreement. Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994), *aff'd*, 96 F.3d 216 (7th Cir. 1996). Other courts have formulated the fourth factor of this test as "the business acumen of the party opposing the waiver." *Morgan Guaranty*, 36 F. Supp. 2d at 604.

Although there are no special requirements for highlighting a jury waiver clause in a contract to meet the second prong of this test, there are ways to craft a sufficiently conspicuous jury waiver clause to support the argument that the waiver was knowingly entered into, including having the clause typed in all bold faced capital letters and placing it at the end of the document directly above the signature lines. Although adherence to these techniques will not guarantee enforceability of the jury waiver clause (*Whirlpool Financial*, 866 F. Supp. at 1106, holding that there was no waiver despite the fact that the clause was printed in capital letters), courts have found these to be important factors in deciding the validity of jury waiver clauses. *See, e.g., Morgan Guaranty*, 36 F. Supp. 2d at 604, where the court held that the defendant had knowingly waived the right because the clause immediately preceded the signature line on the same page.

In deciding whether a jury waiver clause was voluntarily entered into, courts generally will consider (a) the disparity of the parties' bargaining power positions, (b) the parties' opportunity to negotiate and (c) the parties' experience or business acumen. *See, e.g., Morgan Guaranty*, 36 F. Supp. 2d at 604, where the court enforced a jury waiver when it found that certain terms of the note at issue had been negotiated, and Sullivan v. Ajax Navigation Corp., 881 F. Supp. 906, 910 (S.D.N.Y. 1995), where the court refused to enforce a jury waiver contained in a preprinted cruise ship ticket.

Even where the terms of the acquisition agreement are heavily negotiated, the drafter may want to anticipate a challenge to the jury waiver clause, particularly if the seller is financially distressed or not particularly sophisticated. *See, e.g., Phoenix Leasing*, 843 F. Supp. at 1385, where the court held that the waiver was voluntary because some of the agreement's terms were negotiated, evidencing bargaining power, and finding that knowledge by the other party that funds were "badly needed" did not indicate gross disparity of bargaining power. The *Phoenix Leasing* court also enforced the waiver because it found that the defendant was "experienced, professional and sophisticated in business dealings" and "all parties were represented by counsel." Similarly, in *Bonfield v. Aamco Transmissions, Inc.*, 717 F. Supp. 589, 595–6 (N.D. Ill. 1989), the court found the waiver voluntary (a) because the party challenging the waiver was an experienced businessman who chose not to have counsel review the agreement, and (b) the defendant had explained the purpose of the jury waiver to the party challenging the waiver in terms of "the large verdicts juries tend to award" to which the court noted, "[i]f that did not grab [the] attention [of the party objecting to the waiver], nothing would." *But see Whirlpool Financial*, 866 F. Supp. at 1106, where the court held that the waiver was not voluntary in the light of evidence showing that the party challenging the jury waiver clause was desperate for cash and had no ability to change the inconspicuous terms of a standardized contract.

It is worth noting that the courts are split on the question of which party carries the burden of proving that a jury waiver was knowing and voluntary. Some have held that the burden is placed upon the party attempting to enforce the waiver, *Sullivan*, 881 F. Supp. 906, whereas some have held that the party opposing the waiver bears the burden of proving that the waiver was not knowing and voluntary. K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985). Still other courts have expressly avoided the issue altogether. Connecticut Nat'l Bank v. Smith, 826 F. Supp. 57 (D.RI. 1993); *Whirlpool Financial*, 866 F. Supp. at 1102; *Bonfield,* 717 F. Supp. at 589. In *Bonfield*, the court also noted that there do not appear to be any reported decisions regarding the required standard of proof in these cases.

The last sentence of Section 13.4 provides that service of process may be obtained on any party anywhere in the world and is intended to waive the requirement of acquiring in personam jurisdiction.

The Model Agreement does not contain an alternate dispute resolution (ADR) provision (other than that related to the Purchase-Price adjustment procedure in Section 2.9) and contemplates litigation as the principal means of dispute resolution. Because of the growing use of ADR in acquisition documentation, the practitioner might wish to consider the advisability of various ADR clauses in the initial draft. ADR comes in many forms and variants, the most common of which is mandatory arbitration. Other forms of ADR are discussed later in this Comment.

For many years, there was considerable debate in the various jurisdictions as to the enforceability of mandatory arbitration clauses. Those discussions have been resolved by a number of recent U.S. Supreme Court decisions that leave little doubt as to the enforceability of arbitration clauses in commercial documents. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court held that Section 2 of the Federal Arbitration Act preempted a provision of the California Franchise Investment Law, which California courts had interpreted as necessitating judicial consideration rather than arbitration. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Supreme Court held that the Federal Arbitration Act applies to the full extent of the Commerce Clause of the U. S. Constitution and supersedes efforts by some state courts to limit the effect of arbitration clauses within their jurisdictions. In *Allied-Bruce*, the Court held that arbitration may include all forms of damages, including punitive damages claims. *See also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995). In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the U.S. Supreme Court addressed the issue of who decides whether a dispute is arbitrable, the arbitrator or the court, and held that, where the clause itself confers this power on the arbitrator, the clause should be respected, and the courts should give the arbitrator great flexibility in making such determinations.

Notwithstanding the evolution of the law to enforce such clauses, there is much debate among practitioners as to the advisability of including mandatory binding arbitration clauses in acquisition documents. Factors that support exclusion of a mandatory binding arbitration clause include the following: (a) litigation is the appropriate dispute resolution mechanism because the buyer is more likely than the seller to assert claims under the acquisition agreement; (b) the prospect of litigation may give the buyer greater leverage with respect to resolving such claims than would the prospect of mandatory arbitration; (c) arbitration may promote an unfavorable settlement; (d) arbitration brings an increased risk of compromised compensatory damage awards; (e) arbitration lowers the likelihood of receiving high punitive damages; (f) certain provisional remedies (such as injunctive relief) may not be available in arbitration; (g) the arbitration decision may not be subject to meaningful judicial review; (h) rules of discovery and evidence (unavailable in some arbitration proceedings) may favor the buyer's position; (i) the ease with which claims may be asserted in arbitration increases the likelihood that claims will be asserted; and (j) because many of the facts necessary for favorable resolution of the buyer's claims may be in the seller's possession (especially if a dispute centers on representations and warranties containing knowledge qualifications), these facts may not be available to the buyer without full discovery. Factors that would encourage inclusion of a mandatory binding arbitration clause in a buyer's initial draft include the following: (a) arbitration may promote a reasonable settlement; (b) arbitration may reduce costs; (c) arbitration creates the possibility of keeping the dispute confidential; (d) arbitrators may be more sophisticated in business affairs than judges or juries and reach a more appropriate result; (e) arbitration may be speedier than litigation; (f) arbitration eliminates any home-court advantage to a seller litigating in its own jurisdiction; (g) arbitration is a less confrontational environment and may better maintain the business relations of the buyer and the seller; (h) arbitration furnishes an opportunity to have special experts selected by the parties rule on technical issues; and (i) arbitration decreases the risk of punitive damages.

Analysis of this issue must begin with a determination of whether the buyer is more likely to sue or be sued and continue with a selection of the environment that would most favor the buyer under those circumstances. The practice remains for a buyer's first draft to exclude any mandatory arbitration clause, but a number of factors, particularly concern over appearing before a judge and jury in a seller's jurisdiction, are resulting in increasing use of these clauses.

The American Arbitration Association issues general rules for commercial arbitration and specific rules for other types of arbitration, including construction, patent, real estate valuation, securities, employment, title insurance and franchises. The New York Stock Exchange and the National Association of Security Dealers also have specific rules of arbitration. The use of such arbitration procedures often is part of the ordinary course of business, especially in the securities industry.

A complete ADR provision for mandatory, binding arbitration generally addresses the following topics: consent by the parties to arbitration, the disputes that will be covered (generally all matters arising out of the transaction), the rules under which the arbitration will be governed, the substantive law to be applied, the location of the arbitration, the mechanism for selecting arbitrators (including their number and qualification), the person (arbitrator or court) who is to determine whether a dispute is subject to arbitration, any agreed limitation upon damages that can be awarded (although limitations on the remedies to be awarded have been looked upon with disfavor by the courts) and any requirements that the arbitrator recognize rules of evidence or other procedural rules or issue a written opinion. Some ADR provisions leave the qualifications and the number of the arbitrators to be determined once the need for arbitration is evident; others specify as much as possible in advance. Some ADR provisions also specify discovery procedures and procedures concerning exchange of information by the parties. The discovery provisions may require that discovery proceed in accordance with the Federal Rules of Civil Procedure. A comprehensive provision generally includes enforceability language and procedures for appeal of the award, although provisions for appeal may undercut the entire rationale for ADR. *See generally* AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE (1993).

Drafters of ADR provisions should check for case law and statutes governing arbitration in the jurisdiction selected as the site of the arbitration to avoid unintended outcomes. For example, in California, an agreement to arbitrate claims relating to a contract creates authority to arbitrate "tort claims," and an agreement to arbitrate "any controversy" creates authority to award punitive damages. *See* Tate v. Saratoga Savings & Loan Ass'n, 216 Cal. App. 3d 843 (1989).

An example of a mandatory binding arbitration clause that may be appropriate for a buyer's first draft follows:

**Any controversy or claim arising out of or relating to this Agreement or any related agreement shall be settled by arbitration in accordance with the following provisions:**

**(a) *Disputes Covered.* The agreement of the parties to arbitrate covers all disputes of every kind relating to or arising out of this Agreement, any related agreement or any of the Contemplated Transactions. Disputes include actions for breach of contract with respect to this Agreement or the related agreement, as well as any claim based upon tort or any other causes of action relating to the Contemplated Transactions, such as claims based upon an allegation of fraud or misrepresentation and claims based upon a federal or state statute. In addition, the arbitrators selected according to procedures set forth below shall determine the arbitrability of any matter brought to them, and their decision shall be final and binding on the parties.**

**(b) *Forum.* The forum for the arbitration shall be __________________, ______________________.**

**(c) *Law.* The governing law for the arbitration shall be the law of the State of ______________, without reference to its conflicts of laws provisions.**

**(d) *Selection.* There shall be three arbitrators, unless the parties are able to agree on a single arbitrator. In the absence of such agreement within ten (10) days after the initiation of an arbitration proceeding, Seller shall select one arbitrator and Buyer shall select one arbitrator, and those two arbitrators shall then select, within ten (10) days, a third arbitrator. If those two arbitrators are unable to select a third arbitrator within such ten (10)-day period, a third arbitrator shall be appointed by the commercial panel of the American Arbitration Association. The decision in writing of at least two of the three arbitrators shall be final and binding upon the parties.**

**(e) *Administration.* The arbitration shall be administered by the American Arbitration Association.**

**(f) *Rules.* The rules of arbitration shall be the Commercial Arbitration**

**Rules of the American Arbitration Association, as modified by any other instructions that the parties may agree upon at the time, except that each party shall have the right to conduct discovery in any manner and to the extent authorized by the Federal Rules of Civil Procedure as interpreted by the federal courts. If there is any conflict between those Rules and the provisions of this section, the provisions of this section shall prevail.**

**(g) *Substantive Law.* The arbitrators shall be bound by and shall strictly enforce the terms of this Agreement and may not limit, expand or otherwise modify its terms. The arbitrators shall make a good faith effort to apply substantive applicable law, but an arbitration decision shall not be subject to review because of errors of law. The arbitrators shall be bound to honor claims of privilege or work-product doctrine recognized at law, but the arbitrators shall have the discretion to determine whether any such claim of privilege or work product doctrine applies.**

**(h) *Decision.* The arbitrators' decision shall provide a reasoned basis for the resolution of each dispute and for any award. The arbitrators shall not have power to award damages in connection with any dispute in excess of actual compensatory damages and shall not multiply actual damages or award consequential or punitive damages or award any other damages that are excluded under the provisions of Article 11 of this Agreement.**

**(i) *Expenses.* Each party shall bear its own fees and expenses with respect to the arbitration and any proceeding related thereto and the parties shall share equally the fees and expenses of the American Arbitration Association and the arbitrators.**

**(j) *Remedies; Award.* The arbitrators shall have power and authority to award any remedy or judgment that could be awarded by a court of law in [designate jurisdiction]. The award rendered by arbitration shall be final and binding upon the parties, and judgment upon the award may be entered in any court of competent jurisdiction in the United States.**

If each party selects one arbitrator, it might be appropriate to make clear in the arbitration clause whether those party-appointed arbitrators are to be neutral or are, in effect, advocate arbitrators. Some arbitration clauses require the selection of three neutral arbitrators, all of whom are appointed in accordance with the rules of the arbitration authority.

An alternative to mandatory binding arbitration is mediation. A mediation clause may simply require negotiation (with or without a good faith standard) prior to litigation. Mediation is often an optional prearbitration procedure offered by the arbitration authority to the parties involved in arbitration. The following is an example of a mediation provision:

**Any controversy or claim arising out of or relating to this Agreement or any related agreement or any of the Contemplated Transactions will be settled in the following manner: (a) senior executives representing each of Seller and Buyer will meet to discuss and attempt to resolve the controversy**

> **or claim; (b) if the controversy or claim is not resolved as contemplated by clause (a), Seller and Buyer will, by mutual consent, select an independent third party to mediate such controversy or claim, provided that such mediation will not be binding upon any of the parties; and (c) if such controversy or claim is not resolved as contemplated by clauses (a) or (b), the parties will have such rights and remedies as are available under this Agreement or, if and to the extent not provided for in this Agreement, are otherwise available.**

Among other alternative dispute resolution mechanisms is the private judge. The use of a private judge represents a combination of litigation and arbitration techniques and addresses the need for expedited trials between private parties. California statutes and other state laws specifically sanction this procedure, whereby the parties agree to appoint a "referee" to decide the dispute. Once appointed, the referee assumes all the power of a trial judge except contempt power. For example, testimony is made under oath but is often neither recorded nor reported. If the parties so desire, rules of evidence, procedures or pleading may be modified. The referee provides the supervising court with a written report. This report stands as an appealable judgment.

In international transactions, mandatory binding arbitration often is preferred. Many attorneys and clients believe that the presence of an arbitration provision in an international contract gives some assurance that the contract will be performed in accordance with its terms because parties may be more reluctant to arbitrate than to litigate in a foreign national forum where one party would have a local advantage. In deciding to arbitrate a controversy in a country outside the United States, drafters of ADR provisions should verify that the arbitration result will not be disregarded by the courts of the country in which a decision may be enforced. Drafters of ADR provisions in the international context should be aware that resolutions of controversies by institutional arbitration (such as the International Chamber of Commerce or the London Court of Arbitration) are somewhat more readily honored by national courts outside the United States for enforcement purposes than are decisions of private party arbitrators operating outside the formal institutions. The Federal Arbitration Act recognizes the enforceability of international arbitration.

A commonly used international arbitration institution is the International Chamber of Commerce (the ICC), headquartered in Paris. The ICC provides for a review of all arbitration awards issued under its authority through its Court of Arbitration, a built-in review procedure. Drafters of ADR provisions who want to use the ICC Rules of Arbitration may want to first review the most recent version of the Rules. In general, the ICC Rules of Arbitration provide broad latitude to the arbitrators to determine whether to allow expert testimony and the amount of fact-finding to be conducted. An arbitration award under the ICC generally is rendered within six months after the close of hearings. A standard short form ICC arbitration clause is as follows:

> **All disputes arising in connection with this Agreement or any of the Contemplated Transactions will be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with these rules.**

The rules often used within institutional arbitration are the rules of the United Nations Commission on International Trade Law (UNCITRAL). Among others, the American Arbitration Association and the ICC also provide for the use of UNCITRAL rules. Although the UNCITRAL rules reflect an effort to develop a standard international practice for arbitration, such rules may depart from United States practice in important respects. For example, the unsuccessful party pays all costs of arbitration under the UNCITRAL rules unless the arbitrators specifically determine that apportionment is necessary.

As with all ADR provisions, the substantive and governing procedural law (including application of conflicts of law) must be considered. The ADR provision may indicate whether custom or usage or subjective standards of what is just and equitable are to be considered by the arbitration panel in interpreting a contract. A key variable in choosing the forum for arbitration will be the location of the person against whom an award may be enforced and the enforceability of an arbitration award made in a local jurisdiction as opposed to a foreign jurisdiction. The currency for the award in an international dispute could be specified in the ADR provisions.

For a detailed discussion of international arbitration, see LETTERMAN, LETTERMAN'S LAW OF PRIVATE INTERNATIONAL BUSINESS § 11.11 (1990 & Supp. 1991). For additional guidance on alternative dispute resolution, see the CORPORATE COUNSELLORS' DESK BOOK (Block & Epstein eds., 4th ed. 1992, Supp. 1998). For a general discussion of the types of ADR and the issues involved, see COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS (Stipanowich & Kaskell eds., 2001).

## 13.5 ENFORCEMENT OF AGREEMENT

**Seller and Shareholders acknowledge and agree that Buyer would be irreparably damaged if any of the provisions of this Agreement are not performed in accordance with their specific terms and that any Breach of this Agreement by Seller or Shareholders could not be adequately compensated in all cases by monetary damages alone. Accordingly, in addition to any other right or remedy to which Buyer may be entitled, at law or in equity, it shall be entitled to enforce any provision of this Agreement by a decree of specific performance and to temporary, preliminary and permanent injunctive relief to prevent Breaches or threatened Breaches of any of the provisions of this Agreement, without posting any bond or other undertaking.**

### COMMENT

This section provides that the buyer is entitled to certain equitable remedies in those situations where monetary damages may be inadequate. For example, the buyer may, after the closing, seek to compel performance of the further assurances provision (Section 10.11), the confidentiality provision (Article 12) or, if included in the acquisition agreement, an arbitration provision.

The buyer may also seek specific performance of the acquisition agreement if the seller fails to perform its obligations to close the transaction. The RESTATEMENT (SECOND) OF CONTRACTS § 357(1) provides that, with certain exceptions, "specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty." One of the exceptions is "if damages would be adequate to protect the expectation interest of the injured party." *Id.* § 359(1). Courts in exercising their discretion generally will specifically enforce contracts for the sale of real estate, subject to satisfaction of the usual equitable doctrines, but not contracts for the sale of personal property or the sale of stock, at least where there is a ready market or control does not shift. For specific performance to be granted, the buyer will have to convince a court that the business to be acquired is unique and damages would not be adequate to protect its interest. *See* Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153 (3d Cir. 1999). The seller may request a similar provision for its benefit, but its ability to obtain specific performance may be limited, particularly where the consideration is quantifiable in monetary terms.

The buyer may seek to enjoin a breach by the seller or the shareholders of their covenants in the acquisition agreement, such as the covenant not to compete. In the case of a covenant not to compete, an injunction may be the only way for a buyer to prevent irreparable injury to the goodwill purchased by the buyer. As in the case of specific performance, an injunction against a breach of contract duty can be granted in the discretion of the court. Restatement (Second) of Contracts § 357(2).

Providing for equitable remedies will not insure that the buyer will be successful in obtaining the requested relief, but the acknowledgment of the buyer's right to equitable relief may be persuasive to a court that is considering the matter. Similarly, on granting an injunction, a court may have little or no discretion in requiring a bond or undertaking, but expressly negating this in the acquisition agreement may be helpful in causing a court to minimize the impact on the buyer.

## 13.6 WAIVER; REMEDIES CUMULATIVE

**The rights and remedies of the parties to this Agreement are cumulative and not alternative. Neither any failure nor any delay by any party in exercising any right, power or privilege under this Agreement or any of the documents referred to in this Agreement will operate as a waiver of such right, power or privilege, and no single or partial exercise of any such right, power or privilege will preclude any other or further exercise of such right, power or privilege or the exercise of any other right, power or privilege. To the maximum extent permitted by applicable law, (a) no claim or right arising out of this Agreement or any of the documents referred to in this Agreement can be discharged by one party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other party; (b) no waiver that may be given by a party will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on one party will be deemed to be a waiver of any obligation of that party or of the right of the party giving such notice or demand to take further action without notice or demand as provided in this Agreement or the documents referred to in this Agreement.**

### COMMENT

A waiver provision is common in acquisition agreements. A waiver provision specifies that the rights of the parties are cumulative in order to avoid construction that one remedy is sufficient. For example, if a party first requests an injunction and later requests money damages, the waiver provision is intended to eliminate any chance that the party will be deemed to have waived its right to money damages when it requested an injunction.

The waiver provision also is intended to defeat arguments that the course of performance or course of dealing with respect to the acquisition agreement dictates the outcome of disputes between the parties and that an immaterial delay prejudices the rights of the delaying party. Counsel might want to consider the relationship between the second sentence of Section 13.6 and the time-is-of-the-essence provision in Section 13.12.

A seller may seek to exclude Article 11 from the provision in Section 13.6 that the rights of a party in respect of the Model Agreement are cumulative. The effect of Section 13.6 in relation to Article 11 is that a party may elect whether to seek indemnification under Article 11 or pursue its remedies under common law, by statute or otherwise, for breach of contract or other damages or relief. A seller may seek to provide that the indemnification provided by Article 11 is the buyer's exclusive remedy for breach of the Model Agreement, arguing that any limitations on damages and the time for asserting claims the seller has succeeded in negotiating would be frustrated if Article 11 were not the buyer's exclusive remedy.

## 13.7 ENTIRE AGREEMENT AND MODIFICATION

**This Agreement supersedes all prior agreements, whether written or oral, between the parties with respect to its subject matter (including any letter of intent and any confidentiality agreement between Buyer and Seller) and constitutes (along with the Disclosure Letter, Exhibits and other documents delivered pursuant to this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to its subject matter. This Agreement may not be amended, supplemented, or otherwise modified except by a written agreement executed by the party to be charged with the amendment.**

### COMMENT

This section provides that the Model Agreement (along with the documents referred to in the acquisition agreement) contains the entire understanding of Buyer and Seller regarding the acquisition so that, unless otherwise specified, all prior agreements (whether written or oral) between the parties relating to the acquisition are superseded by (and not incorporated into) the terms of the acquisition agreement, and any conflicts between previous agreements and the acquisition agreement are eliminated. Accordingly, if the parties were to agree that any preexisting agreements between the parties regarding the acquisition (such as the confidentiality agreement or certain provisions in the letter of intent) should remain in effect, this section would have to be revised accordingly. The Model Agreement addresses confidentiality (see Article 12) and "no-shop" (see Section 5.6) obligations; thus, there is no need for the letter of intent or any confidentiality agreement to remain in effect. For an example of the codification of nonintegration clauses, see CAL. CIV. PROC. CODE § 1856.

This section also states that the acquisition agreement may be amended only by a written agreement signed by the party to be charged with the amendment. This section reflects the principle that a contract required by the Statute of Frauds to be in writing may not be orally modified and follows Section 2-209(2) of the Uniform Commercial Code, which provides that "[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded. . . . " *Cf.* CAL. CIV. CODE § 1698; Deering Ice Cream Corp. v. Columbo, Inc., 598 A.2d 454, 456 (Me. 1991) ("The parties never memorialized any meeting of the minds on modifying their contract in the form required by the contract documents.") The rule prohibiting oral modification of contracts within the Statute of Frauds, however, has not been applied in cases in which there has been partial performance of an oral agreement to modify the written contract, especially if one party's conduct induces another to rely on the modification agreement. *See, e.g.,* Rose v. Spa Realty Assoc., 42 N.Y.2d 338, 340–41 (1977); Ridley Park Shopping Ctr., Inc. v. Sun Ray Drug Co., 180 A.2d 1 (Pa. 1962); Paul v. Bellavia, 536 N.Y.S.2d 472, 474 (App. Div. 1988); *cf.* Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203 (1997).

## 13.8 DISCLOSURE LETTER

**(a) The information in the Disclosure Letter constitutes (i) exceptions to particular representations, warranties, covenants and obligations of Seller and Shareholders as set forth in this Agreement or (ii) descriptions or lists of assets and liabilities and other items referred to in this Agreement. If there is any inconsistency between the statements in this Agreement and those in the Disclosure Letter (other than an exception expressly set forth as such in the Disclosure Letter with respect to a specifically identified representation or warranty), the statements in this Agreement will control.**

**(b) The statements in the Disclosure Letter, and those in any supplement thereto, relate only to the provisions in the Section of this Agreement to which they expressly relate and not to any other provision in this Agreement.**

### COMMENT

Section 13.8 represents the buyer's opening position in a debate that occurs frequently in the negotiation of acquisition agreements: What effect does a disclosure made with respect to one representation have on other representations? The buyer typically seeks to limit the effect of such a disclosure to the specific representation to which the disclosure refers, arguing that the impact of the matter disclosed cannot be evaluated in the absence of the context given by the particular representation. For example, the buyer may view differently a contract disclosed in response to a representation that calls for a list of material contracts than one disclosed in response to a representation concerning transactions with related parties; the latter situation increases the likelihood that the economic terms of the contract are not at arm's length. The seller and the shareholders will frequently argue that it is unfair for them to be penalized for a failure to identify each of the many representations in a long-form acquisition agreement, which often overlap, to which a disclosed state of facts relate. Indeed, the seller often prefers not to characterize the disclosures made in the Disclosure Letter by reference to any representations and attempts to qualify all representations by the Disclosure Letter (for example, Article 3 would begin "Seller and each Shareholder represent and warrant, jointly and severally, to Buyer as follows, except as otherwise set forth in the Disclosure Letter"). A frequent compromise is to modify Section 13.8(a) by adding at the end "except to the extent that the relevance to such other representation and warranty is manifest on the face of the Disclosure Letter."

Some sellers might prefer to insert a provision such as the following in lieu of Section 13.8:

**(a) Any disclosure under one Part of the Disclosure Letter shall be deemed disclosure under all Parts of the Disclosure Letter and this Agreement. Disclosure of any matter in the Disclosure Letter shall not constitute an expression of a view that such matter is material or is required to be disclosed pursuant to this Agreement.**

**(b) To the extent that any representation or warranty set forth in this Agreement is qualified by the materiality of the matter(s) to which the representation or warranty relates, the inclusion of any matter in the Disclosure Letter does not constitute a determination by Seller and Shareholders that**

**any such matter is material. The disclosure of any [information concerning a] matter in the Disclosure Letter does not imply that any other, undisclosed matter that has a greater significance [or value] is material.**

## 13.9 ASSIGNMENTS, SUCCESSORS AND NO THIRD-PARTY RIGHTS

**No party may assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of the other parties, except that Buyer may assign any of its rights and delegate any of its obligations under this Agreement to any Subsidiary of Buyer and may collaterally assign its rights hereunder to any financial institution providing financing in connection with the Contemplated Transactions. Subject to the preceding sentence, this Agreement will apply to, be binding in all respects upon and inure to the benefit of the successors and permitted assigns of the parties. Nothing expressed or referred to in this Agreement will be construed to give any Person other than the parties to this Agreement any legal or equitable right, remedy or claim under or with respect to this Agreement or any provision of this Agreement, except such rights as shall inure to a successor or permitted assignee pursuant to this Section 13.9.**

### COMMENT

This section requires the other party's consent before a party may assign its rights under the acquisition agreement (except that the buyer may assign its rights to a subsidiary or collaterally assign its rights to a lender without consent). This provision is necessary because the modern rule is that, absent an express provision to the contrary, contract rights are freely assignable. *See, e.g.,* Scott v. Fox Bros. Enter., Inc., 667 P.2d 773 (Colo. Ct. App. 1983); MURRAY, MURRAY ON CONTRACTS § 138 (3d ed. 1990). Although the terms of the acquisition agreement will be binding upon, and will inure to the benefit of, the successors and assigns of the parties, the assignment will not release the assignor from its duties and obligations unless the obligee consents to the assignment. *See, e.g.,* CAL. CIV. CODE § 1457; MURRAY ON CONTRACTS § 140. The seller may nonetheless want to specify that no assignment relieves the buyer from its obligations and could do so by adding the following proviso at the end of the first sentence of Section 13.9: "; provided that no such assignment or delegation shall relieve Buyer from any of its obligations hereunder." The seller also needs to consider whether it wishes, for tax or other reasons, to have the express right to assign its rights to its shareholders or to a liquidating trust for the benefit of its shareholders. For example, a shareholder of an S corporation, who received shares of stock of that corporation as compensation, may have a tax basis in those shares that will not be recovered until the corporation has been liquidated. The shareholder may wish to have such basis offset the shareholder's gain from the sale of the corporation's assets rather than realizing a capital loss with respect to such stock basis when the corporation is liquidated in a later year with no capital gains against which to offset the capital loss. An earlier liquidation of the corporation could be desirable in these circumstances. See also Section 453(h) of the Internal Revenue Code with respect to the distribution of installment obligations within twelve months after adopting a plan of liquidation.

Liquidating trusts are often used in sales of assets when it is desirable to liquidate or dissolve the seller before all its liabilities have been paid or provided for or all its assets have been sold. For example, it may be impractical to distribute real estate or notes receivable in liquidation when there are a large number of shareholders or some of the shareholders cannot be located. The liquidating trust can settle liabilities and dispose of the remaining assets in an orderly manner and then distribute the remaining funds to the shareholders. In providing for a liquidating trust, the assignment provision in Section 13.9 should be reconciled with Section 10.4, which restricts the seller's ability to dissolve or make distributions.

For business, financial, strategic or even emotional reasons, the seller may try to limit the buyer's right of assignment by requiring the seller's prior consent even for assignments to the buyer's subsidiaries.

The right of a third party to be considered a third-party beneficiary and enjoy rights under a contract often depends upon the intention of the contracting parties. *See* Corbin, Corbin on Contracts § 776 (Supp. 1999); *see also* Norton v. First Fed. Sav., 624 P.2d 854, 856 (Ariz. 1981); Sheetz, Aiken & Aiken, Inc. v. Spann, Hall, Ritchie, Inc., 512 So.2d 99, 101–02 (Ala. 1987); Strutz v. State Farm Mut. Ins. Co., 609 A.2d 569, 570 (Pa. Super. 1992). Moreover, states may have specific statutes requiring that "[i]n order for a contract to be enforceable by a third party, the contract must be made expressly for the benefit of the third person." Eastern Aviation Group, Inc. v. Airborne Express, Inc., 6 Cal. App. 4th 1448, 1452 (1992) (interpreting Cal. Civ. Code § 1559). Section 13.9 expressly states that the parties do not intend to benefit, or create any rights, remedies or claims in, any third parties. In some cases, however, the seller may want certain provisions of the agreement to benefit third parties. For example, if the buyer agrees to hire the employees of the seller or to provide certain compensation and benefits to such employees, the seller may want such promises to be enforceable by the employees. The buyer is likely to resist making the employees third-party beneficiaries so as not to subject itself to potential claims by numerous employees.

Under Sections 9.1 and 9.2, the parties do not need the consent of any third-party beneficiary to terminate the acquisition agreement. For a discussion of the indemnification procedure relating to third-party claims, see the Comment to Section 11.9.

Banks and other funding sources typically are willing to finance a transaction only after conducting some due diligence on the seller. In order to reduce the risks associated with a leveraged transaction, a lender may desire the right to proceed directly against a seller for breaches of the seller's representations, warranties, covenants and obligations in its purchase agreement with the buyer. Therefore, the buyer, having been pressured by the lender, may attempt to include a provision similar to the provision contained in Section 13.9 pursuant to which the buyer may assign its rights under a purchase agreement to the financing source.

Such assignment provisions are frequently not found in a buyer's first draft, and a seller is likely to object to any such provision. First, a seller may argue that its relationship with the buyer pertains only to the sale of the company's assets, not to the buyer's financing, that it has no relationship with the buyer's lender and that what the buyer must do to secure financing for the transaction is no concern of the seller. Second, the seller may object on the ground that the lender does not have the same incentives and motivations to resolve disputes as the buyer. For example, the buyer may have a continuing relationship with the seller (through employment agreements, consulting agreements, earnout agreements and other contractual relationships), which may make the buyer more likely to take a softer approach with the seller than would a lender. Further, in cases where a seller has indemnification claims against a buyer, the buyer may be more willing to compromise on its own indemnification claims against the seller, whereas a lender may have no such motivation. The seller may argue, in short, that lenders have different motives than buyers, and such motives work to a seller's disadvantage.

## 13.10 SEVERABILITY

**If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement will remain in full force and effect. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.**

### COMMENT

Whether a contract is entire or severable depends upon the parties' intention, the subject matter of the agreement and the circumstances of the transaction. *See, e.g.,* Christian v. Christian, 42 N.Y.2d 63 (1977); Keene v. Harling, 61 Cal. 2d 318 (1964); Heilwood Fuel Co. v. Manor Real Estate Co., 175 A.2d 880 (Pa. 1961); Knight v. Hamilton, 233 S.W.2d 969 (Ky. 1950). Under Section 13.10, if a provision of the acquisition agreement is held unenforceable, the remaining provisions are separated from the invalid or unenforceable provision and remain in effect. *Cf. Christian*, 42 N.Y.2d at 73 ("Here the parties had a right to and did, by expressly stipulating that if any provision of the separation agreement be held invalid or unenforceable all other[s] shall nevertheless continue in full force, make the agreement within reasonable limits divisible, and there is little room for construction.").

The language in Section 13.10 may not be effective, however, if the invalid provision constitutes an essential element of the contract. According to the RESTATEMENT (SECOND) OF CONTRACTS § 184:

(1) If less than all of an agreement is unenforceable . . . a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.

(2) A court may treat only a part of a term as unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.

As the comment to this section of the *Restatement* explains:

> If the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable. Under Subsection (1), however, if that performance is not an essential part of the agreed exchange, a court may enforce all but the part that contravenes public policy. For example, a promise not to compete that is unreasonably in restraint of trade will often not invalidate the entire agreement of which it is a part. Whether the performance is an essential part of the agreed exchange depends on its relative importance in the light of the entire agreement between the parties.

The parties may also want to consider inserting a provision calling for judicial reformation of the acquisition agreement to modify the invalid provision to achieve the parties' intention. This practice is common with respect to covenants not to compete. The buyer may want to consider whether it will want to rescind the entire acquisition agreement if a major, yet nonessential, provision is held to be invalid or unenforceable.

## 13.11 CONSTRUCTION

**The headings of Articles and Sections in this Agreement are provided for convenience only and will not affect its construction or interpretation. All references to**

**"Articles," "Sections" and "Parts" refer to the corresponding Articles, Sections and Parts of this Agreement and the Disclosure Letter.**

## 13.12 TIME OF ESSENCE

**With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.**

### COMMENT

In order to take advantage of, among other things, the "drop-dead" date termination provisions in Section 9.1(f) and (g), the Model Agreement contains a time-is-of-the-essence provision in Section 13.12. An express statement of this provision is important because time may not be of the essence in a contract unless it is specifically provided or the circumstances clearly indicate that it was the intention of the parties. *See, e.g.,* National Data Payment Sys., Inc. v. Meridian Bank, 18 F. Supp. 2d 543, 547 (E.D. Pa. 1998); Mercer v. Phillips, 676 N.Y.S. 2d 334, 336 (1998); Mailloux v. Dickey, 523 A.2d 66, 69 (N.H. 1986); Hollars v. Randall, 554 N.E.2d 1177, 1179 (Ind. Ct. App. 1990).

Courts differ, however, about whether the failure of a party to comply with its obligations under an agreement in a timely manner will permit the enforcement of the remedies provided for in the agreement. Relying on a state statute and precedent dating to 1897, the North Dakota Supreme Court in *E.E.E., Inc. v. Hanson*, 318 N.W.2d 101 (N.D. 1982), allowed a party to enforce its rights under a time-is-of-the-essence provision:

> [N]ormally, parties to a contract are allowed to write the terms of the contract themselves. A court may be called upon to interpret a contract written by the parties thereto but the court's authority to interpret a contract does not give a court the authority to modify it. Here, the parties took special pains to assure that the contract reflected their intent that time was of the essence . . . . [T]here can be no doubt of their intent and we cannot ignore it under the guise of interpreting the contract.

*Id.* at 104–05 (citations omitted); *see also* Sun Bank of Miami v. Lester, 404 So. 2d 141, 143 (Fla. Dist. Ct. App. 1981); Prime Retail, L.P. v. Caribbean Airport Facilities, Inc., 975 F. Supp. 148, 153 (D.P.R. 1997) ("[w]hen the expiration date has passed, all obligations are completely extinguished"). Enforcement of time-is-of-the-essence provisions, however, has often been subject to the application of principles of equity. For example, courts have held that such a provision will not be given effect if it causes a forfeiture. *See* Kaiman Realty, Inc. v. Carmichael, 655 P.2d 872, 874 (Haw. 1982) ("[A] 'time is of the essence' clause in an agreement of sale will not foreclose equitable relief where, absent gross negligence or bad faith conduct of the vendee, forfeiture would be harsh and unreasonable"); Rothenberg v. Follman, 172 N.W.2d 845, 850 (Mich. Ct. App. 1969) ("[T]he fact that the parties have stipulated that time is of the essence is but one of the factors to be taken into consideration in determining whether equity will intervene to set aside a forfeiture. Where the forfeiture is disproportionately large and the other facts, circumstances and equities cry out for relief, a court of equity may, nevertheless, intervene."); *see also* Restatement (Second) of Contracts § 242(c) cmt. d; *Sun Bank of Miami*, 404 So. 2d at 143–44 (Ferguson, J., dissenting).

Finally, a party should remember that, by its conduct, it may negate the effectiveness of a time-is-of-the-essence provision if a waiver is found. In *Porterco, Inc. v. Igloo Products Corp.*, 955 F.2d 1164 (8th Cir. 1992), the court observed:

> Provisions in a contract which specify or limit the time of performance, even where time is of the essence of the contract, may be waived. Further, such a waiver may be express or implied . . . .
>
> A waiver of the time of performance of a contract will result from any act that induces the opposite party to believe that exact performance within the time designated in the contract will not be insisted upon.

*Id.* at 1171 (quoting Laredo Hides Co., Inc. v. H & H Meat Products, 513 S.W.2d 210, 217–18 (Tex. Civ. App. 1974)). *See also* Frank v. Fleet Finance, Inc. of Georgia, 489 S.E.2d 523, 525 (Ga. App. 1997). Section 13.6 of the Model Agreement, which provides that a party's delay in exercising any of its rights, powers or privileges under the agreement will not operate as a waiver, may be of little help to the party seeking to enforce rights under Section 13.12 because, as the *Porterco* court observed, "it is within the jury's power to find that such a provision was itself waived or modified by the parties' agreement or conduct." *Id.* at 1172, n.9.

## 13.13 GOVERNING LAW

**This Agreement will be governed by and construed under the laws of the State of _______________ without regard to conflicts-of-laws principles that would require the application of any other law.**

### COMMENT

This section allows the parties to select the law that will govern the contractual rights and obligations of Buyer, Seller and Shareholders. (The parties may want to specify a different choice of law with regard to noncompetition provisions.) Without a choice-of-law provision, the court must assess the underlying interest of each jurisdiction to determine which jurisdiction has the greatest interest in the outcome of the matter. The part of Section 13.13 following the designation of a state seeks to have applied only those conflicts-of-laws principles of the state designated that validate the parties' choice of law. As for which laws the parties may select, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 provides:

> **§ 187. Law of the State Chosen by the Parties**
>
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

In *Nedlloyd Lines B.V. v. Superior Court of San Mateo County (Seawinds Ltd.)*, 3 Cal. 4th 459 (1992), the Supreme Court of California applied these principles to uphold a choice of law provision requiring a contract between commercial entities to finance and operate an international shipping business to be governed by the laws of Hong Kong, a jurisdiction having a substantial connection with the parties:

> Briefly restated, the proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law . . . . If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California . . . . If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue." . . . If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.

*Id.* at 466 (footnotes omitted); *see also* Kronovet v. Lipchin, 415 A.2d 1096, 1104 n.16 (Md. Ct. App. 1980) (noting that "courts and commentators now generally recognize the ability of parties to stipulate in the contract that the law of a particular state or states will govern construction, enforcement and the essential validity of their contract" but recognizing that "the parties' ability to choose governing law on issues of contract validity is not unlimited and will not be given effect unless there is a 'substantial' or 'vital' relationship between the chosen sites and issues to be decided.").

Choice of law provisions, however, have not been uniformly upheld by the courts. *See, e.g.,* Rosenmiller v. Bordes, 607 A.2d 465, 469 (Del. Ch. 1991) (holding that, notwithstanding an express choice of New Jersey law in the agreement, Delaware had a greater interest than New Jersey in regulating stockholder voting rights in Delaware corporations, and therefore the parties' express choice of New Jersey law could not apply to this issue); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677–78 (Tex. 1990) (Supreme Court of Texas adopted the choice of law rule set forth in § 187 of the Restatement (Second) of Conflict of Laws and held that a choice of law provision (such as Section 13.13) will be given effect if the contract bears a reasonable relation to the state whose law is chosen and no public policy of the forum state requires otherwise; at issue in that case was a covenant not to compete in an employment context and the court held that its holdings on the nonenforceability of covenants not to compete were a matter of fundamental public policy, which overrode the parties' choice of law agreement.) *DeSantis* was, in turn, overridden by the subsequent enactment of Section 35.51 of the Texas Business and Commerce Code, which generally validates the contractual choice of governing law for transactions involving at least $1,000,000.

Historically, courts have applied rigid tests for determining what substantive law governs the parties' relationship. In a contractual setting, the applicable test, lex contractus, stated that the substantive law of the place of contract formation governed that contract. As interstate and international commerce grew, several problems with this test became evident. First, at times it was difficult to determine which jurisdiction constituted the place of contract formation. Second, this rule frustrated the ability of sophisticated parties to agree on the law that would govern their relationship.

A modern approach, exemplified in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (particularly Sections 6, 187 and 188), focuses on the jurisdiction with the "most significant relationship" to the transaction and the parties where the parties did not choose a governing law. Where the parties did choose a governing law, that choice was to be respected if there was a reasonable basis for the choice and the choice did not offend a fundamental public policy of the jurisdiction with the "most significant relationship."

Several states have now gone a step further by enacting statutes enabling parties to a written contract to specify that the law of that state would govern the parties' relationship, notwithstanding the lack of any other connection to that state. *See, e.g.,* DEL. CODE ANN. tit. 6, § 2708; FLA. STAT. ANN. § 685.101; 735 ILL. COMP. STAT. 105/5-5; N.Y. GEN. OBLIG. LAW § 5-1401; and OHIO REV. CODE § 2307.39. These statutes recognize that sophisticated parties may have valid reasons to choose the law of a given jurisdiction to govern their relationship, even if the chosen jurisdiction is not otherwise involved in the transaction.

These statutes contain several criteria intended to ensure that they are used by sophisticated parties who understand the ramifications of their choice. The primary requirement is that the transaction involve a substantial amount. Certain of these statutes do not apply to transactions for personal, family or household purposes or for labor or personal services. Further, these statutes do not apply to transactions where Section 1-105(2) of the Uniform Commercial Code provides another governing law. One of these statutes requires the parties to be subject to the jurisdiction of the courts of that jurisdiction and subject to service of process. That statute also specifically authorizes courts of that jurisdiction to hear disputes arising out of that contract. DEL. CODE ANN. tit. 6, § 2708. *See also* OHIO REV. CODE ANN. § 2307.39 (authorizing commencement of a civil proceeding in Ohio courts if the parties choose Ohio governing law and consent to jurisdiction of its courts and further providing that Ohio law would be applied). See the Comment to Section 13.4.

Practitioners may wish to consider the use of one of these statutes in appropriate circumstances, perhaps to choose a neutral jurisdiction if the choice of law negotiation has become heated. These statutes are a relatively new development, however, and, as such, are not free from uncertainty. Perhaps the most significant uncertainty is whether the choice of law based upon such a statute would be respected by a court of a different jurisdiction. Although valid reasons (such as protecting the parties' expectations) suggest their choice is likely to be respected, the outcome is not yet clear.

Although a choice of law clause should be enforceable as between the parties where the appropriate relationship exists, the parties' choice of law has limited effect with respect to third-party claims (e.g., claims under Bulk Sales Laws, Fraudulent Transfer Laws or various common law successor liability theories). *But cf.* Oppenheimer v. Prudential Sec., Inc., 94 F.3d 189 (5th Cir. 1996) (choice of New York law in asset purchase agreement applied in successor liability case without dispute by any of parties). Further, an asset transaction involving the transfer of assets in various jurisdictions may be governed as to title transfer matters by the law of each jurisdiction in which the transferred assets are located. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 189, 191, 222, 223. In particular, the transfer of title to real estate is ordinarily governed by the laws of the state where the real estate is located. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223.

## 13.14 EXECUTION OF AGREEMENT

**This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken**

**together, will be deemed to constitute one and the same agreement. The exchange of copies of this Agreement and of signature pages by facsimile transmission shall constitute effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original Agreement for all purposes. Signatures of the parties transmitted by facsimile shall be deemed to be their original signatures for all purposes.**

### COMMENT

This section, which permits execution in counterparts, is common in acquisition agreements. It is inserted for the convenience of the parties and facilitates execution of the agreement when the signatories are not available at the same time or place.

This section does not alter the effective date specified on the initial page of the acquisition agreement. The articles of incorporation or the charter, the bylaws and the minutes will determine which persons have the authority to execute the agreement on behalf of corporations that are parties to the transaction.

The language with respect to exchange of copies and signature pages by facsimile recognizes the increasing trend to rely on facsimile transmission for execution and delivery of acquisition agreements. In most cases, arrangements are made to exchange the original signed copies, but there is always the concern that this might, for some reason, not take place. The question then becomes whether one can rely on a signature that is only digitally recreated by facsimile transmission.

The essential elements to the formation of a contract are an offer, acceptance and manifestation of assent or meeting of the minds. When an offer upon specified terms is accepted without conditions, and acceptance is communicated to the other party without unreasonable delay, a contract arises. The offeror can prescribe conditions on the method of acceptance. RESTATEMENT (SECOND) OF CONTRACTS § 30. If a condition calling for a signature is not met, the contract does not come into being. *See* Kroeze v. Chloride Group Ltd., 572 F.2d 1099 (5th Cir. 1978). Like earlier cases dealing with telegrams and telexes, there is authority to the effect that the exchange of writings and acceptance by facsimile creates a binding contract. *See* Holbrook v. A C and S, Inc., No. Civ. A. 92-1906 1997 WL 52060, at *1 (E.D. Pa. Feb. 3, 1997); Coin Automatic Laundry Equip. Co. v. Pheasant Hollow Assocs., No. Civ. A. 92-7041 1993 WL 267446 (E.D. Pa. June 30, 1993). In addition, a facsimile signature can satisfy the statute of frauds. *See, e.g.,* N.Y. GEN. OBLIG. LAW § 5-701 (written text produced by telefacsimile constitutes a writing and any symbol executed or adopted by a party with the present intention to authenticate a writing constitutes a signing); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 134 cmt. b; Birenbaum v. Option Care, Inc., 971 S.W.2d 497, 502 (Tex. Ct. App. 1997) (statute of frauds not satisfied because buyer signed a post-it cover memo rather than letter of intent that was sent by facsimile).

Although language in the Model Agreement validating signature by facsimile transmission may not be essential, it might be helpful to have authorized the practice of exchanging signature pages by facsimile if a dispute should arise over the acquisition agreement.

## 13.15 SHAREHOLDER OBLIGATIONS

**The liability of each Shareholder hereunder shall be joint and several with Seller and with the other Shareholder. Where in this Agreement provision is made for any action to be taken or not taken by Seller, Shareholders jointly and severally undertake to cause Seller to take or not take such action, as the case may be. Without limiting**

**the generality of the foregoing, Shareholders shall be jointly and severally liable with Seller for the indemnities set forth in Article 11.**

### COMMENT

The first sentence of this section confirms the joint and several liability of Shareholders for the liabilities of Seller that is otherwise implicit in the fact that Shareholders have joined with Seller in executing the Model Agreement. The Fact Pattern assumes that Seller will not continue in business after the Closing and that the assets of Seller will be distributed to its shareholders, and this section increases the likelihood that post-Closing indemnifications will be honored by placing the credit of Shareholders behind those obligations. This may be unnecessary if there is an escrow, Promissory Note or other "holdback" that adequately secures the indemnification obligations of Seller under the Model Agreement. This section would be less appropriate where a seller is a substantial business enterprise with other assets and intends to remain in business after closing.

The second sentence of this section contains an obligation on the part of Shareholders to take such actions as are necessary to cause Seller to fulfill its obligations under the Model Agreement. Such an obligation, which is sometimes contained in numerous places in the acquisition agreement by the use of phrasing such as "Seller shall, and Shareholders shall cause Seller to, . . . ", is also implicit in the fact that Shareholders are joining in the Model Agreement. This obligation is set forth in a single section in order to avoid the need to scrutinize numerous other places in the document where the obligation of Shareholders to cause Seller to take certain action would be critical.

## 13.16 REPRESENTATIVE OF SELLER AND SHAREHOLDERS

**(a) Seller and each Shareholder hereby constitutes and appoints ______________ as their representative ("Selling Parties Representative") and their true and lawful attorney in fact, with full power and authority in each of their names and on behalf of each of them:**

**(i) to act on behalf of each of them in the absolute discretion of the Selling Parties Representative, but only with respect to the following provisions of this Agreement, with the power to: (A) designate the accounts for payment of the Purchase Price pursuant to Section 2.7(b)(i); (B) act pursuant to Section 2.9 with respect to any Purchase Price adjustment; (C) act under the Escrow Agreement; (D) consent to the assignment of rights under this Agreement in accordance with Section 13.9; (E) give and receive notices pursuant to Section 13.3; (F) terminate this Agreement pursuant to Section 9.1 or waive any provision of this Agreement pursuant to Article 8, Section 9.1 and Section 13.6; (G) accept service of process pursuant to Section 13.4; and (H) act in connection with any matter as to which Seller and each of the Shareholders, jointly and severally, have obligations, or are Indemnified Persons, under Article 11; and**

**(ii) in general, to do all things and to perform all acts, including executing and delivering all agreements, certificates, receipts, instructions and other instruments contemplated by or deemed advisable to effectuate the provisions of this Section 13.16.**

**This appointment and grant of power and authority is coupled with an interest and is in consideration of the mutual covenants made herein and is irrevocable and shall not be terminated by any act of either of the Shareholders or Seller or by operation of law, whether by the death or incapacity of either Shareholder or by the occurrence of any other event. Each Shareholder and Seller hereby consents to the taking of any and all actions and the making of any decisions required or permitted to be taken or made by the Selling Parties Representative pursuant to this Section 13.16. Each of the Shareholders and Seller agree that the Selling Parties Representative shall have no obligation or liability to any Person for any action or omission taken or omitted by the Selling Parties Representative in good faith hereunder, and each of the Shareholders shall, on a proportionate basis in accordance with his or her ownership interest in the Seller, indemnify and hold the Selling Parties Representative harmless from and against any and all loss, damage, expense or liability (including reasonable counsel fees and expenses) which the Selling Parties Representative may sustain as a result of any such action or omission by the Selling Parties Representative hereunder.**

**(b) Buyer and the escrow agent designated in the Escrow Agreement shall be entitled to rely upon any document or other paper delivered by the Selling Parties Representative as (i) genuine and correct and (ii) having been duly signed or sent by the Selling Parties Representative, and neither Buyer nor such escrow agent shall be liable to either of the Shareholders or Seller for any action taken or omitted to be taken by Buyer or such escrow agent in such reliance.**

## COMMENT

When there are multiple parties to an acquisition agreement or who, whether through the acquisition agreement or a separate joinder agreement, will be responsible for indemnification, it often is found to be practical to appoint one or more representatives to act on their behalf. The authority of a representative can be limited to specific matters or can cover any matters that might arise concerning the acquisition agreement and any ancillary agreements, such as an escrow agreement. Sometimes, a buyer will require that a representative be appointed so that the buyer need only deal with one or a few people in matters such as purchase price adjustments or indemnification.

The Fact Pattern posits that there are ten shareholders, only two of whom will be parties to the Model Agreement and required to indemnify Buyer. In addition, Seller is a closely held corporation that will be represented by its own officers and directors, presumably including the two principal Shareholders. Because there are relatively few parties, it is unlikely that Buyer would require that a Representative be appointed. Buyer, however, still may find it helpful to centralize the decision making and deal with one person, particularly if Seller is to be dissolved. After Seller is dissolved, its officers and directors still might have authority to continue to wind up its affairs, but the scope and duration of their power and authority will be governed by state law. Sometimes the authority granted to the representative only becomes effective by its terms upon the dissolution of the seller.

Section 13.16(a) provides that one person is to be appointed to serve as the Representative of Seller and both Shareholders. The acceptance by the Representative to act in that capacity is added to the Model Agreement following the signature page for the parties. The authority of the representative in the Model Agreement is limited to those matters specified in clauses (A) through (H) of Section 13.16(a)(i), including any Purchase Price adjustment and indemnification, but with general power to perform all acts to effectuate the provisions of the section.

The appointment and grant of authority is irrevocable and not subject to termination by any act of the shareholders or the seller (including dissolution) or by operation of law. The law of agency will ordinarily apply to this appointment and grant of authority under which the authority of the agent would terminate on revocation by the principal or the death or incapacity of the principal. *See* Restatement (Second) of Agency §§ 118, 120, 122. An exception is made, however, for agencies coupled with an interest, which in Restatement (Second) of Agency § 139 is referred to as a "power given as security." Although this agency is characterized as coupled with an interest, the case law in a particular jurisdiction may suggest a different result.

In appropriate circumstances, the parties may wish to appoint a corporate representative or designate one or more persons to serve as alternate representative to act in place of the person named in case of such person's death, incapacity or unavailability.

The remainder of Section 13.16(a) contains typical exculpation and indemnification language for the protection of the representative. Counsel for the seller may want to expand this to cover a representative's reliance on advice of counsel, reports of accountants and documents believed to be genuine and to have been signed by the proper party, using language similar to the protective provisions often used for escrow agents.

The right of Buyer and the escrow agent to rely on documents or other papers delivered by the Representative is covered in Section 13.16(b). Sometimes the representative is substituted for the selling parties in the notice provision and in certain of the operative provisions of the acquisition agreement to make it even clearer that the buyer is entitled to rely on its dealings with the representative.

**IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.**

**Buyer:**

**By:** ______________________________

**Shareholders:**

______________________________

**A**

______________________________

**B**

**Seller:**

**By:** ______________________________

**ACCEPTANCE AND AGREEMENT OF SELLING PARTIES REPRESENTATIVE**

**The undersigned, being the Selling Parties Representative designated in Section 13.16 of the foregoing Asset Purchase Agreement, agrees to serve as the Selling Parties Representative and to be bound by the terms of such Asset Purchase Agreement pertaining thereto.**

**Dated:** ________________, **20**_______ ______________________________