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# Why is This Boilerplate in my Real Estate Contract?

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# Why is This Boilerplate in My Real Estate Contract?



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## Introduction<sup>1</sup>

"Boilerplate: Standard legal language . . . It has been baffling to laymen, but has been accepted by courts for so long that lawyers have little incentive to simplify such language."<sup>2</sup>

In truth, standard legal language need not be

baffling, and most definitely should not be unduly complex. No matter whether you call them miscellaneous clauses, standard provisions, or boilerplate terms, you may sometimes wonder how so many of them have become commonplace in real estate contracts. How important are they in routine real estate contracts, and when are they especially significant? To what extent are they enforceable?<sup>3</sup> If they are important and enforceable, what hidden

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\* The author acknowledges the helpful assistance of Sarah Ridgley, a third-year law student at the University of Arkansas School of Law, for her research of the relevant Arkansas authorities.

1. For further background on many of the clauses discussed here and for many variations on those clauses the following resources are especially helpful: MARTIN D. FERN & DANIELLE F. FERN, *WARREN'S FORMS OF AGREEMENT*, Vol. 8 (2002) [hereinafter *WARREN'S FORMS*]; ROBERT A. FELDMAN & RAYMOND T. NIMMER, *DRAFTING EFFECTIVE CONTRACTS: A PRACTITIONER'S GUIDE* (2d ed. 2005) (hereinafter *DRAFTING EFFECTIVE CONTRACTS*); and CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU*, Ch. 10 (2002) (hereinafter *WORKING WITH CONTRACTS*). *WARREN'S FORMS* dedicates separate chapters or sections to many of the distinct boilerplate clauses covered here. For most of the boilerplate provisions it covers, *WARREN'S FORMS* provides several alternative provisions for use in a wide variety of transactions and situations. For some provisions, *WARREN'S FORMS* also discusses cases that have construed the provisions. *DRAFTING EFFECTIVE CONTRACTS* presents boilerplate provisions primarily in the context of particular kinds of contracts, including contracts for the sale of goods and services (§ 5.10), promissory notes (§ 7.10), guaranties (§ 9.10) (noting the reputation of guaranties for "wonderfully long" boilerplate), and security agreements (§ 11.11). *DRAFTING EFFECTIVE CONTRACTS* also includes an appendix that summarizes cases that have construed common contract provisions, including several that turn on the interpretation of boilerplate clauses. *DRAFTING EFFECTIVE CONTRACTS*, *supra*, at Appendix A-33-36. A good resource discussing many boilerplate provisions used especially in real estate contracts and mortgage loan agreements is GREGORY M. STEIN ET AL, *A PRACTICAL GUIDE TO COMMERCIAL REAL ESTATE TRANSACTIONS FROM CONTRACT TO CLOSING* (2001) [hereinafter *COMMERCIAL REAL ESTATE TRANSACTIONS*].

2. W. NOEL KEYES, *KEYES ENCYCLOPEDIA OF CONTRACT AND PROCUREMENT LAW* 26 (5th ed. 1992).

3. If, as these materials sometimes suggest, the enforceability of some of these provisions may be suspect in certain circumstances, should lawyers routinely take exceptions to boilerplate when rendering legal opinions on the enforceability of contracts?

mischievous do they portend?

For present purposes, let us define boilerplate<sup>4</sup> to include contract provisions that frequently appear in real estate contracts and that are "peripheral to the essence of the transaction."<sup>5</sup> Many boilerplate provisions address such matters as the enforcement, amendment, administration, and interpretation of the contract, while others concern matters that simply do not fit well into any of the major substantive parts of the contract. The discussion that follows highlights selected standard clauses lawyers often include in real estate contracts, and it presents sample clauses (sometimes with potentially significant variations shown in brackets). It also analyzes some alternative sample clauses that illustrate contrasting approaches.

These materials reflect much conventional wisdom about common contract clauses. They also raise some important questions that lawyers handling real estate transactions should consider when they draft or review contract boilerplate. In some cases, these materials offer suggested resolutions to those questions, but more often they raise the questions solely for the sake of consideration. Even if we cannot fully resolve the issues that these popular, yet maligned, contract provisions raise, we can gain much by reflecting thoughtfully on them.

The discussion that follows frequently notes Arkansas legal principles relevant to specific clauses. When dealing with a contract involving real estate in another jurisdiction, however, you should also consider the relevant cases and statutes in that jurisdiction. Additionally, boilerplate provisions used in connection with transactions involving the sale of goods as well as real estate may be subject to several important provisions of the Uniform Commercial Code and cases interpreting the Code that are beyond the scope of this discussion.<sup>6</sup> Additionally, many states have special statutes concerning particular issues that may affect boilerplate clauses in a real estate transaction.<sup>7</sup>

Although each of the provisions discussed or noted here may be critically important in certain situations, no one clause, alternative, or variation is necessary, correct, or best for every situation. As is true for most issues that transactional lawyers face, sound decisions about contract boilerplate require good judgment, informed by an appreciation of the unique characteristics of the particular transaction, circumstances, and parties involved. Anything less may yield triviality and meaningless consistency at best or legal disaster at worst.<sup>8</sup>

The provisions selected for discussion here include many of the ones most common in real

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4. WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989) defines "boilerplate" in its primary sense rather dryly as a metal plate used to make a boiler, but then it adds a secondary definition that derives from journalism and refers to "syndicated copy in the form of stereotype plates." Although nothing turns on the label used, this discussion prefers the term "boilerplate" to the more sterile terms "miscellaneous" or "standard" because lawyers use these contract terms much in the same way as newspaper publishers use journalistic boilerplate. The term also aptly fits the graphic but dubious analogy that a drafting lawyer, after crafting the critical internal parts that give a contract its essential utility, can reach for the boilerplate and affix it to finish the job. See DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 2.02[J][2] (commenting that because lawyers may be tired by the time they get to these provisions, they may not have much interest in them and may be tempted to "bolt on the boilerplate" from whatever form is readily available.)

5. DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 2.02[J].

6. See generally DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 5.10.

7. For example, in many states a special statute of frauds governs oral agreements between a borrower and a creditor that a lawyer drafting integration and modification clauses for loan agreements and loan commitments will find especially relevant. See generally *id.* at § 11.11[A][4]. See also, ARK. CODE ANN. § 4-59-101(d) (2001).

8. For a discussion of several disastrous situations attributable to the absence of a boilerplate provision or the inclusion of an inapt one, refer to DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at §§ 2.02[J] and 5.10.



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estate contracts, but you might consider many other standard provisions also to be boilerplate.<sup>9</sup> The discussion of each provision reflects the extent to which that provision may raise significant or common issues, but the provisions discussed most extensively are not necessarily the most important ones for every real estate contract. This discussion presents boilerplate provisions in a logical order, as they might appear in a contract that includes all of these provisions.<sup>10</sup> There is, however, no established formula for ordering boilerplate provisions in every agreement.

Here is a more comprehensive (although not exhaustive) list, arranged alphabetically, of topics that real estate lawyers often address in boilerplate provisions, at least for some transactions.

- Amendment
- Anti-modification
- Anti-waiver
- Arbitration or dispute resolution
- Assignment
- Attorneys' fees
- Choice of law
- Compliance with law
- Construction of terms
- Costs and expenses
- Counterparts
- Covenants Running with the Land
- Cumulative remedies
- Force majeure
- Forum selection
- Further assurances
- Headings
- Indemnity
- Integration or merger
- Joint and several liability
- Jurisdiction

- Jury waiver
- No reliance (on representations not included in the contract)
- Notices
- Order of precedence (among documents or components of documents)
- Schedules and exhibits
- Setoff
- Severability
- Successors and assigns
- Survival
- Time of the essence

Many provisions that are standard in real estate contracts are not boilerplate in the sense this discussion uses that term. For example, provisions concerning insurance and risk of loss, representations relating to the condition of property, and provisions dealing with escrow deposits and title and survey matters all are common in contracts for the purchase and sale of real estate. Those provisions, however, are integral to the transaction and often reflect key terms negotiated by the parties for the specific transaction. Similarly, lenders commonly include a variety of waivers and remedial provisions in mortgages and mortgage loan agreements, but those provisions relate in special ways to the relationship of borrower and lender. As already noted, for purposes of this discussion, boilerplate clauses are those that lawyers use in many different kinds of real estate contracts that are peripheral to the specific transaction. For that reason, this discussion does not generally consider provisions that may be common only to particular kinds of real estate transactions.

Now we turn to some of the most common boilerplate provisions used in real estate contracts. Although the importance of any of these provisions

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9. See *id.* at §§ 2.02[J], 5.10 & 11.11.

10. One logical way to organize boilerplate provisions is to begin with those that have broad application and move to those with more isolated application. For example, the choice of law provision often appears early among miscellaneous provisions because later boilerplate may reflect certain peculiarities of the chosen law. Additionally, a draftsman may wish to reserve for the end of the miscellaneous section of the contract those provisions that should be most conspicuous so that those provisions appear on the signature page. Although a logical order may contribute somewhat to a sense of overall organization in the contract, the order in which the provisions appear matters little unless a statute or other specific legal rule imposes a relevant requirement, such as that a notice in a consumer transaction must appear close to the consumer's signature.

varies greatly from one circumstance to another, this discussion primarily considers selected clauses that often merit the close attention of negotiating counsel and courts in connection with real estate contracts.

## Selected Boilerplate Clauses

### Choice of Law

#### *Sample Clause 1*<sup>11</sup>

This agreement is governed by Arkansas law without giving effect to principles of conflict of laws.

#### *Sample Clause 2 (an alternate form)*

This agreement and the rights and obligations of the parties under this agreement are governed by, and are to be construed and interpreted in accordance with, Arkansas law without giving effect to principles of conflict of laws to the contrary.

One could argue that a choice of law clause is unnecessary if the subject of the contract is real

estate located entirely in one state. We cannot, however, entirely ignore the choice of law clause in real estate contracts. Indeed, some authorities argue that for contracts in general this is the most important of all boilerplate because it may determine the result in a dispute.<sup>12</sup> As an example, consider a loan involving an interest rate that was unlawful under the law in effect in one jurisdiction at the time the loan was made but lawful in another jurisdiction.<sup>13</sup> Another common situation involves statutes of limitations that differ from one jurisdiction to another.<sup>14</sup>

Is a choice of law clause so important that you should never omit it from any contract, no matter how simple or limited in scope or size the transaction is? Arguably, you may safely omit it from a routine real estate contract involving only real estate located in a single jurisdiction because the law of the state in which the real estate is located will govern that contract.<sup>15</sup>

One of the primary considerations used by the Arkansas courts in contract cases involving conflict of laws questions is whether the parties included a choice of law provision in the contract.<sup>16</sup> The Arkansas Supreme Court has occasionally declined to enforce a choice of law provision in a contract on the basis that a contract should be governed by the law of the state having the most significant contacts

11. The sample clauses used here illustrate provisions that are customary and appropriate in many situations, but they are not necessarily the best ones for all circumstances. Language enclosed in brackets in the sample clauses may be appropriate in some situations but inappropriate in others. The text discusses some, although not nearly all, alternative situations lawyers frequently encounter when drafting and reviewing these clauses. Several of the sample clauses are based on the Appendix to KENNETH A. ADAMS, *LEGAL USAGE IN DRAFTING CORPORATE AGREEMENTS*, while others draw on *WORKING WITH CONTRACTS*, *supra* note 1, or *DRAFTING EFFECTIVE CONTRACTS*, *supra* note 1. Others come from the author's own files. In most cases, the samples have been edited for purposes of this discussion, including for clarity and style. The Adams book is an especially useful reference for contract drafters because it gives sound advice on matters of drafting usage, and it routinely offers concise contract language that is free of legalese.

12. For an informative discussion of contract cases turning on choice of law and forum selection issues, see *DRAFTING EFFECTIVE CONTRACTS*, *supra* note 1, at § 5.10[A][5].

13. See *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 42-43, 364 S.W.2d 158, 161-162 (1963).

14. *WORKING WITH CONTRACTS* *supra* note 1, at § 244.

15. See generally *Huchingson v. Republic Finance Co.*, 236 Ark. 832, 834, 370 S.W.2d 185, 186 (1963).

16. *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 364 S.W.2d 158 (1963); *Aetna Life Ins. Co. v. Great Nat. Corp.*, 818 F.2d 19 (8th Cir. 1987); *American Honda Finance Corp. v. GloMc, Inc.*, 820 F.Supp. 1157, 1159 (E.D. Ark. 1993).



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with the transaction.<sup>17</sup> It appears, however, that the cases trend toward honoring the parties' choice of law as explicitly stated in the contract as long as the contract has a substantial connection with the state whose law the parties choose.<sup>18</sup> This can be so even where the transaction involves a loan secured by interests in contracts for the sale of Arkansas real estate or by a mortgage covering Arkansas real estate.<sup>19</sup> Additionally, the Arkansas courts have "consistently inclined toward applying the law of the state that will make the contract valid rather than void."<sup>20</sup>

Even if there are situations in which the choice of law clause has little significance, in light of the deference the Arkansas cases give to express contract provisions selecting the governing law, is there any good reason to omit such a short and simple provision? Now and then, you might prefer to leave a contract silent on this issue if you suspect that your client will loose in any negotiations over which law to select, especially if the other side prepared the first draft of the contract and did not address the issue. That way you will be free to marshal the arguments for application of the law that best serves your client's objectives at the time a dispute arises.

Should the choice of law clause state that the chosen law applies "without giving effect to principles of conflict of laws" as sample clause 1 does?

How can a court rule on the enforceability of the choice of law provision without resorting to the forum's conflict of laws principles? In fact, the cases routinely apply conflict of law principles in determining whether to enforce a choice of law provision in a contract.<sup>21</sup> For that reason, sample clause 2 seems more consistent with the reasoning of the cases and therefore more apt than sample clause 1.

There is an even more significant reason for preferring sample clause 2. If the provision merely states that the "agreement" is governed by the selected jurisdiction's law, as does sample clause 1, what law should apply to a related tort claim, such as fraud or negligent misrepresentation? A significant body of case law suggests that the precise language used may be critical in determining the scope of a choice of law clause.<sup>22</sup>

Lawyers drafting and reviewing a choice of law provision should also consider many other issues that may be important in a particular circumstance. How aggressive should you be in proposing a choice of law provision? For example, in a contract for accounting services between an out-of-state real estate management company and your Arkansas accountant client, should you propose Arkansas law solely because Arkansas has enacted a statute that preserves the privity defense in cases of third-party claims against accountants?<sup>23</sup> Are the parties free to choose the law of a jurisdiction that has no con-

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17. See *Ducharme v. Ducharme*, 316 Ark. 482, 872 S.W.2d 392 (1994); *Standard Leasing Corp. v. Schmidt Aviation, Inc.*, 264 Ark. 851, 576 S.W.2d 181 (1979).

18. *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923, 928-29 (8th Cir. 1999); *Aetna Life Ins. Co. v. Great Nat'l Corp.* 818 F.2d 19 (8th Cir. 1987); *Yarbrough v. Prentice Lee Tractor Co.*, 252 Ark. 349, 350, 479 S.W.2d 549, 551 (1972). This is the trend nationally as well. LUTHER L. MCDUGAL, III ET AL, *AMERICAN CONFLICTS LAW* § 137 (5th ed. 2001).

19. *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 42-43, 364 S.W.2d 158, 161-162 (1963).

20. *Yarbrough v. Prentice Lee Tractor Co.*, 252 Ark. 349, 350, 479 S.W.2d 549, 551 (1972).

21. *In re Jones*, 231 B.R. 66, 68 (Bankr. E.D. Ark. 1999); *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 364 S.W.2d 158 (1963).

22. See *Heating & Air Specialists, Inc. v. Jones*, 180 F.2d 923, 928 (8th Cir. 1999) (clause stating that Texas law "shall govern its interpretation" given less deference than a clause stating what law will "govern the contract"). See generally *DRAFTING EFFECTIVE CONTRACTS*, *supra* note 1, at § 5.10[A][5], which discusses cases that highlight the potential significance of the phrase "without giving effect to principles of conflict of laws" and the difference between a clause that subjects to the law of the selected jurisdiction only the agreement itself rather than the agreement "and the rights and obligations of the parties" under the agreement.

23. See ARK. CODE ANN. § 16-114-302 (Supp. 2003).

nection to the transaction or the parties?<sup>24</sup> At a more general level, is it often best to select New York law or Delaware law to govern commercial real estate contracts because the law is highly developed in those jurisdictions or because the law in those jurisdictions may generally support enforcement of provisions favorable to business and commerce?<sup>25</sup>

## Consent to Jurisdiction, Venue, and Service of Process

### Sample Clause

A party may initiate in the courts of \_\_\_\_\_ County, Arkansas, or (if it has or can acquire jurisdiction) in the United States District Court for the \_\_\_\_\_ District of Arkansas, an action or proceeding seeking to enforce any provision of this agreement or seeking any remedy in connection with the transactions contemplated by this agreement. [A party may not initiate any such action or proceeding in any other court.] Each party consents to the [exclusive] jurisdiction of those courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue in any of those courts. A party may serve process in any action or proceeding by delivering a copy of the process to the party to be served at the address and in the manner provided for giving notices in Section

\_\_\_\_. Nothing in this Section, however, affects the right of a party to serve legal process in any other manner permitted by law.

Courts commonly enforce forum selection clauses unless enforcement would be unjust or unreasonable.<sup>26</sup> The relevant considerations include factors such as the burden on the party affected, the extent of the contacts between the selected forum and the selected jurisdiction, whether the parties freely agreed to the provision, whether enforcement impinges on any significant public policies, and whether there are any relevant statutory restrictions against enforcement of the provision.<sup>27</sup>

Based on these principles, an Arkansas court should enforce a clause designating Arkansas as the forum if the contract involves Arkansas real estate or if the matter otherwise has sufficient contacts with Arkansas.<sup>28</sup> The Arkansas courts apply the same considerations when determining whether to decline to entertain an action on a contract under which the parties agreed to the exclusive jurisdiction of a forum other than Arkansas.<sup>29</sup> Accordingly, a court may refuse to enforce a forum selection clause in the absence of sufficient contacts with the forum specified in the contract.<sup>30</sup> Additionally, a court might not respect a provision that purports to deny that court jurisdiction over a matter that the court otherwise has power to hear, especially if the court concludes that enforcement of the clause would contravene a strong public policy or would be

24. At least if any important policy issues are implicated, the answer may be no. See DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 5.10[A][5]. But cf. N.Y. Gen. Oblig. Law § 5-1401 (Westlaw through L. 2004, Ch. 737) (authorizing parties in many commercial transactions to choose New York law even if there is no nexus between the parties or the transaction and New York).

25. See WORKING WITH CONTRACTS, *supra* note 1, at § 10:2.1.

26. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); LUTHER L. MCDUGAL, III ET AL, AMERICAN CONFLICTS LAW § 48 (5th ed. 2001).

27. WARREN'S FORMS, *supra* note 1, at § 103.1.

28. See generally, *Nelms v. Morgan Portable Bldg. Corp.*, 305 Ark. 284, 808 S.W.2d 314 (1991); *SD Leasing, Inc. v. Al Spain & Assoc.*, 277 Ark. 178, 640 S.W.2d 451 (1982).

29. *BAAN, U.S.A. v. USA Truck, Inc.*, 82 Ark. App. 202, 105 S.W.3d 784 (2003).

30. *RMP Rentals v. Metroplex, Inc.*, 356 Ark. 76, 146 S.W.3d 861 (2004).



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unreasonable or unfair on some other basis.<sup>31</sup> Furthermore, a forum selection clause can confer personal jurisdiction, but not subject-matter jurisdiction.<sup>32</sup>

An exclusive forum selection clause may be especially appropriate for a client that wields sufficient negotiating leverage to secure an agreement that litigation will only occur in the forum with which the client is most comfortable. If you are confident that the client will prefer to litigate in that forum under all possible circumstances, then include the sample language shown in brackets in the sample clause so that the provision confers exclusive jurisdiction on the selected forum.

Even if an exclusive forum selection clause is enforceable, there may be other competing considerations. On the one hand, a non-exclusive clause invites a race to the courthouse. On the other hand, an exclusive clause may prevent the client from taking advantage of a more favorable or convenient forum concerning the circumstances or issues involved in a particular case as judged at the time the dispute arises.

An agreement governing service of process may be enforceable provided that the specified procedure satisfies minimum standards of due process.<sup>33</sup> At least in the absence of an enforceable agreement concerning service of process, however, the Arkansas courts require strict compliance with service of process requirements.<sup>34</sup>

As a matter of drafting style, some lawyers prefer to include separate provisions for forum selection and for service of process. The above sample clause

may easily be divided for that purpose.

### Assignment

#### *Sample Clause*

Neither party may in any way transfer or assign any interest in, or right under, this agreement to any other person or entity, nor may either party delegate any obligation under this agreement to any other person or entity [except, in each instance, with the prior written consent of the other party, which consent may be denied in the sole and absolute discretion of the party whose consent is required]. Any attempted assignment or delegation [without the prior written consent of the other party] will be void.

An express contractual provision governing assignment obviates the need to resort to common law rules and principles of contract law that generally permit assignment but that also recognize important exceptions that may be difficult to apply in a particular case.<sup>35</sup> An anti-assignment provision should not simply restrict a party from assigning "the contract" because that approach leaves open fundamental questions, such as whether the restriction prohibits the party from delegating duties but not assigning rights<sup>36</sup> or whether the provision restricts assigning a right to receive payment as well as the right to enforce performance obligations.<sup>37</sup> The sample provision should be suit-

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31. *Id.*

32. *Id.* (forum selection clause could not confer subject matter jurisdiction in an in rem proceeding such as a proceeding on a materialman's lien).

33. *National Equip. Rental, Ltd. v. Szukhernt*, 375 U.S. 311 (1964); WARREN'S FORMS, §#103.1.14.

34. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003); *Thompson v. Potlatch Corp.* 326 Ark. 244, 930 S.W.2d 355 (1996).

35. See generally WARREN'S FORMS, *supra* note 1, at §§ 93.1.02 through 93.1.05.

36. See *Cedar Point Apartments, Ltd. v. Dedar Point Inv. Corp.*, 693 F.2d 748 (8th Cir. 1982).

37. See, e.g., *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223 (10th Cir. 1988).



able for many common circumstances, although some situations will merit greater detail.

Even if a contract includes a provision restricting assignment, the parties can always waive that restriction, and courts often seem eager to find a waiver of a contractual provision against assignment.<sup>38</sup> With that principle in mind, is there ever any need to specify that one party may assign with the consent of the other party? The usual reason is to specify the manner or procedure to follow if a party wishes to request consent to an assignment otherwise prohibited by the contract and to specify any standard that applies to the party requested to consent. Even if an assignment provision calls for a party's prior consent to a proposed assignment, a court may imply a duty on that party to act in good faith and only refuse consent on some reasonable basis.<sup>39</sup>

Assignment provisions often fail to address whether a party may delegate duties. Although a court may construe a restriction against assignment of rights also to restrict delegation of duties, the sample provision illustrates the better practice, which is to state expressly that the restriction both prohibits a party from assigning rights under the contract and also prohibits delegation of duties.

In some transactions, the prospect and procedures for assigning an interest in the contract or for delegating or subcontracting obligations will be appropriate subjects for detailed substantive provi-

sions in the body of the agreement rather than through a boilerplate clause.<sup>40</sup> Those situations are beyond the scope of this discussion.

## Further Assurances

### Sample Clause

Each party agrees to execute and deliver such other documents and take any other actions reasonably requested by the other party to accomplish more effectively the purposes of this agreement.

It would be hard to find a notion with more nebulous boundaries than the further assurances clause, which "addresses one of the transactional lawyer's primal fears"<sup>41</sup> that the agreement may inadvertently fail to address a step required to consummate the transaction. Even so, this is a valuable clause to include in real estate contracts, which often obligate the parties to perform certain actions, such as delivering deeds and other conveyances, in the future.<sup>42</sup> One common request to facilitate a real estate closing that a further assurances clause may benefit involves the last minute discovery that transfer of the real estate requires consent of a third-party or the assignment of a permit or license important for the operation of the property.

A further assurances provision, however, will

38. See, e.g., *North Little Rock Urban Renewal Agency v. Van Bibber*, 252 Ark. 1248, 483 S.W.2d 223 (1972); *Harbottle-Bailey Coal Co. v. Bolton-Hale Coal Co.*, 150 Ark. 473, 234 S.W. 476 (1921).

39. See *Warmack v. Merchants Nat'l Bank*, 272 Ark. 166, 169, 612 S.W.2d 733, 734-735 (1981) (landlord's consent to assignment of lease cannot be withheld unreasonably).

40. A contract assignment may be in the form of a complete assignment of all rights and obligations of a party under the agreement (this is a novation, in which the assignee is substituted for the assignor), an assignment of rights but not duties, or a collateral assignment of rights (typically as security for payment of an indebtedness). See *WORKING WITH CONTRACTS*, *supra* note 1, at § 249-251. Contracts governed by Article 9 of the Uniform Commercial Code are subject to the Code's provisions governing assignment, which establish certain restrictions and special rules relating to assignments. See *ARK. CODE ANN.* §§ 4-9-406, 4-9-408 & 4-9-409 (2001).

41. *WORKING WITH CONTRACTS*, *supra* note 1, at § 253.

42. See, e.g., *McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971) (provision in the nature of a further assurances clause in the contract for sale of business assets provided support for buyer's claim that the sale was intended to include transfer of certain land as well as other assets of the business).

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probably not avoid legal proceedings over significant matters that are not routine, because in those situations there is no satisfactory way to determine objectively whether an additional document or action is reasonably necessary or appropriate for purposes of the transaction as contrasted to calling for something the parties never addressed or resolved as part of their bargain.<sup>43</sup>

### Time of the Essence

#### *Sample Clause 1* (all time periods)

Time is of the essence of every term of this agreement.

#### *Sample Clause 2* (specified dates in real estate sale contract)

The closing date and the dates established for Buyer to complete all inspections and to make all title and survey objections are matters of the essence of this agreement.

This is a popular clause in real estate contracts, especially contracts for the purchase and sale of real estate.<sup>44</sup> What is its effect, and is it always appropriate? The main function of the provision is to make performance on a stated date a material obli-

gation so that a party's failure to perform on time should constitute a material breach of contract.<sup>45</sup> This is significant because the remedies available to the non-breaching party differ depending on whether or not a breach is a material one.

For example, if time is essential, then a non-breaching seller may have the right to terminate the contract if the buyer does not appear as scheduled for the closing.<sup>46</sup> But if time is not essential, the buyer who does not appear on time may have a right to a reasonable extension of time to perform and may only be liable to the seller for whatever damages the seller suffered as the result of the delay in closing. Either party to a real estate sale contract that does not by its terms specify that time is of the essence may have the right to declare unilaterally that the time for closing is a matter of the essence provided that a closing date has been reasonably set or extended.<sup>47</sup>

As a general rule, in equity time is not of the essence unless the contract specifies that it is, and even where the contract includes a provision making time of the essence, the parties may waive the provision by their conduct.<sup>48</sup> Additionally, the effect of a provision making time of the essence may depend on the parties' intent, as evidenced by their conduct.<sup>49</sup> In appropriate cases, however, the courts will hold the time of performance to be a matter of the essence even if the contract does not state

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43. WORKING WITH CONTRACTS, *supra* note 1, at § 253-254.

44. According to one source, "in many states, a contract without this clause would be a rarity." See COMMERCIAL REAL ESTATE TRANSACTIONS, *supra* note 1, at § 2.140.

45. See COMMERCIAL REAL ESTATE TRANSACTIONS, *supra* note 1, at § 2.139.

46. See, e.g., *Miller v. Almquist*, 671 N.Y.S.2d 746 (N.Y. App. Div. 1998) (in the absence of "time is of the essence" provision either party is entitled to a reasonable adjournment of closing, but the other party may subsequently make time of the essence as to the rescheduled date by a unilateral declaration to that effect).

47. See *Marioni v. 94 Broadway, Inc.*, 866 A.2d 208 (N.J. Super. Ct. App. Div. 2005) (although seller, after an extended delay in closing, could declare that closing by a specified date selected by seller was a matter of the essence, the declaration was not effective under the circumstances involved because the seller failed to satisfy certain conditions precedent to the closing).

48. *Medling v. Stewart & Oliver*, 179 Ark. 1001, 18 S.W.2d 1025 (1929).

49. *Taylor v. Eagle Ridge Developers, LLC*, 71 Ark. App. 309, 29 S.W.3d 767 (2000) (court used promissory estoppel rational to enforce option contract even though the option was not exercised timely and contract included a provision making time of the essence).

that it is.<sup>50</sup>

## Calculation of Time Periods

### *Sample Clause*

Unless otherwise specified, in computing any period of time described in this agreement, the day of the act or event after which the designated period of time begins to run is not included and the last day of the period is included, unless the last day is a Saturday, Sunday or legal holiday in the State of Arkansas, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

This provision will often clarify how the parties intend to determine when contractual time periods have elapsed. This may be especially important when one party's obligations depend upon satisfaction of a contractual condition by a stated deadline. In the absence of express contractual terms, the parties may disagree over whether weekends and holidays should count against the period of time allowed for performance.<sup>51</sup>

## Integration (or Merger) Clause

### *Sample Clause*

This agreement [, together with its Exhibits and the other documents delivered pursuant to this agreement,] is the entire agreement between the parties relating to the subject matter of this agreement. It supersedes all prior written and oral agreements between the parties relating to the subject matter of this agreement.

This may be the miscellaneous provision most often relevant to litigated disputes, and it may prove to be invaluable.<sup>52</sup> If an agreement is integrated, then the parol evidence rule prohibits resort to evidence outside the contract to establish the obligations of the parties (subject to important exceptions). But the parol evidence rule itself "does not apply to the threshold question whether an agreement is integrated."<sup>53</sup>

The presence or absence of an integration clause may be the most important factor determining whether or not the parties intended an integrated agreement.<sup>54</sup> You must not, however, assume that an integration clause will prevent a court from permitting evidence of course of dealing, course of performance, or usage of trade to supplement the written contract terms,<sup>55</sup> or that a typical integration

50. See *White v. Page*, 216 Ark. 632, 226 S.W.2d 973 (1950) (contractual provisions for keeping property insured and paying taxes and mortgage debt on time were matters of the essence).

51. See *Mango v. Pierce-Coombs*, 851 A.2d 62, 73-74 (N.J. Super. Ct. App. Div. 2004).

52. See WARREN'S FORMS, *supra* note 1. See also DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 5.10[A][2], which discusses the impact of integration clauses under the UCC and related cases. The integration clause may have special importance for transactions governed by Article 2 of the Uniform Commercial Code because section 2-202 of the Code (the Code's version of the parol evidence rule) leaves open the possibility that the final written expression of the agreement might not necessarily include all matters upon which the parties have reached agreement. That, however, is a matter beyond the scope of this discussion.

53. WARREN'S FORMS, *supra* note 1, at § 101.1.03.

54. See, e.g., *Hosto v. Intellinet, LLC*, No. CA99-918, 2000 WL 302622, at \*5 (Ark. Ct. App. Mar. 22, 2000) (not designated for publication); *Hagans v. Haines*, 64 Ark. App. 158, 984 S.W.2d 41 (1998) (in both of these cases the courts, relying on integration clauses, refused to allow evidence of additional terms not included in the contracts).

55. See *Bank of America, N.A. v. C.D. Smith Motor Co., Inc.*, 353 Ark 228, 106 S.W.3d 425 (2003) (evidence of the collection practices of the parties used to supplement the terms of the contract notwithstanding that the contract included an integration clause).



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clause (as distinguished from a sufficiently expressed no-reliance clause<sup>56</sup>) will be adequate to deal with non-contractual claims, such as fraud or misrepresentation.<sup>57</sup>

It is equally important to include an integration clause in every contract and to confirm with the client that the written document in fact addresses adequately all material aspects of the understanding between the parties. Often, the parties or their business representatives reach some important but tacit assumptions about "side letters" and off-record understandings. A lawyer can unearth some of these lawsuits-suits-in-waiting by gently interrogating the client during the drafting process. You should also be careful to discover whether the parties entered into any prior, related agreements because it may be helpful to identify those agreements expressly and to state whether or not they continue to have force.

### No Implied Waivers

#### *Sample Clause*

No failure to exercise and no delay in exercising any right or remedy under this agreement will operate to waive that right or remedy. All waivers and consents by a party must be in writing and signed by that party to be effective. No waiver or consent given in connection with this agreement will apply to

any events, acts or circumstances other than those expressly covered by that specific written waiver or consent.

This provision may be important to defend against arguments that leniency at one time or with respect to a specific circumstance effectively modifies the terms of the agreement.<sup>58</sup> No clause, however, will deprive a court of the opportunity to find an implied waiver based on the conduct of the parties in an appropriate case. "Reliance converts an otherwise invalid oral modification into an enforceable waiver."<sup>59</sup>

### Joint and Several Liability

#### *Sample Clause*

All persons and entities obligated in any manner under this agreement are jointly and severally liable on each obligation.

Real estate transactions often involve multiple persons or entities on each side. This provision prevents a signatory to the agreement from asserting partial or proportionate liability.<sup>60</sup> When appropriate, the provision must be modified to reflect agreed limitations on a party's obligation. For example, if a spouse signs a real estate contract or a mortgage solely to bind his or her marital property rights, then the document should expressly state that he or

56. See *Vigortone AG Products, Inc. v. PM AG Products, Inc.*, 316 F.3d 641 (7th Cir. 2002) (distinguishing between an integration clause and a no-reliance clause and commenting that sophisticated commercial parties should be able to waive fraud claims through a no-reliance clause that expressly states that a party is not relying on any representations not contained in the contract).

57. *Wilmans v. Dudley*, No. CA 00-13, 2000 WL 1683444 (Ark. Ct. App. Nov. 8, 2000) (integration clause was merely an affirmation of the parol evidence rule, and it would not preclude parol evidence to establish fraudulent inducement claim). See also DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at §§ 2.02[J], 5.10 & 11.11.

58. See generally DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 5.10[A][3].

59. *Jafari v. Wally Findlay Galleries*, No. 89 CIV. 2390 (RWS), 1989 WL 116437, at \*5 (S.D.N.Y. Sept. 26, 1989).

60. *Bledsoe v. Carpenter*, 160 Ark. 349, 254 S.W. 677 (1923) provides a classic explanation of the distinctions between joint liability and several liability on a contract. The court explained that if the contract in question, which included a non-compete agreement respecting one of the three sellers of a business, "was a joint contract, each of the obligors is liable for damage caused by a breach committed by either of the three; but, on the other hand, if the contract was several in its nature, then each obligor is responsible only for his own breach." 160 Ark. at 354, 254 S.W. at 679.

she is not personally or jointly liable on the contractual obligations. Similarly, if investors in a real estate project intend proportional and not joint and several liability on mortgage financing for the project, the proportionate liability should be clearly expressed.<sup>61</sup>

### Survival of Covenants, Warranties, and Representations

#### *Sample clause 1* (all obligations survive closing)

All representations, warranties, covenants, and agreements of each party survive the consummation of the transactions contemplated in this agreement unaffected by any investigation by, or on behalf of, the other party.

#### *Sample clause 2* (obligations of continuing nature)

All obligations of a continuing nature survive the termination or expiration of this agreement.

#### *Sample clause 3* (seller's representations, warranties, and post-closing obligations)

Seller's representations and warranties under this agreement and under the documents and agreement delivered at the closing of this transaction, and those provisions of this agreement intended by their terms to be observed or performed after the closing,

survive the closing and the performance of the parties obligations at the closing.

This provision is especially important in real estate contracts to avoid the unintentional application of the merger doctrine by which all contractual obligations merge into the obligations evidenced by the deed or other documents that conclude the transaction.<sup>62</sup> Conversely, it should not be used if the parties intend a merger.

One circumstance common in real estate transactions deserves special attention. If one party makes representations or undertakes agreements that serve essentially to establish conditions precedent to the other party's obligation to complete the transaction, the parties may intend that those provisions will not survive closing, but will be replaced exclusively by any warranties included in the documents delivered at the closing. For example, the seller may make broad representations concerning the status of title, and the buyer may have the right to refuse to close if those warranties prove to be untrue, but the parties may also agree that the seller will transfer title by special warranty deed (by which the seller warrants title only against title defects created by the seller). In that case, the contractual title warranties presumably should not survive closing, and the contract should make that result clear.

Notice that in some situations (such as alternate clauses 1 and 3) survival applies only if the transaction closes, but in others (such as alternate clause 2) it may apply either if the transaction closes or if the contract terminates for some reason, including as the result of default by a party.<sup>63</sup> Depending on the

61. *Cf. Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995) (in which former Congressman Alexander unsuccessfully sought to pursue a fraud and breach of fiduciary duty claim against a partner in a real estate investment on the basis of a transaction under which the joint and several liability of the partners was modified to become proportional; the court held that the claim was barred by the statute of limitations).

62. As most commonly applied to real estate sales, the merger doctrine essentially holds that contractual representations or warranties are superseded by the terms of the deed transferring the property to the buyer. *Cf. Wingfield v. Page*, 278 Ark. 276, 281, 644 S.W.2d 940, 943 (1983) (in which the court made note of the merger doctrine, but held that even without applying the merger doctrine to a limited warranty in the real estate sale contract, the particular contractual provision involved could not be read to exclude the warranty of habitability implied by law into a contract for the sale of residential real estate by a vendor-builder).

63. WARREN'S FORMS, *supra* note 1, at § 97.1.08 discusses survival primarily in relation to expiration or termination of the agreement, but in a real estate sale contract the concept may be more important in relation to the consummation of the sale at the closing.



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nature of the transaction and the negotiations, the survival concept may also appear in many other forms rather than in a form illustrated by one of the three alternate clauses suggested here. For example, survival may apply only to provisions expressly identified (e.g., "the representations made in Sections 10 and 11 of this agreement") or to provisions of the particular part of the contract in which the survival clause appears (e.g., "the provisions of this Section 15").

### Indemnity

#### *Sample Clause 1* (broad form in favor of buyer)

Seller agrees to defend, indemnify and hold Buyer harmless from and against all loss, liability, damage and expense (including reasonable attorneys' fees and costs of litigation and other legal proceedings) resulting from: (i) any liabilities or obligations in any way relating to the ownership, operation or use of the property prior to the closing date [and not specifically assumed by Buyer under this agreement]; and (ii) any loss, costs, damage or deficiency resulting from any misrepresentation or breach of warranty or breach of any other obligation of Seller under this agreement.

#### *Sample Clause 2* (broad form in favor of mortgage lender)

Borrower agrees to defend, indemnify and hold Lender harmless from and against all liabilities, losses, damages, penalties, actions, judgments, costs, expenses or disbursements of any kind or nature (including

reasonable attorneys' fees and costs of litigation and other legal proceedings) that may be imposed on, incurred by, or asserted against Lender in any way relating to the execution, delivery or performance of this loan agreement or to the transactions contemplated by this loan agreement.

#### *Sample Clause 3* (reciprocal, limited to brokerage fees)

Each party agrees to defend, indemnify, and hold the other harmless from and against any and all claims for commissions, brokers' fees, finders' fees or similar payments relating to the transactions contemplated by this agreement, but only to the extent based on dealings or alleged dealings between a person or entity making the claim and the party against whom indemnification is sought.

#### *Sample Clause 4* (lease, broad form protecting lessor)

Lessee agrees to protect, indemnify and save Lessor harmless from any and all liability for loss, damage, injury or other casualty to persons or property caused or occasioned by any accident or occurrence at or on the leased premises, whether due to defects in the premises or any part thereof, latent or patent, or whether the same may arise from negligence or otherwise, or from any and all liability arising from any other cause arising out of the use, occupancy, or possession of the leased premises by Lessee.<sup>64</sup>

64. This provision is based on an indemnity included in a gasoline service station lease, but for purposes of illustrating a general form of indemnity broadly in favor of a lessor, provisions relating expressly to petroleum products and equipment have been omitted. See *Buck v. Monsanto Co.*, 254 Ark. 821, 497 S.W.2d 664 (1973). That case arose out of a personal injury action brought by a service station employee who suffered burns when a customer struck a match and caused a gasoline fire. The court held that the indemnity clause in a sublease obligated Buck, the sublessee who was the employer of the injured plaintiff, for the defense costs paid by Mathews, the sublessor. The judgment against Buck also included the defense costs of the original lessor, Monsanto Company, which the trial court required Mathews to pay. The lease and the sublease included similar indemnity provisions that made express reference to personal injuries caused by fire or explosion of gasoline, and Mathews, as original lessee, did not appeal from the trial court's judgment requiring it to bear Monsanto's defense costs. Buck unsuccessfully argued that the clause did not obligate him for the defense costs because the injured employee had alleged independent acts of negligence against Mathews and Monsanto. The coda to the story is that the clause was not broad enough to obligate Buck to pay the costs Mathews incurred in the original case to enforce the indemnity. *Buck v. Mathews Oil Co.*, 257 Ark. 712, 520 S.W.2d 194 (1975).



*Sample Clause 5* (lease, simple reciprocal indemnities)

Lessor agrees to indemnify and hold harmless Lessee against all third party claims and third party liabilities arising out of the operation of the building in which the leased premises are located, including the common areas, but not including the leased premises, and not attributable to act or omission by Lessee. Lessee agrees to indemnify and hold harmless Lessor against all third party claims and third party liabilities arising out of the operation of the leased premises and not attributable to act or omission by Landlord. [The provisions of this paragraph are subject, however, to all waivers otherwise expressly provided for in this lease.]<sup>65</sup>

Indemnities relating to real estate transactions should be negotiated with careful regard for the unique circumstances involved.<sup>66</sup> The courts commonly construe contractual indemnities strictly against the party seeking indemnification.<sup>67</sup> Often, indemnities will merit extensive treatment in substantive provisions of the agreement. For example, an agreement for the sale of an income-producing property may dedicate a comprehensive article to the circumstances under which one party must indemnify the other party with respect to matters arising either before or after the closing, including detailed procedures the parties must follow if a

party asserts an indemnity claim. In these situations, the indemnity provisions do not constitute boilerplate, and these circumstances are beyond the scope of this discussion.

The sample clauses illustrate relatively simple indemnity agreements for situations that do not merit extensive negotiations over either the extent of the indemnity or any procedural matters. Samples 1 and 2 may be appropriate for situations in which one party has little or no bargaining leverage. Sample 3 illustrates a more balanced and limited indemnity for a common situation arising under real estate sales contracts. Samples 4 and 5 illustrate two contrasting approaches that may appear in leases.

Simple, broad indemnities, such as the ones illustrated by Samples 1 and 2, are especially common in certain real estate financings and in certain sales transactions. But even in those situations the party giving the indemnity should negotiate for reasonable limitations. For example, in Sample 2 much potential trouble lurks in the all-encompassing phrase "all liabilities, losses, damages, penalties, actions, judgments, costs, expenses or disbursements of any kind or nature," as well as in "execution, delivery or performance of this loan agreement." In addressing Sample 2, the borrower's counsel could at least avoid unreasonable consequences for the client by excluding from the indemnity matters that arise from the breach or fault (or gross negligence or willful misconduct) of the lender.<sup>68</sup>

65. This provision is based in part on a sample lease for an anchor tenant in a shopping center. See STUART M. SAFT, 21 WEST'S LEGAL FORMS, REAL ESTATE TRANSACTIONS, COMMERCIAL § 19.7 (3d ed. 2002).

66. Among other things, a more comprehensive indemnity agreement may expressly address these matters: whether the indemnifying part is responsible for attorneys' fees and costs of legal proceedings; the extent to which the indemnity applies to claims arising out of the fault of the indemnified party; what notices and information the parties should provide to each other; the extent to which the indemnified party must cooperate or assist the indemnifying party; whether settlement of third-party claims within the scope of the indemnity require the consent of the indemnified party; and appropriate exclusions from the indemnity obligation. Although courts sometimes imply reasonable terms relating to at least some of these topics, it is often advisable for the parties to address them expressly. See WARREN'S FORMS, *supra* note 1, at §§ 100.1 & 100.2; DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 5.06[A][9].

67. See, e.g., *Chevron U.S.A., Inc. v. Murphy Exploration & Production Co.*, 356 Ark. 324, 151 S.W.3d 306 (2004); *Buck v. Mathews Oil Co.*, 257 Ark. 712, 520 S.W.2d 194 (1975).

68. Although public policy may prevent enforcement of a provision by which the victim of an intentional or grossly negligent act indemnifies the wrongdoer, the results are less predictable when the indemnitor is not the victim but is instead a party who entered into a commercial contract with the wrongdoer concerning a transaction not directly relating to the wrongful conduct. See WARREN'S FORMS, *supra* note 1, at § 100.1.02; DRAFTING EFFECTIVE CONTRACTS *supra* note 1, at § 2.02[F][2].

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Landlords often propose broad indemnities in their favor similar to Sample 4, but tenants should rarely agree to provisions that extreme. For example, even tenants who agree to insure and maintain a free standing leased building should propose modifications to a broad indemnity to exclude claims attributable to the landlord's fault or arising from a failure of the landlord to perform any obligations the lease imposes on the landlord. The current attitude of many experienced tenants' lawyers is reflected by one commentator's assertion that contemporary commercial leases "generally contain even-handed indemnities of each party to the other unless the parties have agreed to forgo indemnities, waive claims against each other, and seek recourse from each party's insurer."<sup>69</sup> Sample 5 provides an example of one way in which parties with roughly equal bargaining power might strike a balance. Indemnities in leases often present complex issues that involve many aspects of the specific transaction and that may require coordination among several related provisions of the lease, including those provisions concerning insurance and any waivers and exculpatory clauses.<sup>70</sup> For those reasons, a full review of this topic is beyond the scope of this discussion.

### Costs and Expenses

*Sample Clause* (each party pays its own expenses)

Unless otherwise provided in this agreement, each party will pay all of its own costs and expenses incurred in connection with this agreement and the transactions contemplated by this agreement.

This provision is probably most useful to avoid

disputes in which one party might claim that there are industry or local customs that obligate one party to pay certain transactional costs and expenses incurred by the other party. It may have special significance for a lawyer negotiating a real estate transaction involving property in a location with which the lawyer is not familiar. If either party will be paying costs and expenses for specific services or items required by, or furnished to, the other party, such as surveys, title reports, or inspections, substantive provisions of the agreement should address those services or items.<sup>71</sup>

### Attorneys' Fees and other Costs of Dispute Resolution

*Sample Clause 1* (reimbursement of fees in any controversy)

In any controversy, claim, or dispute between the parties affecting or relating to the subject matter or performance of this agreement, the prevailing party is entitled to recover from the other party all reasonable expenses, including reasonable attorneys' and accountants' fees.

*Sample Clause 2* (reimbursement of litigation or dispute resolution costs)

If any legal action, arbitration proceeding, mediation, or other dispute resolution proceeding is brought or conducted relating to this agreement or to the performance, enforcement, or interpretation of this agreement, the prevailing party is entitled to recover from the other party the prevailing party's reasonable attorneys' fees and relat-

69. Cathy Rudisill, A Commercial Lease Primer (with Forms), in ALI-ABA's Practice Checklist Manual for Drafting Leases II, at 8 (Mark T. Carroll ed., 1997).

70. See Robert K. Hagan, *Using Waivers and Indemnities in Commercial Leases*, PRAC. REAL EST. LAW., Sept. 1993, at 11.

71. See *Gerhardt v. Plastics Research & Dev. Corp.*, 241 Ark. 932, 411 S.W.2d 1 (1967) (manufacturer agreed with an inventor to pay or advance to the inventor certain expenses in exchange for certain rights relating to the invention; the court held that after it was determined that the device could not be patented, the inventor had the right to terminate the contract, but only after reimbursing the expenses and advances paid by the manufacturer prior to termination).



ed expenses. [The "prevailing party" for purposes of this provision is the party who, in light of the issues in dispute and the decision on those issues, is determined by the tribunal or other decision maker to be more successful in the action or proceeding, but the "prevailing party" need not necessarily obtain a judgment in its favor.]

A contractual agreement to reimburse a prevailing party's litigation costs may have important practical as well as legal ramifications. It may discourage a party from pressing a questionable legal position too far. Although clients often believe any disputes that may arise will be attributable to the other party's breach or to unreasonable actions or decisions made by the other party, the lawyer should advise the client that a "prevailing party" attorneys' fees provision could impose substantial unanticipated loss simply because misunderstandings and unforeseen developments often arise in even routine transactions.<sup>72</sup> Additionally, the clause may take on special legal significance if the law of the governing jurisdiction restricts the ability of a prevailing party to recover fees.

In many actions based on debts and contracts, Arkansas law permits recovery of reasonable attorney's fees even if the contract is silent on this subject.<sup>73</sup> Moreover, the Supreme Court has made it clear that even apart from the statute, a contractual agreement to pay reasonable attorney's fees is enforceable.<sup>74</sup>

Because many real estate disputes may require the services of other professionals in addition to attorneys, it is a good idea to consider whether to cover expressly the fees of other professionals. Sample clause 1 contemplates the possibility of accountants' fees, but in some circumstances it may

be proper to include appraisers or other professionals. Arguably, sample clause 1 permits a party to claim reimbursement for expenses even if a claim or dispute is resolved without commencement of any legal action or other formal dispute resolution proceeding. Sample clause 2 applies if a dispute results in any legal action or alternative dispute resolution proceedings. It also suggests one way to define "prevailing party," an issue that can sometimes prove problematic.<sup>75</sup>

## Counterparts

### *Sample Clause 1*

This agreement may be executed in counterparts, each of which is an original and all of which together constitute one and the same instrument.

### *Sample Clause 2 (an alternative form)*

The parties may execute this agreement in as many counterparts as may be convenient. It is not necessary that the signature of, or on behalf of, each party, or that the signature of all persons required to bind any party, appear on each counterpart. [This agreement may be authenticated by manual signature, facsimile signature or, if approved in writing in advance by the party to be bound, electronic means, all of which will be equally valid.] This agreement will become binding when at least one counterpart has been signed by each party and delivered to the other party. [Delivery of an executed counterpart of a signature page to this agreement by facsimile or as an attachment to a

72. See WARREN'S FORMS, *supra* note 1, at §§ 94.1 & 94.2.

73. ARK. CODE ANN. § 16-22-308 (1999).

74. *Griffin v. First Nat'l Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994). For a recent case applying *Griffin* in an action for breach of a real estate contract, see *Herzog v. Glover*, No. CA02-796, 2004 WL 848281 (Ark. Ct. App. Apr. 21, 2004) (not designated for publication).

75. See *ERC Mortgage Group, Inc. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990) (party who prevailed and received a monetary judgment on one of seven counts held to be the prevailing party).



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message sent by email will be as effective as delivery of a manually executed counterpart of this agreement.] All counterparts will collectively constitute a single agreement. Any signature page to any counterpart may be detached from that counterpart without impairing the legal effect of the signatures and may be attached to another counterpart that is identical except for the signature pages. It is not necessary in proving this agreement to produce or account for more than a single counterpart to which is attached the [respective signatures of, or on behalf of, each of the parties] [signature of the party to be bound].

Parties commonly sign at separate times and locations. A counterpart clause may be especially useful if the parties wish to have a binding agreement even when the signatures are on different copies of the agreement.<sup>76</sup> Is sample clause 1 adequate for that purpose, or does it merely guard against the unlikely argument that multiple, distinct obligations arise when more than one fully signed document exists? Sample clause 2, although wordy by comparison to sample clause 1, explicitly anticipates the most common challenges that might arise when parties sign at different times and places. For these reasons, if the circumstances justify a counterparts provision at all, sample clause 2 is far more useful than sample clause 1.

Because the parties should be bound by any manner of execution made with the proper intent,<sup>77</sup> one might question whether a counterparts provision is important at all. The most compelling reason for a counterparts provision may be that it may

avoid the need at a later date (when a dispute exists and at least one party may be motivated to contest the validity of the contract) to prove that the parties intended to be bound to the contract when they executed separate copies or signature pages. It may also be useful to dispel any thought that a party seeking to enforce the contract must produce or account for all originals,<sup>78</sup> even though the statute of frauds only requires proof of a writing signed by the party to be charged.<sup>79</sup>

As suggested by the alternative clauses included in brackets in sample clause 2, a counterpart provision may be refined to refer to signatures exchanged by facsimile or made by electronic means.<sup>80</sup> One might question how a provision relating to execution formalities can ever become enforceable in the face of a challenge to proper execution. For example, does an enforceable agreement exist if a party forwards an electronic signature but then asserts that it never agreed to be bound by an electronic signature? This question should be resolved in favor of enforceability if there is evidence that at the time the party sent the electronic signature the party knew of the special provisions in the document relating to execution.

Although peculiar facts may lead to interesting technical questions relating to effective execution of counterparts, when drafting contracts lawyers should be careful not to become entangled in concerns over the most remote risks associated with the signature process. Ultimately, if a dispute arises concerning execution or the genuineness of a document, no magic formula referring to counterparts will avoid the need for the testimony of one or more of the parties to prove the required intent and to identify the documents involved.

76. See, e.g., *In re Popkin & Stern*, 196 F.2d 933, 938 (8th Cir. 1999) (separate copies of settlement agreement signed by distinct parties).

77. "Several instruments constitute a single contract when they pertain to the same transaction and when the parties intend for them to be construed as such." *Id.*

78. See *Jones v. Hoard*, 26 S.W. 193 (Ark. 1894) (because both fully signed copies of a lease were valid, the tenant could enforce the lease by relying on the signed copy in the landlord's possession even though the tenant could not rely on the signed copy in the tenant's own possession because the tenant had wrongfully altered that copy). See also COMMERCIAL REAL ESTATE TRANSACTIONS, *supra* note 1, § 2.156.

79. ARK. CODE ANN. § 4-59-101 (2001).

80. The effect of federal and state laws dealing expressly with electronic commerce and electronic signatures is beyond the

## Severability

### *Sample Clause 1*

If a court of competent jurisdiction holds any provision of this agreement to be unenforceable, all other provisions of this agreement will remain effective. If any provision of this agreement is unenforceable only in part or degree or in any other limited sense, that provision and the balance of this agreement will remain effective to the extent not held unenforceable.

### *Sample Clause 2*

Whenever possible, each provision of this agreement will be interpreted in such a way as to be effective and valid under applicable law. If a provision is prohibited by, or invalid under, applicable law, it will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of the provision or the remaining provisions of this agreement. Any ineffective portion or provision will be severed from this agreement, and the balance of this agreement will be construed and enforced as if this agreement did not contain the ineffective portion or provision. The parties further agree to amend this agreement to replace any severed provision with a valid provision that comes as close as possible to the intent of the severed provision. [The provisions of this section will not, however, prevent this entire agreement from being void should a provision that is of the essence of this agreement be determined to be prohibited or invalid.]

When a particular provision or aspect of a contract is invalid or unenforceable, the question arises whether the contract is "entire" on the one hand, meaning that the contract, as a whole, is either enforceable or unenforceable, or it is severable, on the other hand, such that a court will, in effect, excise or ignore the unenforceable part and enforce the balance of the contract. The courts should resolve this question by considering the subject matter of the contract, the circumstances of the transaction, and the language the parties use in the contract.<sup>81</sup> A severability clause is the most direct manner in which the parties can express their intent on the question.

Sample 1 represents one of the most common approaches to severability. It essentially advises anyone interpreting the contract, especially a court, that the parties intend their agreement to continue in force even if one or more provisions are unenforceable in whole or in part.

Sample 2 presents a more comprehensive approach that may be preferable in some situations. First, it encourages interpretations that comport with legal restrictions on enforceability. Additionally, by opting to include the final sentence, the parties can acknowledge that some provisions may be so central to the bargain that enforcing other provisions makes little sense if the challenged provision is unenforceable. This can be an issue worthy of consideration. For example, if the primary consideration for a mortgagee's agreement to forebear from foreclosing for a mortgage default is the mortgagor's waiver of the statutory right to redeem the mortgaged property after a foreclosure sale in the event of a subsequent default, then logically the entire agreement should be invalidated if a court determines that the waiver is unenforceable. Arguably, common sense might lead a court to

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scope of these materials. See generally DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 2.04.

81. Cf. *Ellison v. Tubb*, 295 Ark. 312, 749 S.W.2d 650 (1988) (involving the question whether materials and work provided by a subcontractor both before and after the effective date of a change in the laws governing the process for establishing a materialman's lien, and which was undertaken in the absence of any written instrument, should be treated as having been provided under a single contract entered into before the effective date of the statutory change or under a series of separate contracts for work and materials provided at different times).



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ignore the severability clause in such a case, but we cannot be certain of that.<sup>82</sup> Can the parties adequately address this concern in advance by distinguishing in the clause between run-of-the-mill provisions and those that go to the heart of the parties' bargain? There may be situations in which it is best to invite a court to decide whether or not an unenforceable provision is so material to the bargain that the entire contract should be unenforceable. That, in essence, is what the bracketed sentence at the end of sample clause 2 contemplates.

Sample clause 2 also addresses the possibility that the unenforceability of a contractual provision might be cured by modifying the provision. Sample clause 2 proposes the rather extreme solution of obligating the parties to renegotiate the terms of the contract to replace a defective provision with one "that comes as close as possible to the intent of the stricken provision." This is a creative solution, but one might question whether the courts will enforce the parties' promise to agree to a new term when the courts themselves often decline an invitation to rewrite the terms of a contract to reform a problematic provision.<sup>83</sup>

One of the two sample clauses should be appropriate for most situations, but you should consider whether modifications may be important in special circumstances. One common variation is to specify that invalidity or unenforceability of a provision under the law of one jurisdiction will not impair validity or enforceability in any other jurisdiction. What effect would that modification have if the agreement also includes a choice of law provision that selects the law of the jurisdiction that makes the challenged provision unenforceable? Another

less common variation is to single out one or more specific provisions of the contract to which the severability clause applies (or even to single out those to which it does not apply). Finally, for some contracts a severability clause probably can do more harm than good, especially if the contract is of rather limited scope and contains no provisions likely to be challenged as unenforceable other than provisions that are essential to the parties' bargain.

### Cumulative Remedies

#### *Sample Clause*

The remedies provided in this agreement are cumulative and are in addition to any remedies available under applicable law. The assertion by a party of any right or remedy will not preclude the assertion by that party of any other rights or remedies under this agreement or applicable law.

Contracts in real estate transactions often specify remedies available to a party for the other party's breach. Sometimes, the parties intend the specified remedies to supplement rather than replace other remedies. Absent special considerations, a court should respect a clear statement that the parties intend remedies specified in the contract to be in addition to other remedies otherwise available.<sup>84</sup> At other times, however, the parties may intend a specified remedy to be exclusive for a particular failure of performance (such as forfeiture of an earnest money deposit if the buyer fails to close).<sup>85</sup> In the later case, the cumulative remedies

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82. See *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 87 (Tex. Ct. App. 1996) ("when the severed portion is integral to the entire contract, a severability clause, standing alone, cannot save the contract").

83. See *Federated Mut. Ins. Co. v. Bennett*, 36 Ark. App. 99, 818 S.W.2d 596 (1991) (the court upheld the chancellor's refusal to use a severability clause, the terms of which the opinion does not disclose, as a basis to modify an overly broad covenant not to compete).

84. See *Lindell Square Ltd. P'ship v. Savers Fed. Sav. & Loan Ass'n*, 27 Ark. App. 66, 73, 766 S.W.2d 41, 45-46 (1989). Note that if a party has available two or more inconsistent remedies for a single cause of action, the election of remedies doctrine provides that only one of those remedies may be ultimately pursued, but if the remedies are concurrently available and they are consistent with one another, the election of remedies doctrine does not apply. See HOWARD W. BRILL, 1 ARKANSAS PRACTICE SERIES: LAW OF DAMAGES § 2:9 (5th ed. 2004).

85. See generally, COMMERCIAL REAL ESTATE TRANSACTIONS, *supra* note 1, at § 2.127.



provision must be coordinated with the provisions that specify any exclusive remedies. assigns provision)

### Successors and Assigns

#### *Sample clause*

This agreement binds and inures to the benefit of the parties and their [permitted] successors and assigns[, subject, however, to the provisions of Section \_\_\_\_ that restrict assignment]. [No assignment, even if permitted under this agreement or approved by the other party will relieve the assigning party of its obligations under this agreement.]

In an agreement relating to real estate, this provision may avoid many technical questions about whether the agreement may be enforced by or against successors (such as a personal representative) or those to whom an interest is assigned or transferred. In some circumstances, a simple statement may be sufficient to avoid otherwise difficult questions.<sup>86</sup> Note, however, that the sample provision requires modification if the contract includes any personal agreements or obligations that the parties do not intend to pass to successors or assignees. Additionally, as discussed below, a more explicit statement is often appropriate if it is important to make the parties' intent explicit that an obligation should operate as a covenant running with the land.

### Covenants Run with the Land

#### *Sample clause* (combined with successors and

This agreement binds and inures to the benefit of the successors and assigns of the grantor and the grantee, and all covenants and agreements contained in this agreement are covenants running with the land that bind each person or entity having any interest in any part of the subject property at any time.

An agreement relating to land may either simply be binding on the person or entity making the promise or it may be binding on all owners, present and future, of the land affected. Promises in the latter category are covenants running with the land. The technical requirements applicable to covenants running with the land are beyond the scope of this discussion.<sup>87</sup> For present purposes, it is enough to note that deeds, mortgages, leases, easement agreements, and similar documents conveying or creating interests in land often include promises, obligations, or restrictions that the parties intend to be binding on those who subsequently acquire interests in the land.<sup>88</sup> The sample clause illustrates a common provision used to establish that the parties intend that result. All agreements of this nature should, of course, be properly recorded in the real estate records.<sup>89</sup>

### Notices

#### *Sample Clause*

(a) Every notice or other communication required or contemplated by this agreement must be in writing and sent by one of

86. See *Winningham v. Harris*, 64 Ark. App. 239, 981 S.W.2d 540 (1998) (easement grant did not specify whether the right of way over grantor's property was intended to be personal to the grantees or transferable when the grantees sold their adjoining land to others).

87. Readers who ache for doctrine on the point, both ancient and modern, may wish to begin with the comments to Restatement (Third) of Property: Servitudes, §§ 3.1 & 3.2 (2000).

88. See, e.g., *McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988) (involving restrictive covenants in residential subdivision).

89. See ARK. CODE ANN. §§ 18-12-201 through -209 (2003). Restrictive covenants affecting the use of real property should be recorded to be effective against a subsequent owner of the real property. ARK. CODE ANN. § 18-12-103 ((2003).

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the following methods:

(1) personal delivery made by a party or agent of a party in person to another party or agent of that other party, in which case it is effective the day of delivery;

(2) certified mail, return receipt requested, in which case it is effective the day it is delivered to the designated address, which will be conclusively established by receipt or delivery record obtained or provided by the U.S. Postal Service; or

(3) recognized overnight or expedited delivery service such as Federal Express, in which case it is effective the day it is delivered to the designated address, which will be conclusively established by receipt or delivery record obtained or provided by the delivery service.

(b) In each case, a notice or other communication sent to a party must be directed to the address for that party set forth below, or to another address designated by that party by written notice:

If to \_\_\_\_\_, to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If to \_\_\_\_\_, to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The main benefit of a notice provision may be to clarify that significant communications must be in writing.<sup>90</sup> A well conceived notice provision also anticipates several technical objections that a party might raise to the effectiveness of a notice. This can be especially important when the relationship between the parties breaks down and the parties begin to seek refuge in procedural or technical arguments.<sup>91</sup> Excellent drafters and negotiators may take opposing positions on how much detail to include in a notice provision.<sup>92</sup> The sample clause illustrates a good, common sense compromise for most situations.

Here are some considerations that may help determine whether to use a more complex provision. First, how likely is it that a party will play games with notices? In certain leases and financing arrangements, for example, the landlord or creditor may want to limit the number of times that the tenant or debtor may change addresses or may want to limit the number of additional addresses the tenant or debtor might request solely to frustrate default notices. In most commercial transactions between significant business entities, however, it may seem silly to draft around those risks. Other considerations are even more specific to the transaction and parties involved. Should copies of all or certain notices be sent to legal counsel or anyone else? If so, is proper delivery of all copies a condition to the effectiveness of the notice? Will the parties want the option to give notices by other means, such as by facsimile or email, because response time is critical? If so, should the provision specify a method for confirming delivery? Many notice provisions allow for delivery of notices to be effective when given by facsimile if delivery is confirmed by a machine-generated confirmation record or if the facsimile transmission is followed promptly by physical delivery by another means. While a facsimile transmission by telecopy may meet the requirement for a writing,

90. See *Atwood v. Southeast Bedding Co.*, 485 S.E.2d 217 (1997) (in the absence of a notice clause, issue of fact existed concerning whether an oral notice of breach was sufficient notice under the Uniform Commercial Code).

91. See *COMMERCIAL REAL ESTATE TRANSACTIONS* *supra* note 1, at § 2.150 (noting that although the parties will often ignore the formal notice provision, it takes on special importance when the relationship sours); *Bollen v. McCarty*, 252 Ark. 442, 479 S.W.2d 568 (1972) (result turned on whether a notice was given on October 6 or October 7).

92. For several variations on notice provisions for different purposes and for citation to some cases and other authorities on notice disputes, see Chapter 107 of *WARREN'S FORMS*, *supra* note 1.



does an electronic file sent by email? Should different procedures apply to routine notices, special notices, and default notices? For example, under a secured credit agreement, one procedure might apply to notices relating to financial covenants, another procedure might apply if the debtor decides to request a partial release of a blanket mortgage, a different procedure if the debtor is requesting conversion to a alternative interest rate structure, and yet another procedure if the lender intends to accelerate the debt for default.

## Headings

### *Sample Clause*

All article, section, or other headings appearing in this agreement are for convenience of reference only and are to be disregarded in construing this agreement.

A common justification for this provision is that it should preclude a party from making arguments based on headings that are incorrect or that are poorly written. For example, suppose that a contract contains a provision under which Party A waives all rights of setoff. The provision does not include a similar waiver by Party B. The provision's heading, however, is "Waiver of Parties' Rights of Setoff." Without the provision specifying that headings are to be substantively ignored, Party A could argue, based on this heading, that Party B has waived its right of setoff.<sup>93</sup> In other words, this provision guards against careless drafting that may occur as changes are made in haste or at the last

minute.<sup>94</sup>

Most drafters consider this provision a matter of innocuous housekeeping. However, one might argue against it on the grounds that a good lawyer should always review all headings to confirm that they are appropriate for the specific contract and that headings should be part of the substantive agreement of the parties. That position ignores the practical reality that lawyers must often draft changes to complex contracts under extraordinary time pressures and that headings usually serve only as helpful guideposts or organizational devices.

## Amendments

### *Sample Clause*

This agreement may be amended or terminated in whole or in part by an instrument in writing signed on behalf of both parties, but it may not be amended or terminated in any other manner.

Among other things, this provision may guard against the technical argument that amendments made after the contract has been formed must be supported by separate consideration.<sup>95</sup> It may also be used to challenge oral modifications, but it will not necessarily be adequate for that purpose in all cases because contract provisions (including provisions that require modifications to be in writing) generally may be modified by a subsequent oral agreement.<sup>96</sup> A common variation on this clause states that any amendment must be signed by the party or parties intended to be bound or charged,

93. WORKING WITH CONTRACTS, *supra* note 1, at § 248.

94. Similar questions arise when courts consider whether to rely on headings and captions when interpreting legislative materials. *See, e.g.,* R.N. v. J.M., 347 Ark. 203, 61 S.W.3d 149 (2001) (descriptive heading in section of the Arkansas Code did not have the effect of law).

95. *See generally* DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 5.10[A][3].

96. *See* Gerhardt v. Plastics Research & Dev. Corp., 241 Ark 932, 411 S.W.2d 1 (1967).

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which presumably means that any party negatively affected by the amendment must sign.<sup>97</sup> "The difficulty with this approach is that it may not always be clear which parties are negatively affected."<sup>98</sup>

### Schedules and Exhibits

#### *Sample clause*

The schedules and exhibits attached to this agreement constitute integral parts of this agreement.

This simple provision, although rarely critical, is often appropriate as a matter of good housekeeping because contract attachments are often integral to the parties' agreement, and they sometimes figure prominently into contract disputes.<sup>99</sup> The sample provision merely confirms that the parties intend all contractual attachments to be part of their agreement. The provision may help define the legal obligations of the parties. For example, a legal description of the property to be conveyed is integral to the contractual obligations to buy and sell no matter whether the description appears in the body of the contract or in an attached exhibit.

On occasion, it may be necessary to limit the operation of this provision, but that should be unusual. Even exhibits attached solely to confirm the form of closing documents, such as deeds and promissory notes, may safely be incorporated into the agreement as forms. The agreement should state the obligation of the parties to execute the documents in the agreed forms upon consummation of the transaction. The operative provisions of the contract normally will show the parties' intention respecting an attached form of closing document.

For example, if the buyer agrees to deliver a purchase money mortgage at closing, it should be apparent that incorporation of the form of the mortgage attached as an exhibit does not purport to grant a lien contemporaneous with execution of the contract. The contractual reference to the mortgage will state that the buyer agrees to deliver a mortgage at closing that is in the form of the exhibit. As a result, the seller cannot claim that the mortgage has been executed and delivered with the contract, but only that the buyer cannot renegotiate the provisions of the mortgage once the parties have signed the contract to which they have attached the mortgage form.

### Waiver of Jury Trial

#### *Sample clause 1*

THE PARTIES MUTUALLY, IRREVOCABLY, AND UNCONDITIONALLY WAIVE TRIAL BY JURY FOR ANY PROCEEDINGS ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT OR THE TRANSACTION THAT IS THE SUBJECT OF THIS AGREEMENT, OR ANY CONDUCT OR OMISSION RELATING TO THIS AGREEMENT OR THIS TRANSACTION, INCLUDING WITH REGARD TO ANY COUNTERCLAIMS, CAUSES OF ACTION, AND DEFENSES WHETHER BASED IN CONTRACT OR TORT OR OTHERWISE. THE PARTIES AGREE TO THIS WAIVER IN THE INTEREST OF AVOIDING DELAYS AND EXPENSES ASSOCIATED WITH JURY TRIALS. THE PARTIES ACKNOWLEDGE THAT THEY HAVE

97. See *Milberg, Weiss, Bershad, Hynes, & Lerach, LLP v. State*, 342 Ark. 303, 318, 28 S.W.2d 842, 852 (2000) (by its terms, master settlement agreement in multi-state tobacco litigation could not be amended except by written instrument executed by the participating tobacco manufacturers and the settling states affected by the amendment).

98. WORKING WITH CONTRACTS, *supra* note 1, at § 249.

99. See, e.g., *Ison Properties, LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004) (schedule attached to contract for the sale of inventory specified amount of indebtedness owed by seller to inventory suppliers, but it did not disclose that a substantial portion of the total debt was already due; the case turned on procedural issues relating, among other things, to the buyer's fraud defense based on the schedule).



BEEN INDUCED TO ENTER INTO THIS AGREEMENT IN PART BY THE PROVISIONS OF THIS SECTION.

*Sample clause 2 (mortgage)*

BORROWER AND LENDER EACH (A) COVENANTS AND AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS INSTRUMENT OR THE RELATIONSHIP BETWEEN THE PARTIES AS BORROWER AND LENDER THAT IS TRIABLE OF RIGHT BY A JURY AND (B) WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.<sup>100</sup>

The most common real estate transactions, other than mortgage loans, suggest no special reasons why the parties should shun jury trials. In some situations, however, the parties may prefer to include in a contract an advance waiver of the right to a jury trial in any action arising from the contract because they anticipate that a trial to the court will be more cost-effective or because they believe that a judge may be more capable than a jury to understand a particularly complex business transaction.

Additionally, financial institutions commonly wish to avoid jury trials arising out of loan transactions because of a perceived bias of juries against large financial institutions.<sup>101</sup> To the extent that federal law applies, a contractual provision constituting a knowing, mutual waiver of jury trial is enforceable.<sup>102</sup> A waiver in the absence of mutuality of obligation, however, may be unenforceable.<sup>103</sup>

Because a waiver of trial by jury must be knowing, it is useful to make the waiver clause conspicuous, such as by the use of all capital letters or bold print or by having the parties initial the clause.<sup>104</sup> It is also useful to establish that the parties relied on the advice of counsel in deciding whether to agree to the waiver,<sup>105</sup> or at least that each party had the opportunity to consult with counsel on the point.<sup>106</sup>

### The All-Inclusive Provision

Although the discussion to this point confirms how important some contract boilerplate may be, circumstances will arise in which the need for brevity dictates a minimalist approach. For those circumstances, the drafting attorney must decide what to include and what to omit and how much space to devote to these peripheral provisions. Two sample clauses will illustrate.

*Sample clause 1*

Miscellaneous. This agreement and the rights and obligations of the parties are governed by, and are to be construed in accordance with, Arkansas law. The captions in

100. This provision appears in the form of multi-family mortgage for use in Arkansas promulgated by the Federal National Mortgage Association (Fannie Mae).

101. See generally DRAFTING EFFECTIVE CONTRACTS, *supra* note 1, at § 11.07[A][1][b].

102. Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 373 F.2d 136 (8th Cir. Minn. 1967).

103. Cf. The Money Place, LLC v. Barnes, 349 Ark. 411, 78 S.W.3d 714 (2002) (arbitration clause unenforceable because it was not supported by mutuality of obligations).

104. See generally Phoenix Leasing, Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994).

105. *Id.* at 1385. Cf. MIF Realty v. Pickett, 963 S.W. 2d 308, 310 (Mo. App. W.D. 1997) (waiver of notice of creditor's election to enforce rent assignment).

106. See Bonfield v. AAMCO Transmissions, Inc., 717 F. Supp. 589, 595 (N.D. Ill. 1989).

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this agreement appear for convenience of reference only and are to be disregarded in construing this agreement. This agreement binds and inures to the benefit of the parties and their respective successors and assigns. The parties may execute this agreement in any number of counterparts, each of which will be an original and all of which taken together will constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this agreement by facsimile is as effective as delivery of a manually executed counterpart. In proving this agreement, it is not necessary to produce or account for more than one counterpart signed by the party against whom enforcement is sought.

*Sample clause 2 (an alternate form for a building contract)*

Miscellaneous. Builder may not assign its interest in this agreement, in whole or in part, or any right to payment under this agreement, without the prior written consent of Owner. The provisions of this agreement that are (either by their express terms or by necessary implication) continuing obligations and all indemnities, warranties and representations contained in this agreement, survive the completion of construction and any termination of this agreement. If a court of competent jurisdiction determines that any portion of this agreement is unenforceable, all other portions of this agreement will remain effective. This agreement and the rights and obligations of the parties are governed by, and are to be construed in accor-

dance with, Arkansas law. This agreement contains the entire understanding of the parties. The parties enter into this agreement solely on the strength of the terms included in this agreement and without any collateral agreement or understanding. This agreement may be amended or terminated in whole or in part by an instrument in writing signed by the party to be bound, but it may not be amended or terminated in any other manner.

Specific circumstances must determine what variations on this approach may be appropriate for any particular contract. Even though a situation may justify an abbreviated provision that combines several boilerplate clauses into an all-inclusive miscellaneous paragraph, the drafting attorney must consider what boilerplate to include or omit and how best to express each relevant boilerplate concept for that transaction.

### Conclusion

The provisions of the miscellaneous section of a real estate contract are not "standard" or "boilerplate" in the sense that they are insignificant, universal, or nonnegotiable. These provisions are distinguishable from deal-specific provisions only because they address issues that are so fundamental to contract negotiations that they should appear in a wide variety of agreements. We achieve consistency and efficiency by including standard versions of these provisions in our contracts, but we protect our clients only by modifying and adapting these provisions to the specific purposes and objectives of individual transactions and situations.