

# Sale of Goods Agreement (Pro-Buyer, Short Form) (TX)

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A short-form agreement for the sale of goods under Chapter 2 of the Texas Uniform Commercial Code (UCC), drafted in favor of the buyer. This Standard Document has integrated drafting notes with important explanations and drafting and negotiating tips.

## Sale of Goods Agreement

### DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Sale and supply agreements vary in length and complexity depending on a variety of factors, such as:

- The relationship between the parties.
- The size of the deal.
- Whether the goods are off-the-shelf or custom-made.
- The creditworthiness of the buyer.
- The allocation of warranty and other responsibilities.

This Standard Document is:

- A short-form sale or supply agreement for the sale of goods under Chapter 2 of the Texas Uniform Commercial Code (UCC) (Tex. Bus. & Com. Code Ann. §§ 2.101 to 2.725).
- Drafted from the perspective of the buyer purchasing off-the-shelf goods.

For a sample short-form pro-seller sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller, Short Form) (TX) ([W-001-4750](#)).

### ASSUMPTIONS

This Standard Document assumes that:

- **This agreement is covered by Texas law.** If the law of another state applies, this agreement may have to be modified to comply with the laws of the applicable jurisdiction.
- **All references to the “UCC” refer to the Texas Uniform Commercial Code.** The information contained in this Standard Document is specific to Texas and refers to the Uniform Commercial Code enacted under Texas law and not the model Uniform Commercial Code.
- **The agreement is not intended to be a master agreement.** This Standard Document covers a single sales transaction only. If the buyer purchases additional goods from the seller, each subsequent purchase is governed by a new and separate contract. For a sample master sale of goods agreement, see Standard Document, Sale of Goods Agreement

(Pro-Buyer) ([5-541-6567](#)). For a sample pro-seller master sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller) ([2-518-9260](#)).

- **The buyer does not present its purchase order.** This document contemplates that the buyer and the seller will negotiate and incorporate all of the terms and conditions of the transaction into this document. This helps the parties to avoid the battle of forms. For more information about the battle of the forms, see Article, Preparing for the Battle of the Forms ([4-552-7146](#)) and Practice Note, Sale of Goods Agreements: Avoiding Common Pitfalls (TX): Avoid a Battle of the Forms ([W-000-8889](#)).
- **The seller is a merchant selling durable, off-the-shelf goods.** The seller is a merchant in the business of manufacturing or selling durable goods of the type that are sold under the agreement. The parties must revise this Standard Document if the seller is selling nondurable (consumable) products. Furthermore, this Standard Document does not include certain terms and conditions that traditionally accompany a sale of custom-made goods. If the buyer is purchasing custom-made goods, the parties should consider entering into a manufacturing supply agreement (see Standard Document, Manufacturing Supply Agreement (Pro-Buyer) ([6-522-5143](#))).
- **The buyer purchases the goods without accompanying services.** If the buyer purchases or may purchase services together with the goods, the parties must revise this Standard Document to address services-specific issues. For a sample services agreement, see Standard Document, Services Agreement (Pro-Customer) (TX) ([W-000-8923](#)).
- **Standard reseller and distributor agreement-specific terms and conditions are not appropriate for use under this transaction.** Although parties can use this Standard Document to purchase goods for resale, certain considerations for purchase for resale are beyond the scope of this resource (for example, advertising and marketing terms and conditions). If the buyer is purchasing goods for resale, the parties should consider entering into either:
  - a reseller agreement (see Standard Documents, Product Reseller Agreement (Pro-Supplier) ([4-517-9793](#)) and Product Reseller Agreement (Pro-Reseller) ([7-558-2725](#))); or
  - a distribution agreement (see Standard Documents, Distribution Agreement (Pro-Seller) ([2-520-3379](#)) and Distribution Agreement (Pro-Seller, Short Form) (TX) ([W-009-5082](#))).
- **The parties to the agreement are US entities and the transaction takes place in the US.** If either party is organized or operates in, or any part of the transaction takes place in a foreign jurisdiction, this agreement may have to be modified to comply with applicable laws in the relevant foreign jurisdiction. For example, US companies that enter into international sales contracts with companies located in countries that have ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG) must:
  - consider the differences between state UCC law and the CISG; and
  - select the appropriate law to govern the sales contract.
- For more information about the CISG, see Practice Note, Choice of Law and Choice of Forum: Key Issues: Choice of Law in International Sale of Goods Contracts ([7-509-6876](#)) and Standard Clauses, General Contract Clauses: Choice of Law (TX): Drafting Note: United Nations Convention on Contracts for the International Sale of Goods (CISG) ([W-000-0223](#)). If the seller is a foreign entity or the buyer believes that the seller's export activities could cause the buyer to suffer liability, then the buyer should consider adding international and export-specific representations and warranties and covenants. For more information on complying with US export control regulations, see Complying with US Export Control Regulations Checklist ([1-520-0908](#)).
- **The buyer does not have the right to resell the goods or incorporate the goods into other products that are resold to a government entity.** In the US, contracts with the government are more heavily regulated than non-government contracts. US government procurement laws and regulations cover some subcontracting agreements, which may indirectly impact the relationship between

the buyer and the seller. Therefore, if the parties agree to give the buyer the right to resell the goods or incorporate the goods into other products that are to be resold to a government entity, the parties may have to revise this agreement.

- **The buyer purchases the goods without any third-party imposed requirements or services.** The goods may contain or be contained in, be comprised of (in whole or in part), or be packaged together with products manufactured by a third party. This Standard Document assumes that the buyer purchases the goods without third-party manufacturer-imposed:
  - requirements (for example, return requirements);
  - accompanying third-party manufacturer services; or
  - warranties.
- If there are third-party manufacturer-imposed requirements on the goods or the goods are covered by a services agreement or warranties, then the parties must revise the agreement.
- **The agreement excludes a trademark license.** The parties must revise the agreement to include a trademark license from the seller if the buyer incorporates the goods into the buyer's products and the buyer wants to:
  - display any of the seller's trademarks on the buyer's products; or

- use any of the seller's trademarks in any advertising, marketing, or other materials.
- **There are a single seller and a single buyer.** The parties should revise this agreement if there are additional sellers or buyers. For example, multiple sellers or buyers must determine whether their obligations are joint, several, or joint and several and amend the agreement accordingly. For an example of a provision for joint, several, and joint and several liability, see Standard Clause, General Contract Clauses: Joint and Several Liability (TX) ([W-000-0384](#)).
- **This agreement is being used in a business-to-business transaction.** This Standard Document should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **This agreement is not industry-specific.** This Standard Document does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.

## BRACKETED ITEMS

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

This Sale of Goods Agreement, dated as of [DATE] (this "**Agreement,**" to be referenced by [NUMBER] ("**Contract Reference Number**")), is entered into between [BUYER NAME], a [STATE OF ORGANIZATION] [TYPE OF ENTITY] ("**Buyer**") and [SELLER NAME], a [STATE OF ORGANIZATION] [TYPE OF ENTITY] ("**Seller,**" and together with Buyer, the "**Parties,**" and each, a "**Party**").

## DRAFTING NOTE: THE PARTIES

This Standard Document is a two-party sale of goods agreement between:

- **Buyer.** The buyer buys the goods from the seller for its own account, takes title to the goods and either uses the goods or incorporates the goods into its own products that it sells to resellers, retailers, dealers, or end users.

- **Seller.** The seller either:
  - manufactures off-the-shelf goods and sells them to the buyer; or
  - resells goods manufactured by others to the buyer.

The parties include a contract reference number, which makes it easier for the parties

to refer to the transaction in the shipping documents, such as the commercial invoice, packing list, bill of lading, and any other documents necessary to release the goods

to buyer. For example, Section 5 and Section 7 refer to the Contract Reference Number regarding the shipping terms and packaging requirements, respectively.

WHEREAS, Buyer is in the business of [DESCRIPTION OF BUSINESS];

WHEREAS, Seller is in the business of selling [DESCRIPTION OF GOODS]; and

WHEREAS, Buyer desires to purchase from Seller, and Seller desires to sell to Buyer the Goods.

### DRAFTING NOTE: RECITALS

While not legally required, recitals provide information about the basic background and purpose of the agreement. In Texas, recitals in a contract generally do not control the operative clauses unless a court finds the operative clauses ambiguous, but courts may look at them to determine the proper construction of the contract and the parties' intention (*Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 336 (Tex. App.—Dallas 2011, no pet.) (citing *Gardner v. Smith*, 168 S.W.2d 278, 280 (Tex. Civ. App.—Beaumont 1942, no writ))).

In this sale of goods agreement, the recitals provide only a general description of the parties and the transaction. The parties can revise these recitals to include additional information.

When drafting recitals, the parties should draft them in a way that avoids ambiguity. For example, the parties should not include any language in the recitals that:

- Adds legally binding obligations.
- Contradicts the wording contained in an operative provision of the contract.

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

1. Sale of Goods. Seller shall sell to Buyer and Buyer shall purchase from Seller the goods set forth in the attached Exhibit A (the "**Goods**") in the quantities, at the prices, and upon the terms and conditions set forth therein and in this Agreement.

### DRAFTING NOTE: SALE OF GOODS

Section 1 contemplates that the parties have set out all the business terms of the transaction, such as a description of the

goods, the price, and the quantity in an attached exhibit.

2. Delivery Date. Seller shall deliver the Goods in the quantities and on the date(s) specified in Exhibit A or as otherwise agreed in writing by the parties (the "**Delivery Date**"). Timely delivery of the Goods is of the essence. If Seller fails to deliver the Goods in full on the Delivery Date, Buyer may terminate this Agreement immediately by providing written notice to Seller and Seller shall indemnify Buyer against any losses, claims, damages, and reasonable costs and expenses attributable to Seller's failure to deliver the Goods on the Delivery Date.

**DRAFTING NOTE: DELIVERY DATE**

To avoid uncertainty, the buyer should specify a delivery date or schedule (if there is more than one shipment). This clause provides that timely delivery is of the essence and allows the buyer to terminate the contract and collect damages if the seller is late in delivering the goods.

For more information about time of the essence, see Practice Note, Time of the Essence in Commercial Contracts ([6-519-5141](#)). For a sample time of the essence provision, see Standard Clause, General Contract Clauses: Time of the Essence (TX) ([W-000-0720](#)).

In the absence of a delivery date, the UCC provides that the time for delivery is a “reasonable time” (Tex. Bus. & Com. Code Ann. § 2.309(a)). The UCC default provision provides the seller with more flexibility than a specific delivery date and a seller with strong negotiating leverage may try to negotiate this point.

For more information on drafting and negotiating delivery clauses, including the delivery date, see Standard Clauses, General Contract Clauses: Delivery Provisions ([9-521-7269](#)).

3. Quantity. Seller shall deliver the quantities of the Goods specified in Exhibit A. If Seller delivers more than [NUMBER]% or less than [[NUMBER]% of the quantity of Goods specified in Exhibit A, Buyer may reject all or any of the Goods, including, without limitation, all or any excess Goods. Any such rejected Goods shall be returned to Seller at Seller’s risk and expense. If Buyer does not reject the Goods and instead accepts the delivery of Goods at the increased or reduced quantity, the Price for the Goods shall be adjusted on a pro-rata basis.

**DRAFTING NOTE: QUANTITY**

This provision sets out the terms where the quantity of goods delivered is different from the quantity specified in Exhibit A. Under the UCC, if the goods fail in any way to conform to the contract requirements, the buyer may:

- Reject all the goods.
- Accept all the goods.
- Accept any portion of the delivery and reject the rest.

(Tex. Bus. & Com. Code Ann. § 2.601.)

The bracketed language in the second sentence of the clause is useful if the particular goods are difficult to count or weigh precisely because in practice, the

seller may deliver slightly more or less than the exact quantity of goods specified in the agreement.

The buyer must determine the percentage of tolerance it is willing to accept. A shortfall may force the buyer to obtain the balance of the goods on the open market at a higher price, especially if a small quantity is sought, which may result in losing the advantage of a volume discount. A buyer may be unwilling to accept excess goods if it has storage constraints.

The buyer should provide expressly that it can return rejected goods at the seller’s risk and expense.

4. Delivery Location. All Goods shall be delivered to the address specified in Exhibit A (the “**Delivery Location**”) during Buyer’s normal business hours or as otherwise instructed by Buyer.

**DRAFTING NOTE: DELIVERY LOCATION**

To avoid uncertainty, the buyer should specify that delivery is to take place at the buyer's chosen delivery location and at a time

convenient for the buyer. The parties should ensure that this provision is consistent with any shipping terms specified in Section 5.

5. Shipping Terms. [Delivery shall be made [[DDP/CPT/OTHER INCOTERMS® RULE] Delivery Location, Incoterms® [YEAR OF APPLICABLE INCOTERMS® RULE]/[OTHER SHIPPING TERMS]/ in accordance with the terms set forth in Exhibit A].] Seller shall give written notice of shipment to Buyer when the Goods are delivered to a carrier for transportation. Seller shall provide Buyer all shipping documents, including the commercial invoice, packing list, [air waybill/bill of lading], and any other documents necessary to release the Goods to Buyer within [NUMBER] business day[s] after Seller delivers the Goods to the transportation carrier. The Contract Reference Number must appear on all shipping documents, shipping labels, [air waybill/bill of lading], invoices, correspondence, and any other documents pertaining to this Agreement.

**DRAFTING NOTE: SHIPPING TERMS**

Shipping terms govern the shipping mode, costs, risks, and other practical arrangements related to the movement of goods.

The UCC addresses shipping terms relating to the delivery of goods, including FOB (free on board), FAS (free alongside ship), CIF (cost, insurance, and freight), C&F (cost and freight), and DES (delivered ex-ship) (Tex. Bus. & Com. Code Ann. §§ 2.319 to 2.324; see also Standard Clauses, General Contract Clauses: Risk of Loss (TX) ([W-000-0581](#))). However, contract parties frequently employ the shipping terms set out in the Incoterms® rules, which are:

- Various shipping terms published by the International Chamber of Commerce.
- Used primarily in international transactions, but increasingly used in domestic transactions, such as the transaction set out in this Standard Document.

“Incoterms” is a trademark of the International Chamber of Commerce. The version of the Incoterms® rules being used should be specified, such as Incoterms® 2010, Incoterms® 2000, or an earlier version.

Parties can use Incoterms® rules to:

- Specify shipping terms without having to draft their own provisions for each transaction.

- Allocate the specified amount of risk to the parties, for example:
  - DDP (delivered duty paid), which is the Incoterms® rule that provides that the seller bears all risks and costs, including duties, taxes, import clearance, and all delivery charges until the goods are delivered to the named destination; or
  - CPT (carriage paid to), which is the Incoterms® rule that provides that the seller bears the risk of loss and insurance costs until the seller delivers the goods to the transportation carrier.

Instead of incorporating Incoterms® rules, the buyer can include specific provisions that best describe its requirements. If the use of Incoterms® rules is not desirable, then replace the first bracketed sentence with terms that address the appropriate shipping mode, shipping costs, risk-of-loss terms, insurance coverage, and destination.

For more information about carriers, see Practice Note, Logistics: Transportation Service Providers Overview ([0-525-9268](#)). For standard forms of truck transportation agreements, see Standard Documents, Transportation Agreement (Pro-Carrier) ([1-525-2105](#)) and Transportation Agreement (Pro-Shipper) ([7-553-2165](#)).

6. Title [and Risk of Loss]. Title passes to Buyer upon [delivery of the Goods to the Delivery Location/[TIME AND LOCATION]]. [Seller bears all risk of loss or damage to the Goods until [delivery of the Goods to the Delivery Location/[TIME AND LOCATION]].]

**DRAFTING NOTE: TITLE AND RISK OF LOSS**

The timing of both the passing of title and of risk of loss is extremely important in sale of goods contracts. The buyer can modify or replace the bracketed language of this clause according to its needs and circumstances. If the transfer of risk is addressed by use of an Incoterms® rule or otherwise addressed by the shipping terms specified in Section 5, then delete the bracketed portion of the title to this provision and the bracketed second sentence of this provision.

**TRANSFER OF TITLE**

This Section 6 provides that title to the goods passes to the buyer at the time and place of delivery to the named destination. This is consistent with the requirements of Tex. Bus. & Com. Code Ann. § 2.401(b), which provides that unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes its performance with reference to the physical delivery of the goods:

- Despite any reservation of a security interest.
- Even though the parties plan for the seller to deliver a document of title at a different time or place.

**TRANSFER OF RISK**

The general rule under the UCC for the transfer of risk is that if the seller is a

merchant, risk is transferred only on the buyer's actual receipt of the goods (Tex. Bus. & Com. Code Ann. § 2.509(c)). However, the parties are free to vary the default rule by contract (Tex. Bus. & Com. Code Ann. § 2.509(d)).

The contract may not only shift the loss but may divide the risk between both parties in any manner they determine (for example, insurance coverage in favor of buyer by either seller or buyer). If the goods are destroyed before the risk in them has passed to the buyer, the seller still must deliver the equivalent quantity of goods to the buyer. Conversely, if the goods are destroyed after risk passes to the buyer, the buyer must still pay the seller for the goods. Commercial parties generally link the transfer of risk with the completion of delivery.

Usually, the buyer and seller agree that title and risk of loss transfer at the same time. Sometimes, however, a buyer may request that title transfer at one point, but risk of loss transfer at some later point. For example, if the goods are to be stored in the seller's warehouse, the buyer may want to take title when the goods are ready to protect itself against the seller's creditors, but leave the risk of loss with the seller until delivery. Therefore, if there is, for example, a fire at the seller's warehouse, the seller must bear the cost of that loss.

7. Packaging. Seller shall properly pack, mark, and ship Goods as instructed by Buyer and otherwise in accordance with applicable law and industry standards, and shall provide Buyer with shipment documentation showing the Contract Reference Number, the quantity of pieces in shipment, the number of cartons or containers in shipment, Seller's name, the [air waybill/bill of lading] number, and the country of origin.

**DRAFTING NOTE: PACKAGING**

This agreement assumes that the goods are manufactured and delivered within the US. If the seller is shipping goods from outside the US, additional provisions may be required to address:

- Customs charges and labeling requirements.

- Compliance with the US Customs and Border Protection (CBP) requirements regarding commercial invoices.
- Compliance with CBP's Customs Trade Partnership Against Terrorism (CTPAT) initiative.

- Responsibility for obtaining export licenses.
- Ownership of:
  - trade credits;
  - export credits;
  - customs drawbacks; and
  - any refund of duties, taxes, or fees.

For more information about legal requirements relating to the importation

of goods into the US, see Practice Notes, *Importing Goods into the US: Overview and Core Elements of an Import Compliance Program* ([w-005-2872](#)). For more information about CTPAT, see Practice Note, *Customs Trade Partnership Against Terrorism: A Guide for US Importers* ([W-008-0945](#)) and *International Trade Toolkit* ([O-555-4486](#)).

8. Inspection and Rejection of Nonconforming Goods. Buyer has the right to inspect the Goods on or after the Delivery Date. Buyer, at its sole option, may inspect all or a sample of the Goods, and may reject all or any portion of the Goods if it determines the Goods are nonconforming or defective. If Buyer rejects any portion of the Goods, Buyer has the right, effective upon written notice to Seller, to: (a) rescind this Agreement in its entirety; or (b) reject the Goods and require replacement of the rejected Goods. If Buyer requires replacement of the Goods, Seller shall, at its expense, [promptly/within [NUMBER] days] replace the nonconforming Goods and pay for all related expenses, including, but not limited to, transportation charges for the return of the defective Goods and the delivery of replacement Goods. Any inspection or other action by Buyer under this Section shall not reduce or otherwise affect Seller's obligations under this Agreement, and Buyer shall have the right to conduct further inspections after Seller has carried out its remedial actions.

#### DRAFTING NOTE: INSPECTION AND REJECTION OF NONCONFORMING GOODS

If the seller delivers goods that do not conform to the contract requirements, under the UCC the buyer has the right to either reject or accept those goods (Tex. Bus. & Com. Code Ann. § 2.601). The buyer must reject the goods in good faith and within a reasonable time after delivery (Tex. Bus. & Com. Code Ann. §§ 1.304 and 2.602). If the seller alleges that the buyer rejected in bad faith, the seller has the burden of proof on the issue. (*Printing Center of Texas, Inc. v. Supermind Pub. Co., Inc.*, 669 S.W.2d 779, 784 (Tex. App. – Houston [14th Dist.] 1984)).

Acceptance of goods under the UCC does **not** mean taking physical possession of the goods. Instead, the buyer indicates, either in writing or by conduct (such as making payment), that the goods conform to the contract requirements or, if nonconforming, that the buyer accepts them (Tex. Bus. & Com. Code Ann. § 2.606(a)(1)). Acceptance can also result from:

- The buyer's failure to make an effective rejection.

- The buyer acting inconsistently with the seller's ownership of the goods (such as the buyer obtaining insurance coverage for the goods).

(Tex. Bus. & Com. Code Ann. § 2.606(a)(2) and (3).)

Even if the buyer has accepted the goods, the UCC allows the buyer to revoke its acceptance within a reasonable time after it discovers or should have discovered their nonconformity (Tex. Bus. & Com. Code Ann. § 2.608; see also *Toshiba Mach. Co., Am. v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 772–75 (Tex. App.—Fort Worth 2005, pet. granted)). Once a buyer has properly revoked acceptance of a product, the seller has neither the right to cure by repair nor by replacement. (*Gappelberg v. Landrum*, 666 S.W.2d 88, 91 (Tex. 1984)).

Apart from revocation, when the goods do not conform to the contract requirements, the buyer, whether it rejects or accepts the goods, may have an action for breach of contract.

A buyer accepting nonconforming goods does not lose any remedy otherwise available to it. However, once the buyer accepts the goods, rejection is no longer an option.

Although the UCC is silent on this issue, the contract can include variations of acceptance with price allowances as a contractual limitation of remedy. Paying a modified price is still an acceptance of the goods. A buyer therefore loses its ability to reject the goods if it agrees to accept the goods at a reduced price.

The seller's right to cure correspondingly limits the buyer's right to pursue remedies for breach (see Buyer's UCC Default Remedies Flowcharts ([W-015-3867](#))). Under the UCC, the seller has the right to cure where a delivery is rejected because of nonconformity:

- If the time for performance has not yet expired (Tex. Bus. & Com. Code Ann. § 2.508(a)).
- Even if the time for performance of the contract has expired, if the right to cure is timely and appropriate under the

circumstances (for example, if the seller had reasonable grounds to believe that the tender would be acceptable) (Tex. Bus. & Com. Code Ann. § 2.508(b)). Reasonable grounds may relate to:

- prior course of dealing (Tex. Bus. & Com. Code Ann. § 1.303(b));
- course of performance or usage of trade (Tex. Bus. & Com. Code Ann. § 1.303(a)(c); or
- the particular circumstances surrounding the making of the contract (Tex. Bus. & Com. Code Ann. § 2.508, cmt. 2.)

If the buyer wrongfully refuses the seller's right to cure, the buyer breaches the contract.

The seller typically wants to limit the buyer's inspection rights, including establishing a time period during which the buyer must complete its inspection. For a sample pro-seller inspection provision, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 6.05 ([2-518-9260](#)) and Standard Document, Sale of Goods Agreement (Pro-Seller, Short Form) (TX) ([W-001-4750](#)).

9. **Price.** Buyer shall purchase the Goods from Seller at the prices set forth in Exhibit A, as it may be modified from time to time by agreement of the Parties (the "**Price**"). The Price includes all [packaging,] [transportation costs to the Delivery Location,] [insurance,] [customs duties,] [and] [fees and applicable taxes][, including, but not limited to, all sales, use, or excise taxes]. No increase in the Price is effective, whether due to increased material, labor, or transportation costs or otherwise, without the prior written consent of Buyer.

#### DRAFTING NOTE: PRICE

This clause should state clearly the costs that are and are not included in the price. Examples of items to consider including in the price are set out in the second sentence above in brackets. If the buyer prefers that certain items like taxes or shipping costs be itemized on the invoice, revise the provision. For more information on Texas taxes, see State Q&A: Sales and Use Taxes: Texas ([8-519-1689](#)).

For more information on drafting and negotiating pricing clauses, see Standard Clauses, General Contract Clauses:

Pricing Terms (Sale of Goods, Pro-Buyer) ([1-520-3879](#)) and General Contract Clauses: Pricing Terms (Sale of Goods, Pro-Seller) ([6-520-4819](#)).

Because this Standard Document contemplates a single sale of goods transaction rather than a long-term sales relationship, it does not include a most favored customer (MFC) provision, also known as a most favored nations (MFN) provision. An MFC provision grants the buyer the right to benefit from any more favorable prices that the seller charges to

other purchasers for the same or similar goods. For more information on drafting and negotiating an MFC clause (including

the US antitrust law implications), see Standard Clause, General Contract Clauses: Most Favored Customer ([8-510-7389](#)).

10. Payment Terms. Seller shall issue an invoice to Buyer within [NUMBER] days after the completion of delivery of the Goods. Buyer shall pay all properly invoiced amounts due to Seller within [NUMBER] days after Buyer's receipt of such invoice, except for any amounts disputed by Buyer in good faith. All payments hereunder must be in US dollars and made by [METHOD OF PAYMENT]. [In the event of a payment dispute, Buyer shall deliver a written statement to Seller no later than [NUMBER] days prior to the date payment is due on the disputed invoice listing all disputed items. The parties shall seek to resolve all such disputes expeditiously and in good faith. Seller shall continue performing its obligations under this Agreement notwithstanding any such dispute.]

#### DRAFTING NOTE: PAYMENT TERMS

The buyer should leave this clause as drafted with no mention of late fees or interest payments, but including the language permitting the buyer to withhold disputed amounts. A seller, however, likely wants a provision allowing for collection of fees or interest for late payments. Insert the method of payment, such as check or wire transfer, in the second sentence.

Consider including a provision setting out the procedure for disputing an invoice, such as the language set out in the last set of brackets.

For more information on drafting and negotiating payment term clauses, see Standard Clauses, General Contract Clauses: Payment Terms (TX) ([W-000-6241](#)).

11. Setoff. Without prejudice to any other right or remedy it may have, Buyer reserves the right to set off at any time any amount owing to it by Seller against any amount payable by Buyer to Seller [under this Agreement].

#### DRAFTING NOTE: SETOFF

The buyer typically wants the maximum flexibility to be able to set off its payment obligations against any moneys owed to it by the seller under the seller's warranty and indemnification obligations. The buyer may have setoff rights granted under common law or state statute. However, because these rights are often limited, the buyer typically includes the explicit right of setoff. Include the bracketed language if the setoff right is limited only to amounts owed under the agreement.

For more information about setoff, see Practice Note, Setoff and Commercial Contracts ([8-534-2848](#)). For more information on drafting and negotiating setoff clauses, see Standard Clause, General Contract Clauses: Setoff ([5-532-5548](#)).

For more information on drafting and negotiating a clause that explicitly prohibits the right of setoff, see Standard Clause, General Contract Clauses: No Setoff (TX) ([W-000-0902](#)).

12. Warranties. Seller warrants to Buyer that for a period of [NUMBER] months from the Delivery Date, all Goods will: (a) be free from any defects in workmanship, material, and design; (b) conform to applicable specifications[, drawings, designs, samples, and other requirements

specified by Buyer]; (c) be fit for their intended purpose and operate as intended; (d) be merchantable; (e) be free and clear of all liens, security interests, or other encumbrances; and (f) not infringe or misappropriate any third party's patent or other intellectual property rights. These warranties survive any delivery, inspection, acceptance, or payment of or for the Goods by Buyer. These warranties are cumulative and in addition to any other warranty provided by law or equity. Any applicable statute of limitations runs from the date of Buyer's discovery of the noncompliance of the Goods with the foregoing warranties. [If Buyer gives Seller notice of noncompliance with this Section, Seller shall, at its own cost and expense, [promptly/within [NUMBER] days] replace or repair the defective or nonconforming Goods and pay for all related expenses, including, but not limited to, transportation charges for the return of the defective or nonconforming Goods to Seller and the delivery of repaired or replacement Goods to Buyer.]

### DRAFTING NOTE: WARRANTIES

Under the UCC, warranties may be express (spoken or written) or implied. For more information about express and implied warranties in Texas, see Practice Notes, UCC Article 2 Express Warranties (TX) ([W-001-4747](#)) and UCC Article 2 Implied Warranties (TX) ([W-000-8871](#)).

In this pro-buyer provision, the seller specifically restates the implied warranties provided under the UCC, which include:

- **The implied warranty of fitness for a particular purpose.** This warranty requires the seller to supply suitable goods when it knows both the buyer's needs and that the buyer is relying on the seller to supply suitable goods for the buyer's particular purpose (Tex. Bus. & Com. Code Ann. § 2.315).
- **The implied warranty of merchantability.** This warranty requires the seller to sell goods that meet a certain minimum level of quality (Tex. Bus. & Com. Code Ann. § 2.314).
- **The warranty of title.** A seller warrants that:
  - title to the goods it supplies shall be good;
  - the conveyance is rightful; and
  - title to the goods shall be free of all possessory or security interests, liens, and encumbrances, except those of which the buyer is aware at the time of sale.
 (Tex. Bus. & Com. Code Ann. § 2.312(a) and (b).)
- **The warranty against infringement.** In this warranty, a merchant regularly dealing in goods of the kind sold, warrants that the goods will be free from a third party's claim of infringement, including infringement of patent and

trademark rights (Tex. Bus. & Com. Code Ann. § 2.312(c)).

Parties can negotiate the length of the warranty period. However, if the agreement fails to specify a duration, the warranty period is generally set by state law. The statute of limitations for breach of warranty under the UCC is four years, which generally begins to run when the seller first tenders delivery of the product, regardless of when the buyer purchased or came into contact with the product or learned of the breach (Tex. Bus. & Com. Code Ann. § 2.725(a), (b); see also *G.R. Auto Care v. NCI Grp., Inc.*, 2018 WL 4087295, at \*5 (Tex. App. – Houston [1st Dist.] Aug. 28, 2018) and *B. Mahler Interests, L.P. v. DMAC Constr., Inc.*, 503 S.W.3d 43, 49 (Tex. App.—Houston [14th Dist.] 2016, no pet.)). The buyer can also provide for specific remedies available to the buyer if a breach of a warranty occurs, for example, the seller's obligation to replace or repair the defective or nonconforming goods. For more information, see State Q&A: Statutes of Limitations: Texas: Breach of Warranty ([W-000-2946](#)).

The seller is likely to object to these implied warranties and seek to disclaim them. For more information on drafting and negotiating warranty and disclaimer clauses, see Standard Clause, General Contract Clauses: Product Warranty and Disclaimers (TX) ([W-017-0520](#)). For a sample pro-buyer warranty clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Product Warranties ([5-541-6567](#)). For a sample pro-seller warranty disclaimer clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 14.05 ([2-518-9260](#)).

13. Compliance with Law. Seller is in compliance with and shall comply with all applicable laws, regulations, and ordinances. Seller has and shall maintain in effect all of the licenses, permissions, authorizations, consents, and permits that it needs to carry out its obligations under this Agreement.

#### DRAFTING NOTE: COMPLIANCE WITH LAW

This agreement includes a general compliance with laws provision. The buyer should revise this agreement to include any specific government standards or requirements that apply to the particular goods or relevant industry. For more information on drafting and negotiating compliance with law clauses, see Standard Clause, General Contract Clauses: Compliance with Laws ([2-524-6307](#)). For a sample pro-buyer compliance with laws clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 12.01 ([5-541-6567](#)).

The seller is likely to object to this provision as overly broad and seek to include materiality or knowledge qualifiers to limit its liability. The buyer should also expect the seller to insist on a reciprocal provision requiring the buyer to represent its compliance with law. For a sample buyer's compliance with law provision, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 9.01 ([2-518-9260](#)) and Standard Document, Sale of Goods Agreement (Pro-Seller, Short Form) (TX) ([W-001-4750](#)).

14. General Indemnification. Seller shall indemnify, defend, and hold harmless Buyer and its officers, directors, managers, shareholders, members, partners, employees, agents, affiliates, successors, and permitted assigns (collectively, "**Indemnified Party**") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including [reasonable] attorneys' fees, fees and the costs of enforcing any right to indemnification under this Agreement, and the cost of pursuing any insurance providers, [incurred by Indemnified Party/awarded against Indemnified Party [in a final [non-appealable] judgment]] (collectively, "**Losses**"), [relating to/arising out of or resulting from] any claim of a third party [or Buyer] arising out of or occurring in connection with the products purchased from Seller or Seller's negligence, willful misconduct, or breach of this Agreement. Seller shall not enter into any settlement without Buyer's or Indemnified Party's prior written consent.

#### DRAFTING NOTE: GENERAL INDEMNIFICATION

In this pro-buyer agreement, the general indemnification provision is unilateral, in favor of the buyer. The buyer should expect the seller to insist on a similar indemnification obligation covering the buyer's breach of the agreement.

The buyer should review those included in the definition of Indemnified Party to determine if it is appropriate based on the particular circumstances. The definition of Indemnified Party includes third-party beneficiaries. Therefore, if the buyer wants to ensure that third-party beneficiaries can seek remedies under this indemnification provision, it should carve them out from Section 28.

When drafting a unilateral provision, the buyer should consider broadening the scope of the seller's indemnity, for example, by:

- Defining losses broadly to include all losses incurred by the buyer, not limited to:
  - judicial awards generally; or
  - final, non-appealable judgments.
- Including the broader "relating to" nexus phrase. For more information on nexus phrases, see Practice Note, Indemnification Clauses in Commercial Contracts (TX): Choosing the Right Nexus Phrase ([W-004-5777](#)).

The buyer should consider extending this provision by adding the optional phrase "or

Buyer” to cover direct claims (the buyer’s claims against the seller) in addition to third-party claims. In Texas, a defining characteristic of an indemnity agreement is that it does not apply to direct claims between the parties to that agreement unless there is express language to that effect (see *Nat’l City Mortg. Co. v. Adams*, 310 S.W.3d 139, 144 (Tex. App.—Fort Worth 2010, no pet.)). For more information on indemnification for direct claims, see Practice Note, Indemnification Clauses in Commercial Contracts (TX): Direct Versus Third-Party Claims ([W-004-5777](#)).

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

- Qualifying certain provisions, for example, by including the bracketed language using reasonableness to qualify attorneys’ fees.
- Including the bracketed language to limit payment to losses that are finally adjudicated.
- Narrowing the definition of “Indemnified Party.”
- Limiting the indemnity obligation to losses and liabilities that are not covered by:
  - insurance proceeds received by the indemnified party; and
  - tax benefits received by the indemnified party.
- Replacing the broad nexus phrase “relating to” with a narrower nexus phrase, such as “caused by” or “solely resulting from.”
- Limiting the scope of third-party claims to those caused by actual inaccuracies or breaches and not merely those caused by alleged inaccuracies or breaches. This may eliminate the obligation to defend (and reimburse or pay attorneys’ fees) for third-party claims adjudicated in favor of the indemnified party.
- Including exceptions and liability limitations, such as:
  - a liability cap (for more information on drafting and negotiating a liability cap, see Standard Clauses, General Contract Clauses: Indemnification (TX): Drafting Note, Maximum Liability ([W-000-0637](#)));
  - a liability basket (for more information on drafting and negotiating a liability

basket, see Standard Clauses, General Contract Clauses: Indemnification (TX): Drafting Note, Liability Basket ([W-000-0637](#)));

- an exception for claims for losses arising from the buyer’s gross negligence or bad faith (for a sample exceptions clause, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 15.02 ([5-541-6567](#))); or
- the buyer’s waiver of consequential and indirect damages (for a sample waiver clause, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 16.01 ([2-518-9260](#))).

In Texas, if the parties intend to indemnify a party from the consequences of its own future negligence, the indemnification provision must meet the fair notice requirements of:

- **Express negligence doctrine.** The intent to indemnify the party from the consequences of its own negligence must be expressed clearly and unambiguously within the four corners of the contract.
- **Conspicuousness.** A term or clause is conspicuous when it is written so that a reasonable person against whom it is to operate ought to have noticed it, such as by using capital letters, larger font size, contrasting font color, or bold type. Texas courts, however, apply a sliding scale of acceptability based on the size of the document and complexity of the contract at issue if the indemnified party had actual knowledge of the contents of the indemnity provision.

(*Oxy USA, Inc. v. Sw. Energy Prod. Co.*, 161 S.W.3d 277, 282-83 (Tex. App.—Corpus Christi 2005, pet. denied); see also *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993) and *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987).)

For more information on drafting and negotiating indemnification clauses, see Practice Note, Indemnification Clauses in Commercial Contracts (TX) ([W-004-5777](#)) and Standard Clauses, General Contract Clauses: Indemnification (TX) ([W-000-0637](#)). For a sample pro-buyer, unilateral seller indemnification clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 15.01 ([5-541-6567](#)).

15. Intellectual Property Indemnification. Seller shall, at its expense, defend, indemnify, and hold harmless Buyer and any Indemnified Party against any and all Losses arising out of or in connection with any claim that Buyer's or Indemnified Party's use or possession of the Goods infringes or misappropriates the patent, copyright, trade secret, or other intellectual property right of any third party. In no event shall Seller enter into any settlement without Buyer's or Indemnified Party's prior written consent.

#### DRAFTING NOTE: INTELLECTUAL PROPERTY INDEMNIFICATION

This clause requires the seller to indemnify the buyer for intellectual property infringement claims brought by third parties arising out of the use or possession of the goods. Depending on the bargaining positions of the parties, the characteristics of the goods and the nature of the infringement, the parties can negotiate an additional provision that requires the seller to:

- Obtain for the buyer explicit permission to continue to use and sell the goods.
- Modify the goods so that they are non-infringing.
- Replace the goods with non-infringing goods.
- Accept the cancellation of the contract and return of the goods for a full refund.

For a sample pro-buyer intellectual property indemnification clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 15.03 ([5-541-6567](#)).

The seller typically tries to negotiate an exception for losses arising from infringement due to the buyer's:

- Sales and marketing activities.
- Unauthorized combination of the seller's goods with third-party goods.

For a sample exceptions clause, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 15.04 ([5-541-6567](#)). For more information on state laws pertaining to trademarks, see State Q&A, Trademark Laws: Texas ([8-534-9166](#)).

16. Insurance. For a period of [TIME PERIOD] after the date of this Agreement, Seller shall, at its own expense, maintain and carry insurance in full force and effect that includes, but is not limited to, commercial general liability (including product liability) with limits no less than \$[AMOUNT] for each occurrence and \$[AMOUNT] in the aggregate [ADD OTHER INSURANCE COVERAGES AND RESPECTIVE AMOUNTS, AS APPLICABLE] with financially sound and reputable insurers. Upon Buyer's request, Seller shall provide Buyer with a certificate of insurance from Seller's insurer evidencing the insurance coverage specified in this Agreement. The certificate of insurance shall name Buyer as an additional insured. Seller shall provide Buyer with [NUMBER] days' advance written notice in the event of a cancellation or material change in Seller's insurance policy. Except where prohibited by law, Seller shall require its insurer to waive all rights of subrogation against Buyer's insurers and Buyer or the Indemnified Parties.

#### DRAFTING NOTE: INSURANCE

The buyer must adjust this provision based on the type and size of the transaction and the price or sophistication of the goods. The determination of the appropriate types of insurance coverage and policy limits for a particular transaction should be made by the buyer in consultation with its risk management departments and insurance specialists.

For more information on drafting and negotiating an insurance covenant in a sale of goods agreement, see Standard Clauses, General Contract Clauses: Insurance Covenant (Sale of Goods) ([7-524-9426](#)). For more information about insurance generally, see Practice Note, Insurance Policies and Coverage: Overview ([9-505-0561](#)) and Insurance Policies and Coverage Toolkit ([4-506-1171](#)).

17. Termination. In addition to any remedies that may be provided under this Agreement, Buyer may terminate this Agreement with immediate effect upon written notice to Seller, either before or after the acceptance of the Goods, if Seller has not performed or complied with any of the terms and conditions of this Agreement, in whole or in part. If Seller becomes insolvent, is generally unable to pay, or fails to pay, its debts as they become due, files a petition for bankruptcy, or commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization, or assignment for the benefit of creditors, then Buyer may terminate this Agreement upon written notice to Seller. If a Force Majeure Event, as defined in Section 33, affecting Seller's performance of this Agreement continues for more than [NUMBER] [consecutive] [days/business days], then Buyer may terminate this Agreement upon written notice to Seller. If Buyer terminates this Agreement for any reason, Seller's sole and exclusive remedy is payment for the Goods received and accepted by Buyer prior to the termination.

#### DRAFTING NOTE: TERMINATION

This clause gives the buyer the right to terminate for the seller's breach of the agreement, either before or after the buyer's acceptance of the goods. The buyer may terminate the agreement due to the seller's bankruptcy, insolvency, or financial distress.

A clause allowing a party to terminate an agreement due to the other party's bankruptcy or insolvency (also referred to as an ipso facto clause) is generally unenforceable against a debtor during bankruptcy (11 U.S.C.A. § 365(e)(1)); see also *Andriukaitis-Woodlands Med. Office, I, LLC v. Woodlands-N. Houston Heart Ctr., PA*, 2014 WL 4854590, at \*5 n.6 (Tex. App.—Houston Sept. 25, 2014, pet. denied)). However, this clause should still be included in contracts because it can be triggered by events outside of bankruptcy (such as the inability to pay debts as they become due or making a general assignment for the benefit of creditors). Without this clause, none of these events become grounds to terminate the agreement. Also, the clause is enforceable again once the bankruptcy case is closed.

Consider whether any other event should trigger a termination, including:

- A breach by the seller and termination of any other contract between the parties.
- The seller's change of control.

For more information on drafting and negotiating termination clauses, see Standard Clauses, General Contract Clauses: Term and Termination (TX) ([W-001-4773](#)). For a sample pro-buyer, termination clause in a long-form sale of goods agreement, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 10.03 ([5-541-6567](#)).

This Standard Document does not include the buyer's right to terminate for convenience. If the buyer desires to negotiate the right to terminate for convenience, it should expect the seller to negotiate the:

- Reciprocal right to terminate for convenience.
- Buyer's payment of a termination fee.

For more information about the buyer's right to terminate for convenience, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Buyer's Right to Terminate for Convenience ([5-541-6567](#)).

18. Confidential Information. All non-public, confidential, or proprietary information of the Buyer, including, but not limited to, trade secrets, specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts, or rebates, disclosed by Buyer to Seller, whether disclosed orally or disclosed or accessed in written, electronic, or other form or media, and whether or not marked, designated, or otherwise identified as "confidential," in connection with this Agreement is confidential, solely for the use of performing this Agreement and may not be disclosed or copied unless authorized by Buyer in writing. Upon Buyer's request, Seller shall promptly return all documents and other materials received from Buyer. Buyer shall be entitled to injunctive relief for any violation of this Section. This Section shall not apply to information that is: (a) in the public domain; (b) known to the Seller at the time of disclosure; or (c) rightfully obtained by the Seller on a non-confidential basis from a third party.

**DRAFTING NOTE: CONFIDENTIAL INFORMATION**

This clause sets out the seller's obligations regarding the buyer's confidential information. Consider adding language to this clause if the parties must create and enforce confidentiality provisions to cover their affiliates, employees, contractors, and other representatives. Some confidential information may rise to the level of a trade secret and receive protection under state or federal law. For more information, see:

- State Q&A, Trade Secret Laws: Texas: Definition of Trade Secret ([4-506-3556](#)).
- Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (TX): Drafting Note: Trade Secrets ([W-000-0595](#)).
- Practice Note, Confidentiality and Nondisclosure Agreements (TX): Defend Trade Secrets Act ([W-007-0568](#)).
- General Contract Clauses: Confidentiality Agreement Clauses After the Defend Trade Secrets Act ([W-002-9194](#)).

While a trade secret must meet the statutory definition for a court to protect it, confidential information is not defined by statute. Confidential information may generally mean whatever the parties to an agreement define it to be, which may or may not include trade secrets. Texas courts, however, give effect to confidentiality provisions regardless of whether the information covered by the provisions achieves trade secret status (see *Corporate Relocation, Inc. v. Martin*, 2006 WL 4101944, at \*15 n.17 (N.D. Tex. Sept. 12, 2006) and *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 471 n.18 (Tex. App. — Austin 2004, pet. denied)). Best practices in Texas, however, include the incorporation of

trade secrets in the definition of confidential information.

The confidentiality obligations in this clause can be included in the general list of obligations that survive expiration or termination of the agreement in the survival clause (Section 20) of this Standard Document. If, however, the buyer intends for the confidentiality obligations to only survive for a certain period after termination of the agreement, that should be specified in this clause.

For more information on drafting and negotiating confidentiality agreements, see Practice Note, Confidentiality and Nondisclosure Agreements (TX) ([W-007-0568](#)).

A buyer may also want to make this provision mutual, as a seller is likely to object to a one-sided confidentiality provision particularly if the seller is providing any proprietary skills or knowledge. For more information on drafting and negotiating mutual confidentiality clauses, see Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (TX) ([W-000-0595](#)) and General Contract Clauses: Confidentiality (Short Form) (TX) ([W-000-0596](#)).

If the buyer wants to protect a large quantity of confidential information, it should consider entering into a separate, more detailed confidentiality agreement. For more information on drafting and negotiating a stand-alone confidentiality agreement, see Standard Document, Confidentiality Agreement: General (Unilateral, Pro-Discloser) ([9-501-6497](#)).

19. **Entire Agreement.** This Agreement, including and together with any related exhibits, schedules, attachments, and appendices, constitutes the sole and entire agreement of the Parties with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, regarding such subject matter.

**DRAFTING NOTE: ENTIRE AGREEMENT**

This provision (also known as a merger or integration provision) is used to

prevent the parties from being liable for any understandings, agreements, or

representations and warranties other than those expressly set out in the agreement. For more information on drafting and

negotiating entire agreement clauses, see Standard Clauses, General Contract Clauses: Entire Agreement (TX) ([W-008-0773](#)).

20. Survival. Subject to the limitations and other provisions of this Agreement: (a) the representations and warranties of the Parties contained herein shall survive the expiration or earlier termination of this Agreement; and (b) [SECTIONS] of this Agreement, as well as any other provision that, in order to give proper effect to its intent, should survive such expiration or termination, shall survive the expiration or earlier termination of this Agreement. [With respect to confidential information that constitutes a trade secret under applicable law, the rights and obligations set forth in Section 18 hereof shall survive the expiration or earlier termination of this Agreement until, if ever, such confidential information loses its trade secret protection other than due to an act or omission of Seller.] [All other provisions of this Agreement shall not survive the expiration or earlier termination of this Agreement.]

#### DRAFTING NOTE: SURVIVAL

This clause identifies the rights and obligations that continue after the termination of the Agreement. The buyer should include the specific provisions that apply to its circumstances. Confidentiality and indemnification clauses are commonly included in the survival clause.

The optional trade secret language can be included if the buyer is concerned about protecting any trade secrets contained in the confidential information (see Section 18) throughout the time that the information qualifies for protection under applicable law. Trade secret status requires that the trade secret owner has made and continues to make reasonable efforts to maintain the secrecy of the information (Tex. Civ. Prac. & Rem. Code §134A.002(6)(B); see also *Baxter Elevators v. D&D Elevators, Inc.*, 2017 WL 604043, at \*8 (Tex. App.—Dallas Feb. 15, 2017, no pet.)).

The buyer disclosing any trade secrets must be careful if the seller wants to include term limits in confidentiality provisions to avoid undermining the buyer's efforts to maintain trade secret status. The reason for concern is that the expiration of a confidentiality obligation of a limited duration may be evidence that

the trade secret owner is not exercising reasonable efforts to maintain the secrecy of the information beyond the expiration date (see *Structured Capital Sols., LLC v. Commerzbank AG*, 177 F. Supp. 3d 816, 835 (S.D.N.Y. 2016); *DB Riley, Inc. v. AB Eng'g Corp.*, 977 F. Supp. 84, 91 (D. Mass. 1997); and *Alta Devices, Inc. v. LG Elecs., Inc.*, 2018 WL 5045429, at \*7 (N.D. Cal. Oct. 17, 2018) (the fact that a contract expired does not automatically render any information incapable of receiving trade secret protection, but it is a fact that may be considered to determine whether trade secrets were adequately protected)).

One Texas court has commented on this point without reaching a conclusion (see *INEOS Group Ltd. v. Chevron Phillips Chem. Co., LP*, 312 S.W.3d 843, 854-55, n.8 (Tex. App.—Houston 2009, no pet.)).

For more information on survival, see Standard Clauses, General Contract Clauses: Survival (TX) ([W-004-0307](#)) and General Contract Clauses: Contractual Statute of Limitations (TX) ([W-000-0230](#)) and Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Survival of Representations and Warranties ([9-519-8869](#)).

21. Notices. All notices, requests, consents, claims, demands, waivers, and other communications under this Agreement (each, a “**Notice**,” and with the correlative meaning “**Notify**”) must be in writing and addressed to the other Party at its address set forth below (or to such other address

that the receiving Party may designate from time to time in accordance with this Section). Unless otherwise agreed herein, all Notices must be delivered by personal delivery, nationally recognized overnight courier or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Agreement, a Notice is effective only (a) on receipt by the receiving Party, and (b) if the Party giving the Notice has complied with the requirements of this Section.

Notice to Buyer: [BUYER ADDRESS]  
Telephone: [NUMBER]

Notice to Seller: [SELLER ADDRESS]  
Telephone: [NUMBER]

#### DRAFTING NOTE: NOTICES

This provision governs how any notice under the agreement must be given and the time when the notice is deemed to be formally given. This notices provision does not permit the delivery of formal notice by facsimile or email (to protect the receiving party

from being bound by a notice that it does not actually see). For more information on drafting and negotiating notices clauses, see Standard Clause, General Contract Clauses: Notice ([6-533-1025](#)).

22. Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction[; provided, however, that if any fundamental term or provision of this Agreement (including [FUNDAMENTAL TERMS]), is invalid, illegal, or unenforceable, the remainder of this Agreement shall be unenforceable]. [Upon a determination that any term or provision is invalid, illegal, or unenforceable, [the Parties shall negotiate in good faith to/the court may] modify this Agreement to effect the original intent of the Parties as closely as possible in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible].

#### DRAFTING NOTE: SEVERABILITY

The purpose of the severability clause is to clarify that if one or more terms or provisions is held to be invalid, illegal, or unenforceable, the parties intend the agreement as a whole to survive by severing the invalid, illegal, or

unenforceable terms or provisions from the agreement.

For more information on drafting and negotiating severability provisions, see Standard Clause, General Contract Clauses: Severability (TX) ([W-000-0650](#)).

23. Amendments. No amendment to, or modification of, [or rescission, termination, or discharge of] this Agreement is effective unless it is in writing[, identified as an amendment to [or rescission, termination, or discharge of] this Agreement,] and signed by [an authorized representative of] each Party.

#### DRAFTING NOTE: AMENDMENTS

For more information on drafting and negotiating amendment clauses, see Standard Clause, General Contract Clauses: Amendments (TX) ([W-000-0510](#)).

For a sample amendment agreement, see Standard Document, Amendment Agreement (TX) ([W-007-6889](#)).

24. Waiver. No waiver by any party of any of the provisions of this Agreement shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

#### DRAFTING NOTE: WAIVER

Either party may fail to enforce its rights under a contract, whether because of oversight or the commercial realities of the situation. This clause provides that a waiver of a breach of the terms on one occasion does not affect the rights of the waiving party if there is a further breach or if that party later requires compliance with the

relevant terms. For more information on drafting and negotiating waiver clauses, see Standard Clause, General Contract Clauses: Waivers (TX) ([W-000-0509](#)). For a sample waiver of contractual provisions, see Standard Document, Waiver (TX) ([W-000-1881](#)).

25. Cumulative Remedies. All rights and remedies provided in this Agreement are cumulative and not exclusive, and the exercise by either Party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently be available at law, in equity, by statute, in any other agreement between the Parties, or otherwise. Notwithstanding the foregoing, the Parties intend that, if Buyer terminates the Agreement in accordance with Section 17, Seller's sole and exclusive remedy is the right to payment for the Goods received and accepted.

#### DRAFTING NOTE: CUMULATIVE REMEDIES

This provision seeks to ensure that the rights and remedies set out in the agreement are in addition to any rights provided by law or equity and not in substitution for them. Without the clause, there may be a presumption (that may be supported by the entire agreement language) that all the terms intended to govern the parties'

relationship are in the agreement itself and that, any rights and remedies provided by law that are not specified in the agreement are intentionally displaced.

Under the UCC, however, clauses prescribing remedies are presumed cumulative unless the remedy is expressly

agreed to be exclusive (Tex. Bus. & Com. Code Ann. § 2.719(a)(2)). As a safeguard, where the parties wish to preserve the rights and remedies available to them under law and equity, they should include this clause.

If the parties include any exclusive remedies in the agreement, they should ensure that the provisions under which the remedies are granted are excluded from this provision. For example, this pro-buyer Standard Document provides the seller with an

exclusive remedy if the buyer exercises its right to terminate the agreement under Section 17. Sellers may also insist that the remedies under the agreement's warranty or indemnification provisions are exclusive.

For more information on drafting and negotiating cumulative remedies clauses, see Standard Clauses, General Contract Clauses: Cumulative Remedies (with Exclusive Remedies Carve-Out) (TX) ([W-001-4919](#)).

26. Assignment. Seller shall not assign, transfer, delegate, or subcontract any of its rights or obligations under this Agreement without the prior written consent of Buyer. Any purported assignment, transfer, delegation, or subcontract in violation of this Section shall be null and void. No assignment, transfer, delegation, or subcontract shall relieve Seller of any of its obligations hereunder. Buyer may at any time assign, transfer, delegate, or subcontract any or all of its rights or obligations under this Agreement without Seller's prior written consent.

#### DRAFTING NOTE: ASSIGNMENT

This provision addresses the parties' respective rights to assign and delegate rights and obligations under the agreement. This pro-buyer provision favors the buyer by:

- Prohibiting the seller from assigning or delegating without the buyer's consent. However, the parties can adapt this provision to allow the seller to assign or delegate without the buyer's consent in specific situations.
- Permitting the buyer to assign or delegate.

The second sentence renders any assignment by the seller in violation of the clause ineffective. Without this sentence, the buyer may only have a breach of

contract claim if the seller assigns the contract without the buyer's consent. (See Standard Clause, General Contract Clauses: Assignment and Delegation (TX): Drafting Note: Declaration That Impermissible Transfers Are Void ([W-000-0869](#))).

For more information on drafting and negotiating assignment clauses, see Standard Clauses, General Contract Clauses: Assignment and Delegation (TX) ([W-000-0869](#)). For a sample form of assignment agreement, see Standard Document, Assignment and Assumption Agreement and Optional Novation (TX) ([W-003-1822](#)).

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

#### DRAFTING NOTE: SUCCESSORS AND ASSIGNS

For more information on drafting and negotiating successors and assigns clauses, see Standard Clause, General Contract

Clauses: Successors and Assigns (TX) ([W-002-4391](#)).

28. No Third-Party Beneficiaries. [Subject to the next paragraph, this/This] Agreement benefits solely the Parties to this Agreement and their respective permitted successors and assigns and nothing in this Agreement, express or implied, confers on any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

[The Parties hereby designate [CLASS OF INDEMNIFIED PERSONS] as third-party beneficiaries of [SECTION(S)], having the right to enforce [SECTION(S)].]

#### DRAFTING NOTE: NO THIRD-PARTY BENEFICIARIES

Most contracts contain an unqualified “no third-party beneficiaries” clause, which expressly states that third parties do not have enforceable rights under the contract. However, if the parties intend for certain third parties to benefit from the contract, they must qualify the clause by:

- Choosing the phrase “Subject to the next paragraph” from the alternatives in the bracketed language in the first paragraph.
- Adding the optional second paragraph and listing the third-party beneficiaries and the corresponding sections of the contract. In some cases, the parties add that the third-party beneficiaries have the direct right to enforce the specified provisions of the contract.

Absent language to the contrary, in Texas, a third party may sue on a contract made for the party’s direct benefit (*Republic Nat. Bank of Dallas v. Nat’l Bankers Life Ins. Co.*, 427 S.W.2d 76, 79 (Tex. Civ. App.—Dallas 1968, writ ref’d n.r.e.)). However, the parties generally must expressly provide that the agreement is made for the benefit of a non-signatory third party to allow the third party to have rights under an agreement. Otherwise, Texas courts presume that the parties contracted for themselves, as there is a presumption against third-party beneficiary agreements (*First Bank v. Brumitt*, 519 S.W.3d 95, 102-04 (Tex. 2017); see also *MCI Telecommunications Corp. v. Texas Utilities Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999).)

Under a sale of goods agreement, the third-party beneficiaries are most often:

- **Indemnified parties.** The issue is whether specified non-parties can enforce the indemnification provisions of this agreement (see Standard Clause, General Contract Clauses: Third-Party Beneficiaries ([6-519-7630](#))).
- **Downstream end users.** The issue is whether end users or others beyond the buyer of goods can enforce any warranties provided by the seller of the goods (see Standard Clause, General Contract Clauses: Third-Party Beneficiaries: Drafting Note: End-Users of Goods that Do Not Have Privity with the Seller ([8-614-3485](#))).
- **Third parties deemed beneficiaries under government contracts by statute or public policy.** The issue is whether third-party beneficiaries of government contracts can enforce the contractual or, in some cases, statutory rights conferred by the contract or the underlying statute (see Standard Clause, General Contract Clauses: Third-Party Beneficiaries: Drafting Note: Third-Party Beneficiary Rights Under Government Contracts ([6-519-7630](#))).

For more information on drafting and negotiating no-third-party-beneficiaries clauses, see Standard Clause, General Contract Clauses: Third-Party Beneficiaries ([6-519-7630](#)).

29. Choice of Law. This Agreement and all related documents [including all exhibits attached hereto][, and all matters arising out of or relating to this Agreement, whether sounding in contract, tort, or statute] are governed by, and construed in accordance with, the laws of the State of Texas, United States of America [(including [its statutes of limitations] [and] [Tex. Bus. & Com. Code Ann. § 271.001 et seq.]][, without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Texas].

**DRAFTING NOTE: CHOICE OF LAW**

This provision allows parties to choose the substantive law of Texas to apply to the contract.

Parties may choose the substantive law of Texas to apply to the contract for both:

- Transactions that bear a reasonable relation to the state (Tex. Bus. & Com. Code Ann. § 1.301(a)).
- Qualified transactions under Chapter 271 of the Business and Commerce Code (Tex. Bus. & Com. Code Ann. §§ 271.001 to 271.011).

For a discussion of choice of law rules in Texas, including qualified transactions, see Standard Clauses, General Contract

Clauses: Choice of Law (TX): Drafting Note: Texas Choice of Law Statutes ([W-000-0223](#)).

For more information on the optional language in brackets, see Standard Clause, General Contract Clauses: Choice of Law (TX) ([W-000-0223](#)) Drafting Notes:

- Extra-Contractual Matters ([W-000-0223](#)).
- Statutes of Limitations ([W-000-0223](#)).
- Choice of Law Rules ([W-000-0223](#)).

For more information on drafting and negotiating choice of law clauses, see Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

30. **Choice of Forum.** Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions[, including, but not limited to, contract, equity, tort, fraud, and statutory claims], in any forum other than the US District Court for the [Northern/Southern/Eastern/Western] District of Texas or[, if such court does not have subject matter jurisdiction,] the courts of the State of Texas sitting in [POLITICAL SUBDIVISION], and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in the US District Court for the [Northern/Southern/Eastern/Western] District of Texas or[, if such court does not have subject matter jurisdiction,] the courts of the State of Texas sitting in [POLITICAL SUBDIVISION]. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

**DRAFTING NOTE: CHOICE OF FORUM**

In this provision, the parties confer personal jurisdiction on the courts of a selected state and agree that the selected forum is the exclusive forum for bringing any claims under (and sometimes, more broadly relating to) the agreement.

Parties should be aware that in contrast to forum selection, venue selection, which refers to the geographic location within the forum (often, the county, but sometimes, a particular court) with the authority to hear the case, is not enforceable in a private contract in Texas unless otherwise provided by statute (*Liu v. CiCi Enters., LP*, 2007 WL

43816, at \*2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.)). For example, parties may contractually agree to have the case heard in a specific Texas county if the suit arises from a “major transaction” (Tex. Civ. Prac. & Rem. Code Ann. § 15.020(b), (c)). With certain exceptions, a major transaction is a written agreement under which a person pays or receives consideration with an aggregate stated value of at least \$1 million (Tex. Civ. Prac. & Rem. Code Ann. § 15.020(a)). Best practice, however, is to include the geographic location.

For more information on drafting and negotiating choice of forum clauses, including venue concerns unique to Texas, see Standard Clauses, General Contract Clauses: Choice of Forum (TX) ([W-000-0220](#)) and Practice Notes, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)) and Commencing a Lawsuit: Initial Considerations (TX): Forum and Venue Selection Clauses ([W-005-5157](#)).

To settle or avoid protracted forum selection negotiations, the parties sometimes elect to include a floating forum selection clause that forces a party initiating litigation to do so in the home jurisdiction of the counterparty being sued. For a sample floating forum selection clause, see Standard Clauses, General Contract Clauses: Choice of Forum (Floating: Reciprocal) (TX) ([W-000-0222](#)).

If the buyer prefers to resolve disputes by arbitrating, rather than litigating them, then it must replace this provision with an arbitration clause. For more information on arbitration and other alternative dispute

resolution agreements, including sample clauses, see:

- Practice Note, Drafting Arbitration Agreements Calling for Arbitration in the US ([2-500-4624](#)).
- Practice Note, Standard Recommended Arbitration Clauses ([1-381-8470](#)).
- Standard Clauses, American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR): Standard Arbitration Clauses ([3-520-8381](#)).
- Drafting Contractual Dispute Provisions Toolkit (TX) ([W-007-8921](#)).

This short-form Standard Document does not contain a dispute resolution escalation provision. Escalation provisions first require the parties to resolve their disputes by alternative dispute resolution (ADR), including a period of negotiation and then mediation before submitting the dispute to litigation or ad hoc arbitration. For more information on drafting and negotiating escalation clauses, see Standard Clauses, General Contract Clauses: Alternative Dispute Resolution (Multi-Tiered) (TX) ([W-004-9900](#)).

31. **[WAIVER OF JURY TRIAL. EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY THAT MAY ARISE UNDER THIS AGREEMENT, INCLUDING EXHIBITS, SCHEDULES, ATTACHMENTS, AND APPENDICES ATTACHED TO THIS AGREEMENT, IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, ATTACHMENTS, OR APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY.]**

#### DRAFTING NOTE: WAIVER OF JURY TRIAL

Commercial agreements frequently include this optional provision. Many sophisticated parties prefer that a judge hear and decide any dispute arising out a complex agreement rather than a jury who may not appreciate or understand the potentially

complex issues involved in the litigation. For more information on drafting and negotiating waiver of jury trial clauses, see Standard Clause, General Contract Clauses: Waiver of Jury Trial (TX) ([W-000-0601](#)).

32. Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. [Notwithstanding anything to the contrary in Section 21, a signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.]

**DRAFTING NOTE: COUNTERPARTS**

The parties should include the bracketed language if facsimile and email are not accepted as means of sending notices under Section 21. For more information on drafting

and negotiating counterparts clauses, see Standard Clauses, General Contract Clauses: Counterparts ([5-564-9425](#)).

33. Force Majeure. Any delay or failure of either Party to perform its obligations under this Agreement will be excused to the extent that the delay or failure was caused directly by an event beyond such Party's control, without such Party's fault or negligence and that by its nature could not have been foreseen by such Party or, if it could have been foreseen, was unavoidable (which events may include natural disasters, embargoes, explosions, riots, wars, or acts of terrorism) (each, a "**Force Majeure Event**"). Seller's financial inability to perform, changes in cost or availability of materials, components or services, market conditions, or supplier actions or contract disputes will not excuse performance by Seller under this Section 33. Seller shall give Buyer prompt written notice of any event or circumstance that is reasonably likely to result in a Force Majeure Event, and the anticipated duration of such Force Majeure Event. Seller shall use all diligent efforts to end the Force Majeure Event, ensure that the effects of any Force Majeure Event are minimized, and resume full performance under this Agreement.

**DRAFTING NOTE: FORCE MAJEURE**

A force majeure clause aims to exclude liability for breach of contract where delay or failure to perform is a result of an event outside the reasonable control of the party who would otherwise be in default.

As the seller is responsible for the main obligations under the agreement (the buyer's only major obligation is to pay for the goods), the buyer wants the force majeure clause to be drafted as narrowly as possible and for the definition of force majeure events to be limited to events that

are genuinely outside the seller's control. Section 17 of this pro-buyer agreement permits the buyer to terminate the contract if a force majeure event continues for the specified length of time.

For more information on drafting and negotiating force majeure clauses, see Standard Clause, General Contract Clauses: Force Majeure (TX) ([W-000-0683](#)) and Practice Note, Force Majeure Clauses: Key Issues ([5-524-2181](#)).

34. Relationship of the Parties. The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, franchise, business opportunity, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between the Parties, and neither Party shall have authority to contract for or bind the other Party in any manner whatsoever. No relationship of exclusivity shall be construed from this Agreement.

**DRAFTING NOTE: RELATIONSHIP OF THE PARTIES**

This clause, also known as an "independent contractor" or "no agency or partnership" clause, minimizes the risk of creating an unwanted joint venture,

partnership, employer-employee, or agency relationship between the parties under Texas law (see State Q&A: Independent Contractors: Texas

(1-506-2756)). Creating a relationship other than one between independent contractors may:

- Have unfortunate tax consequences.
- Result in one party being bound by another in relation to third parties in ways not contemplated by the agreement.
- Result in one party becoming liable for the other's acts and omissions.

Another reason for wanting to exclude a partnership relationship is that partners in a partnership owe fiduciary duties to each other. Contracting parties usually prefer to exclude implied duties of this kind.

For more information on drafting and negotiating relationship of the parties clauses, see Standard Clause, General Contract Clauses: Relationship of the Parties ([6-561-3685](#)).

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

[BUYER NAME]

By \_\_\_\_\_

Name:

Title:

[SELLER NAME]

By \_\_\_\_\_

Name:

Title:

## EXHIBITS

### EXHIBIT A

- [DESCRIPTION OF GOODS]
- [PRICE]
- [QUANTITY]
- [DELIVERY DATE]
- [DELIVERY LOCATION]
- [SHIPPING TERMS]

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