

. CONTENTS .

<i>Contributions</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxiii</i>
<i>Preface</i>	<i>xxv</i>

CHAPTER ONE: NON-DISCLOSURE AND CONFIDENTIALITY AGREEMENTS	1
<i>A Practitioner Perspective: The Use and Purpose of NDAs</i>	<i>3</i>
A. Non-Disclosure Agreement in the Employment Context	4
<i>Agreement on Confidentiality, Non-Competition and Non-Solicitation [The Coca-Cola Company]</i>	<i>5</i>
1. Recitals and Acknowledgments	8
2. Consideration in “Unilateral” Non-Disclosure Agreements	10
3. Tortious Interference: Legally Reaching a Third Party	11
<i>A Practitioner Perspective: Tortious Interference and NDAs</i>	<i>11</i>
4. Employee’s Duty of Confidentiality	12
5. Trade Secrets	13
B. Non-Disclosure Agreement in the Commercial Context	15
<i>Microsoft Corporation Non-Disclosure Agreement [Microsoft Corporation and Electronic Arts Inc.]</i>	<i>16</i>
1. Integration and Merger Clauses	21
2. Severability Clauses	22
3. Third-Party Rights and Duties: Assignment and Third-Party Beneficiaries	23
a. Assignment: Transferring Rights and Duties to a Third Party	23
b. Binding Third Parties	26
c. Benefitting Third Parties	26
4. Termination and Survival	28
5. Choice of Law and Forum	29

<i>Drafting Note: Forum-Selection Clauses; Exclusivity and Courts</i>	31
6. Stipulating Remedies by Contract	32
a. Stipulating Equitable Relief by Contract	32
<i>Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.</i>	33
b. Stipulating Monetary Damages by Contract: Liquidated Damages	36
(1) The “Reasonableness” of Liquidated-Damages Provisions	36
<i>Drafting Note: Specifying Relevant Breaches in Liquidated-Damages Clauses</i>	39
(2) “Optional” Liquidated-Damages Provisions	39
(3) “Alternative-Performance” Contracts	40
C. The Enforceability and Limits of NDAs	42
<i>Coady v. Harpo, Inc.</i>	42
1. The Limits of NDAs: Reasonableness, etc.	46
2. Consideration and Employee Non-Disclosure Agreements	48
3. The Distinction Between Non-Disclosure and Non-Compete Obligations	49
 CHAPTER TWO: EMPLOYMENT AGREEMENTS	51
<i>A Practitioner Perspective: The Emergence of Employment Law</i>	52
<i>A Practitioner Perspective: Negotiating the More Challenging Terms of Employment and Separation Agreements</i>	55
A. Executive Employment Agreement	56
<i>Employment Agreement [Sirius XM Radio Inc. and Greenstein]</i>	57
1. Familiarity Breeds Fluency: A Review	69
2. No-Oral-Modification Provisions	70
3. Implied Waiver and No-Waiver Provisions	71
4. Arbitration and Dispute Resolution	73
<i>Drafting Note: Arbitration Provisions; “Arising out of” and “Related to”</i>	76
5. Waiving the Right to a Jury Trial	77
6. Indemnifying a Corporate Officer	78
<i>Drafting Note: Incorporating Outside Sources of Obligations</i>	79
7. Terminating the Employment Relationship	79
a. Severance and Release	80
b. Material Breach (and Substantial Performance)	82
c. Constructive Termination	85
<i>Drafting Note: “Notwithstanding” and Statutory Compliance Through Contract</i>	86

B. Post-Employment Restrictive Covenants and Their Enforceability	88
1. Covenants, Generally	88
2. Restrictive Covenants: Obligations Not to Compete, Solicit, or Hire	88
<i>A Practitioner Perspective: Retaining Employees and Post-Employment Restrictions</i>	89
<i>Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.</i>	91
a. Requirement of Reasonableness	98
b. Lawyer’s Agreement Not to Compete	100
c. An Employer’s Protectable Interest	101
<i>Nike, Inc. v. McCarthy</i>	102
d. Reasonably in Restraint of Trade: Ancillarity	106
e. Judicial Response to Overly Restrictive Clauses	106
C. Distinguishing “Employee” and “Independent Contractor”	108
CHAPTER THREE: SERVICES AGREEMENTS	111
A. Independent Contractor Consulting Agreement	113
<i>Consulting Agreement [Hewlett-Packard Co. and Landa]</i>	114
1. Familiarity Breeds Fluency: A Review	123
<i>A Practitioner Perspective: International Services Agreements</i>	124
2. An Attorney-in-Fact Designation and Agency	125
<i>Drafting Note: “Hereby” and Future, Conditional Matters</i>	127
3. Intellectual Property Rights and Concerns	128
<i>U.S. Intellectual Property Regimes</i>	128
a. Intellectual Property Ownership and Assignment	130
b. Moral Rights of an Author	134
B. Master Services Agreement	135
<i>A Practitioner Perspective: The More Contentious Terms in Services Contracts</i>	135
<i>Confidential Master Services Agreement [AOL Inc. and Time Warner Inc.]</i>	136
1. Familiarity Breeds Fluency: A Review	160
2. Relationship of Parties: Agency Revisited	161
3. Master Agreements: Structure, Precedence, and Incorporation by Reference	161
4. Definitions Sections	165
<i>A Practitioner Perspective: The Perils of “Scope Creep”</i>	167
5. Service Levels and Credits	169
<i>Section 12. Service Levels [Cowen Holdings, Inc. and Hewlett-Packard Co.]</i>	170
<i>A Practitioner Perspective: The Importance of Service Levels</i>	173

6. Notice and Waiver of Claims; Contractual “Statute of Limitations”	173
<i>Drafting Note: Broad Provisions in Specific Sections</i>	175
7. Representations, Warranties, and Their Differences	175
<i>CBS Inc. v. Ziff-Davis Publishing Co.</i>	176
a. Understanding “Warranty” and “Representation” After <i>Ziff-Davis</i>	181
b. Use of Representations and Warranties in Practice	186
c. Implied Warranties and the Disclaimer Thereof	187
8. Force Majeure Provisions and the Doctrine of Excuse	188
<i>Drafting Note: “Including”</i>	190
9. Shifting Risk: Indemnification and Limitation of Liability	190
a. Indemnification	191
<i>Making Sense of Indemnity Agreements</i>	192
<i>A Practitioner Perspective: Warranty vs. Indemnity for IP Infringement</i>	196
<i>A Practitioner Perspective: Indemnification Issues in Practice</i>	198
<i>A Practitioner Perspective: Insurance Euphoria</i>	199
b. Limitation of Liability	200
<i>A Practitioner Perspective: Limitations-of-Liability “Carve-Outs” for Services</i>	201
(1) Understanding “Consequential” Damages	204
(a) Distinguishing General and Consequential Damages	205
(b) Distinguishing Consequential and the Litany	206
(2) The Economic Loss Doctrine, Actions in Tort, and Limitation of Liability	207
(3) Exclusive Remedies and Failure of Essential Purpose	208
(4) The Interaction of Indemnification and Limitation-of-Liability Provisions	211
<i>Drafting Note: “Herein” and Broadly Worded Limitations of Liability</i>	212
<i>Mobil Chemical Co. v. Blount Bros. Corp.</i>	213
CHAPTER FOUR: AGREEMENTS FOR THE SALE OF GOODS	219
A. The Scope of Article Two of the Uniform Commercial Code	220
1. Some Background on the U.C.C.	220
<i>An International Focus with Domestic Implications: The United Nations Convention on Contracts for the International Sale of Goods</i>	222
2. The Scope of Article Two	223
a. What Is a “Good”?	224
<i>Advent Systems Ltd. v. Unisys Corp.</i>	226
b. What Is a “Transaction in Goods”?	230
c. “Mixed” Contracts for Both Goods and Services	232

Contents

<i>Advent Systems Ltd. v. Unisys Corp.</i>	234
B. Master Purchase Agreement	236
<i>Dell Supplier Master Purchase Agreement [Adaptec, Inc. and Dell Products L.P.]</i>	237
<i>Risk Memorandum (Fictional)</i>	259
1. Familiarity Breeds Fluency: A Review	264
<i>A Practitioner Perspective: Indemnification and Patent Infringement</i>	266
2. Revisiting No-Oral-Modification Provisions Under Article Two	268
3. Conditions	269
<i>Drafting Note: The Language of Conditions</i>	270
4. Open-Price Terms	273
<i>A Practitioner Perspective: The “Manufacturer’s Suggested Retail Price”</i>	275
5. Most-Favored-Nations Clauses	277
6. Quantity: Output and Requirements Contracts	278
<i>Advent Systems Ltd. v. Unisys Corp.</i>	281
7. Delivery, Transfer of Title, and Risk of Loss	284
a. “Title” and “Risk of Loss”	284
b. Terms of Delivery	286
<i>A Practitioner Perspective: Overview of U.S. Export Control Laws</i>	286
8. Acceptance and Rejection: Triggering Payment and Warranties	290
9. Revisiting Warranties and Disclaimers Under Article Two	294
a. Express Warranties	294
b. Implied Warranties	295
10. Licensing Intellectual Property	296
<i>A Practitioner Perspective: Intellectual Property License Agreements</i>	298
11. The “Ipso Facto” Clause: Anticipating Bankruptcy	299
<i>Understanding the “Ipso Facto” Clause</i>	300
12. The Implied Covenant of Good Faith and Fair Dealing	301
<i>Advent Systems Ltd. v. Unisys Corp.</i>	303
a. The Implied “Fruits” of Express Provisions	304
b. Performance Standards: “Commercially Reasonable” and “Best Efforts”	306
 CHAPTER FIVE: LENDING AGREEMENTS	 309
<i>A Practitioner Perspective: A Colorful Side of Lending Agreements</i>	309
A. Commercial Lending Agreement	311
<i>A Practitioner Perspective: Loan and Related Agreements</i>	311
<i>Loan Agreement [L.S. Wholesale, Inc. and Tiffany and Co.]</i>	316

1. Familiarity Breeds Fluency: A Review	337
2. The Basic Terms and Structure of Loan Agreements	338
<i>A Practitioner Perspective: Syndicated Lending Arrangements</i>	340
3. Conditions to Closing (i.e., Lending)	346
4. Representations and Warranties of a Borrower	348
a. Avoiding the Breach of Third-Party Contracts	348
b. Disclosing Financial Information; Accounting Terms	349
c. Revealing Liabilities: Off-Balance-Sheet Liabilities and Litigation	350
5. Covenants of a Borrower	352
a. Affirmative Covenants of the Borrower	352
<i>Drafting Note: Defining Terms for Use Throughout an Agreement</i>	352
(1) Compliance with Law	353
(2) Reporting Requirements	354
(3) Restricting Use of Loan Proceeds	355
<i>Drafting Note: Consistency in Series</i>	355
b. Negative Covenants	356
(1) Negative Pledges	356
<i>A Practitioner Perspective: The “Pari Passu” Clause and Cross-Border Lending</i>	358
(2) Depletion or Distribution of Assets	360
<i>Medigroup, Inc. v. Schildknecht</i>	362
(3) Financial Covenants	364
<i>Section 5. Financial Covenants [BB & T Co. and Industrial Services of America, Inc.]</i>	366
(4) Change in Ownership and Business	367
6. Events of Default and (Some of) Seller’s Remedies Upon Default	368
a. Events of Default	369
(1) Defaulting on the Note; Payment Default	369
(2) Incorrect Representation or Warranty	370
(3) Failure of Covenant	370
(4) Cross-Default Provisions	371
b. Lender’s Rights upon Event of Default	372
7. Material Adverse Change or Effect	374
B. Security and Guaranty Agreement	375
<i>A Practitioner Perspective: Article Nine and the Revision Process</i>	376
<i>A Practitioner Perspective: What Are Asset Securitization and Structured Finance?</i>	378
<i>Security, Pledge and Guaranty Agreement [L.S. Holding (USA), Inc., Little Switzerland, Inc., L.S. Wholesale, Inc., and Tiffany and Co.]</i>	383

Contents

1. Credit Enhancement: Third-Party Guaranties	406
<i>A Practitioner Perspective: Standby Letters of Credit and Swiss Law</i>	406
a. Types of Guaranty: Payment and Collection	409
b. Rights of a Guarantor upon Payment	410
c. Waiving the Defenses of a Guarantor	410
2. Requirements of a Security Agreement Under Article Nine	412
3. Perfection of Security Interests	413
4. Remedies Available to a Secured Lender	415
C. Subordination Agreement	416
<i>Subordination Agreement [Blackwater New Orleans, L.L.C., Blackwater Midstream Corp., and JPMorgan Chase Bank, N.A.]</i>	417
D. Legal Opinion Letters	420
<i>Greycas, Inc. v. Proud</i>	420
<i>Legal Opinion Letter from Counsel for Mayflower</i>	428
CHAPTER SIX: AGREEMENTS FOR MERGER AND ACQUISITION	431
<i>Delaware’s Continued Primacy as a Source of Corporate Law</i>	431
A. Preliminary Documents; Letters of Intent	437
<i>A Practitioner Perspective: International M&A and U.S. Trade Control Due Diligence</i>	437
<i>A Practitioner Perspective: An International Take on Binding Contracts</i>	446
<i>Memorandum of Intent [Arnold Palmer Golf Co. and Fuqua Indus., Inc.]</i>	447
B. The Basic Types of M&A Transactions	453
<i>A Practitioner Perspective: Structuring Mergers and Acquisitions</i>	453
<i>A Practitioner Perspective: Corporate “Partnership” Agreements</i>	462
<i>A Practitioner Perspective: Strategic Alliances and M&A</i>	466
C. Asset Purchase Agreement	471
<i>Piper Jaffray Cos. Press Release</i>	472
<i>Asset Purchase Agreement [Piper Jaffray Cos., Piper Jaffray & Co., and UBS Financial Services Inc.]</i>	475
1. Familiarity Breeds Fluency: A Review	548
2. Acquiring Which Assets	549
<i>Drafting Note: “Without Limiting the Generality” and “Notwithstanding the Contrary”</i>	550
a. Anti-Assignment Provisions Revisited	551
3. Assuming and Succeeding to Liability	552
<i>A Practitioner Perspective: The U.S. Foreign Corrupt Practices Act</i>	556
<i>A Practitioner Perspective: Special Considerations for Cross-Border M&A Transactions</i>	559

4. M&A Consideration	562
a. Types of Consideration	562
b. Price and Adjustments	562
c. Contingent Consideration: Earnout Provisions	563
<i>A Practitioner Perspective: Earnouts</i>	563
5. Representations and Warranties	566
a. Representations and Warranties of the Buyer	567
<i>Drafting Note: Defined Terms; Knowledge</i>	568
b. Representations and Warranties of the Seller	568
(1) Organization and Authority; Stockholder Approval	569
(2) Financial Statements and Disclosures	570
(3) Potential Encumbrances and Limitations on Assets	570
(4) Absence of Changes or Events; No Material Adverse Effect	571
(5) Excluding Representations and Warranties	572
(6) Survival of Representations and Warranties (and Other Provisions)	573
6. Covenants of the Seller	575
a. Access	575
b. Ordinary Conduct	576
c. Restrictive Covenants Revisited: Sale-of-Business Context	576
<i>Drafting Note: “And” vs. “Or”</i>	577
d. Deal Protection Devices	582
<i>A Practitioner Perspective: Deal Protection Covenants</i>	584
<i>A Practitioner Perspective: Contentious Issues in M&A Agreements</i>	586
7. Closing and Conditions; Material Adverse Effect	588
a. Reciprocal Conditions to Closing	589
b. Conditions to Buyer’s Obligation to Close	590
(1) The “Bring-Down” Provision: Representations and Warranties	590
(2) “Bringing Down” Covenants and Other Obligations	591
(3) Material Adverse Effect or Change	591
<i>In re IBP, Inc. Shareholders Litigation</i>	592
<i>The Use and Effect of “Material Adverse Change” Clauses</i>	603
c. Conditions to Sellers’ Obligation to Close	607
8. Indemnification	608
a. Indemnification Obligations of Each Party	600
b. “Caps” and “Baskets”	610
9. Termination	612
<i>Index</i>	615