

Suggested Best Practices for Contract Wording to Limit the Errors & Omissions Liability Exposure of Technology Companies

(Prepared by Chubb Insurance Company of Canada)

Note that this document is an example only and is not Chubb approved language. As such, these clauses should not be used without first consulting your legal counsel.

Clauses considered mandatory in every customized contract include:

- Arbitration Clause
- Disclaimer of Warranties
- Limitation of Consequential Damages
- Hold Harmless in Insured's Favour

Other important clauses include:

- Performance and Scope
- Term and Termination
- Force Majeure
- Severability

Often, limitation of Consequential Damages and Hold Harmless Agreements are combined into one clause, as below.

Limitations on Liability

(Company Name) shall not be liable for costs of procurement of substitute goods or services, property damage, personal injury, loss of profits, interruption of business, or any other special consequential, or incidental damages, based on failure to perform the Services or other breach of this Agreement, or any other theory of liability. In addition, (Company Name) shall not be liable for any loss or damages arising out of or related to any products, devices, software or applications developed through use of (Company Name)'s products, the Deliverables or the Services. (Company Name)'s total liability to Customer shall not exceed the total amount actually paid by Customer hereunder in connection with each individual Statement of Work

IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR SPECIAL, CONSEQUENTIAL, INCIDENTAL, INDIRECT, PUNITIVE OR EXEMPLARY DAMAGES, HOWEVER CAUSED, WHETHER FOR BREACH OF WARRANTY, CONTRACT, TORT NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

No action, regardless of form, arising from this Agreement may be brought by either party more than one year after the cause of action has occurred, except that an action for non-payment may be brought at any time.

Arbitration Clause

The parties shall attempt in good faith to resolve any dispute. Each party will designate an officer with the responsibility and the authority to resolve the dispute. These officers shall meet within fifteen (15) days after the request to identify the scope of the dispute and the information needed to discuss and attempt to resolve such dispute. These officers shall then gather relevant information regarding the dispute and shall meet to discuss the issues and to negotiate in good faith to resolve the issue. In the event that the parties are unable to resolve the dispute within thirty (30) days after the specific meeting of the designated officers as specified above (or such longer time as the parties agree), then the dispute shall be resolved by binding arbitration under the terms of this Section. Such arbitration shall be conducted in (*jurisdiction of choosing*), in accordance with the rules then in effect of the Arbitration & Mediation Institute of Ontario by three (3) arbitrators appointed in accordance with such rules. The award rendered by the arbitrators shall be final and binding, and the judgment may be entered upon it in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties may apply to any court of competent jurisdiction for a temporary restraining order, preliminary injunction, or other interim or conservatory relief, as necessary, without breach of this arbitration agreement and without any abridgement of the powers of the arbitrators.

Disclaimer of Warranties

(COMPANY NAME) WARRANTS THAT THE SERVICES PROVIDED HEREUNDER WILL BE PERFORMED IN A PROFESSIONAL MANNER CONSISTENT WITH THE QUALITY OF (COMPANY NAME)'S PERFORMANCE OF SERVICES FOR SIMILARLY SITUATED CUSTOMERS, (COMPANY NAME) DOES NOT WARRANT THAT THE SERVICES OR DELIVERABLES ARE ERROR FREE, THAT ALL ERRORS WILL BE CORRECTED, WILL RUN ON ALL HARDWARE, OR IDENTIFIES ALL KNOWN VIRUSES, EXCEPT AS PROVIDED ABOVE, THE SERVICES, DELIVERABLES, MEDIA AND RELATED DOCUMENTATION ARE PROVIDED ON AN "AS IS" BASIS, AND (COMPANY NAME) DISCLAIMS ANY IMPLIED WARRANTIES AND CONDITIONS, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR THOSE ARISING BY LAW, STATUTE, USAGE OF TRADE OR COURSE OF DEALING. (COMPANY NAME) MAKES NO REPRESENTATION WITH RESPECT TO THE ADEQUACY OF THE SERVICES OR DELIVERABLES FOR ANY PARTICULAR PURPOSE OR WITH RESPECT TO ITS ADEQUACY TO PRODUCE ANY PARTICULAR RESULT. (COMPANY NAME) SHALL NOT BE LIABLE FOR LOSS OR DAMAGE ARISING OUT OF THIS AGREEMENT OR THE USE OF THE DELIVERABLES BY CUSTOMER.

In order to receive warranty remedies, deficiencies in the services must be reported to (Company Name) in writing within 30 days of completion of the Deliverables and Services. Customer shall not make any additions, deletions or modifications to the Deliverables except as specifically set forth in the documentation or as authorized in writing by (Company Name). Unauthorized modification of the Deliverables shall cause immediate termination of any applicable warranty as established above. CUSTOMER'S SOLE REMEDY SHALL BE TO HAVE THE DEFICIENCIES REMEDIED OR TO RECEIVE A REFUND OF THE PRO RATA AMOUNT OF THE FEES ALLOCABLE TO SUCH SERVICES, AT (COMPANY NAME)'S OPTION. IN NO EVENT SHALL (COMPANY NAME)'S LIABILITY UNDER THIS AGREEMENT, EXCEED THE FEES PAID TO IT BY CUSTOMER ON EACH INDIVIDUAL STATEMENT OF WORK.

Performance and Scope

(Company Name) will provide to Customer the professional services ("Services") as described in the Statement(s) of Work attached hereto as Exhibit A ("SOW") under the terms and conditions of this Agreement. Such Statement of Work may be amended or modified by supplementary change orders agreed to by both parties hereto and attached to the related Statement of Work, and thereafter the Services shall be deemed to include the services described in such supplementary changes orders. Additional Statements of Work may be added to this Agreement and shall be subject to the same terms and conditions as agreed to herein.

(Company Name) will provide such resources and utilize such employees and/or third party consultants as it deems necessary to perform the services as specified in the Statement of Work. The manner and means used by (Company Name) to perform the services desired by the Customer are in the sole discretion and control of (Company Name). (Company Name) shall use commercially reasonable efforts to meet the schedules and times of performance for the Services as set forth in the Statement of Work.

Customer agrees to provide (Company Name) with such information, materials, and technology owned or controlled by Customer as (Company Name) reasonably requires in order to perform the Services. Customer Hereby grants (Company Name) a royalty-free, non-exclusive, world-wide license to use the Customer's Technology, and all Customer IP Rights covering such Customer's technology solely in order for (Company Name) to perform the Services and develop or prepare the Deliverables (as defined) during the term of this Agreement. As between the parties, Customer shall retain all ownership rights in and to the Customer's Technology, and (Company Name) shall gain no rights in or to the Customer's Technology except for the license set forth above. Customer agrees to obtain for (Company Name) the right to use, for the purpose of performing the Services and preparing the Deliverables (as defined), such third party information, materials and technology, and the IP Rights therein, as (Company Name) reasonably requires in order to perform the Services and / or prepare the Deliverables.

Customer and (Company Name) agree to cooperate in good faith to achieve completion of the Services in a timely and professional manner. Customer understands and agrees that (Company Name)'s provision of the Services may depend on the completion of certain Customer tasks or adherence to Customer schedules within

Customer's control; consequently the schedule for completion of the Services or any portion thereof may require adjustments or changes in the event such Customer tasks or schedules change or are modified or are not completed as anticipated. (Company Name) shall bear no liability or otherwise be responsible for delays in the provision of Services or any portion thereof occasioned by Customer's failure to complete in a timely manner, a Customer task or adhere to a Customer schedule.

Term and Termination

This Agreement commences on the Effective Date and, unless terminated earlier pursuant to the terms of this Agreement, shall continue in force unless terminated by the parties. This Agreement may be terminated by either party upon thirty (30) days' prior written notice in the event the other party materially breaches or fails to perform any material term hereof and the breaching party fails to cure such breach within the 30-day period; notwithstanding the foregoing, the cure period for any failure of Customer to pay service fees and expenses due hereunder shall be 10 days from the date of receipt by Customer of any notice of breach relating thereto.

Force Majeure

(Company Name) shall not be responsible for any reasonable delay and/or failure in performance by (Company Name) of any and/or all of (Company Name)'s obligations under this Agreement caused by any act, omission, and/or event beyond (Company Name)'s reasonable control.

Severability

Should any provision of this Agreement be deemed contrary to applicable law and/or unenforceable by any court of competent jurisdiction, such provision shall be considered severed from this Agreement but all remaining provisions shall continue in full force.

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