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Doing Business Overseas: Key Trends and Common Pitfalls

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Grow | Protect | Operate | Finance

Data Privacy

Reconciling Global Regulations

Privacy Law in Massachusetts

Sectoral, at both the Federal and State Level



Applicable Federal Law

Gramm-Leach-Bliley Act (GLBA)

**Health Insurance Portability and
Accountability Act (HIPAA)**

Video Privacy Protection Act (VPPA)

**Family Educational Rights and Privacy
Act (FERPA)**

**Children's Online Privacy Protection Act
(COPPA)**

Federal Trade Commission Act (FTC Act)



Applicable State Law

**Data Breach Notification (Mass. Ann.
Laws 93H, § 3(b)).**

**Insurance Information and Privacy
Protection (Mass. Ann. Laws 175I, § 2)**

**Fair Information Practices (Mass. Ann.
Laws 66A)**

**Protect Access to Confidential Healthcare
(PATCH) Act**

Quick Comparison

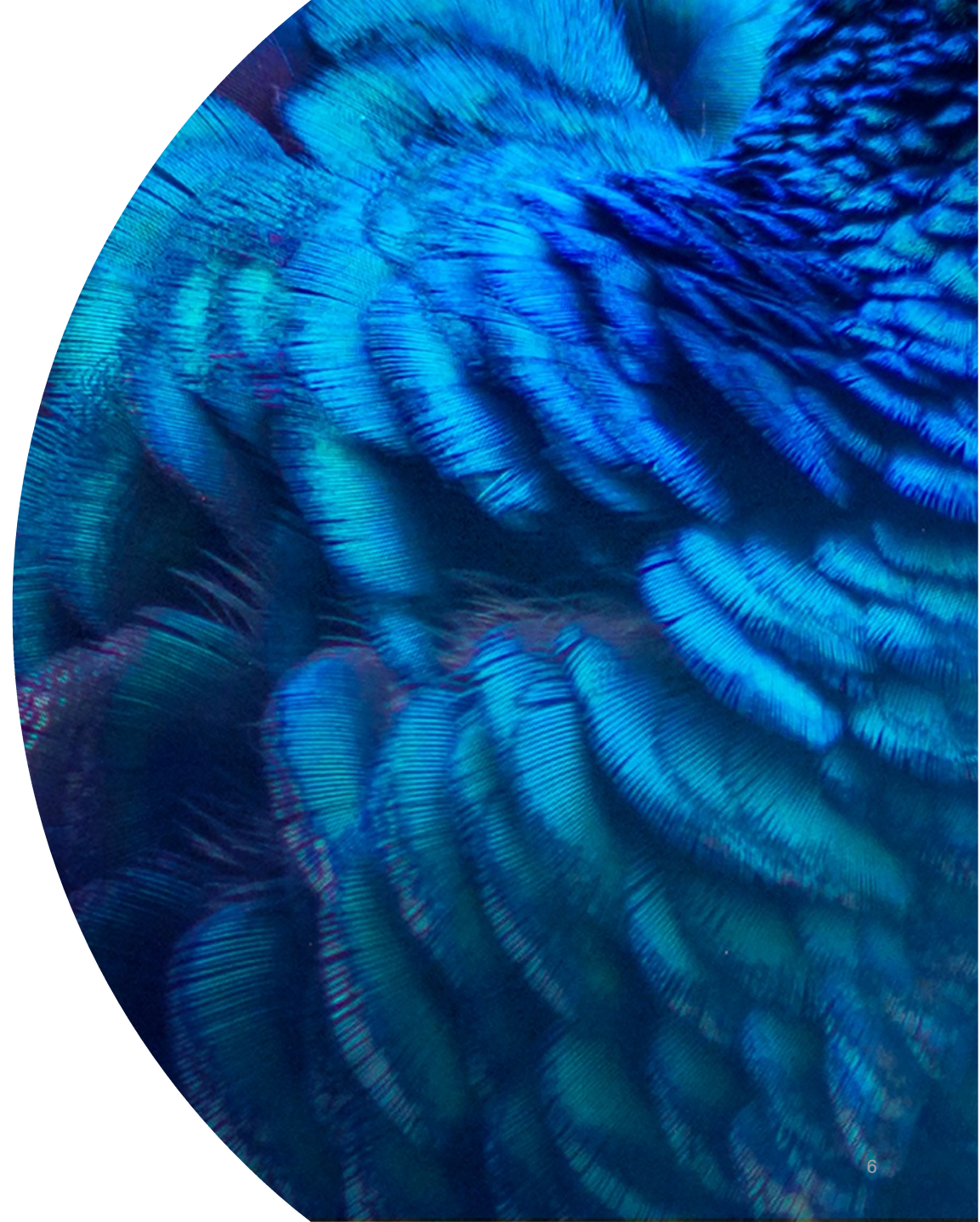
Comprehensive State Privacy Laws at a Glance

State Law	Notice	Risk Assessment	Purpose Limitation	Contract	Quirk
California Consumer Privacy Act, as amended	X	X	X	X	Covers employee data
Colorado Privacy Act	X	X	X	X	Precise geolocation alone not “sensitive”
Connecticut Data Privacy Act	X	X	X	X	Consumer right regarding profiling limited to “automated decisions”
Delaware Personal Data Privacy Act	X	X	X	X	
Indiana Consumer Data Protection Act	X	X	X	X	
Iowa Consumer Data Protection Act	X		X	X	Sexual orientation not “sensitive”
Montana Consumer Data Privacy Act	X	X	X	X	
Oregon Consumer Privacy Act	X	X	X	X	Definition of “Precise Geolocation”
Tennessee Information Protection Act	X	X	X	X	NIST Privacy Framework can be used as affirmative defense
Texas Data Privacy and Security Act	X	X	X	X	
Utah Consumer Privacy Act	X			X	Lowest level of protection
Virginia Consumer Data Protection Act	X	X	X	X	

Privacy Law Internationally

Three Issues

1. Data Subject Rights
2. Cross Border Data Transfers
3. Data Processing Agreements



Privacy Law Internationally

Data Subject Rights: EU General Data Protection Regulation (GDPR)

RIGHT TO BE INFORMED

The right to be informed about the collection and use of their personal data

RIGHT TO ACCESS

The right to view and request copies of their personal data

RIGHT TO RECTIFICATION

The right to request inaccurate or outdated personal information be updated or corrected

RIGHT TO BE FORGOTTEN/RIGHT TO ERASURE

The right to request their personal data be deleted

RIGHT TO DATA PORTABILITY

The right to ask for their data to be transferred to another controller or provided to them. The data must be provided in a machine-readable electronic format

RIGHT TO RESTRICT PROCESSING

The right to request the restriction or suppression of their personal data

RIGHT TO WITHDRAW CONSENT

The right to withdraw previously given consent to process their personal data

RIGHT TO OBJECT

The right to object to the processing of their personal data

RIGHT TO OBJECT TO AUTOMATED PROCESSING

The right to object to decisions being made with their data solely based on automated decision making or profiling

Privacy Law Internationally

Cross Border Data Transfers: China's Personal Information Protection Law



This map is an artistic rendering. There may be some inconsistencies with current, precise national borders.

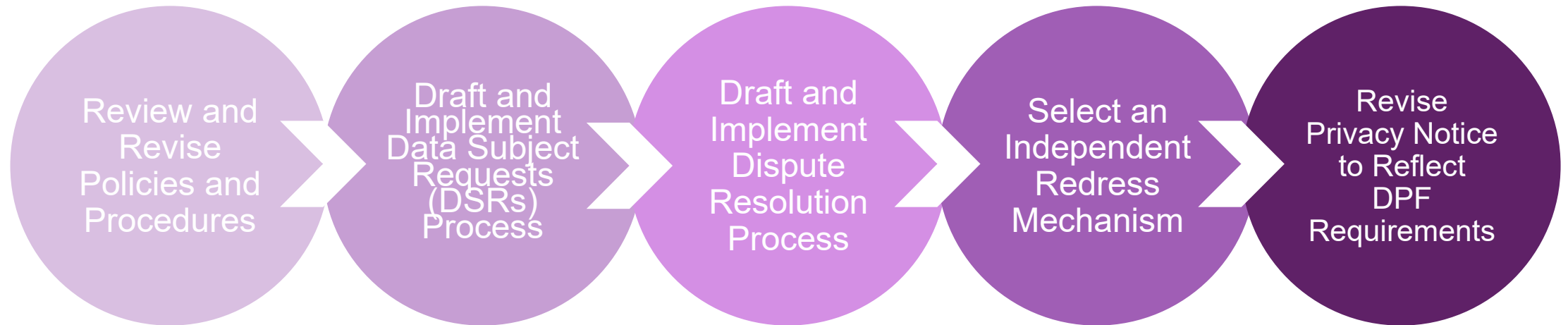
Privacy Law Internationally

Common Elements of Data Processing Agreements/Addenda (DPAs)

- The specific purposes for which the personal data will be processed;
- The categories of personal data that will be processed;
- The duration of the processing;
- The geographic scope of the processing;
- The security measures that will be implemented to protect personal data;
- The rights of individuals with respect to their personal data; and
- The obligation of the parties to comply with applicable law.



DATA PRIVACY FRAMEWORK PROGRAM



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Contract Provisions



Key Contract Provisions

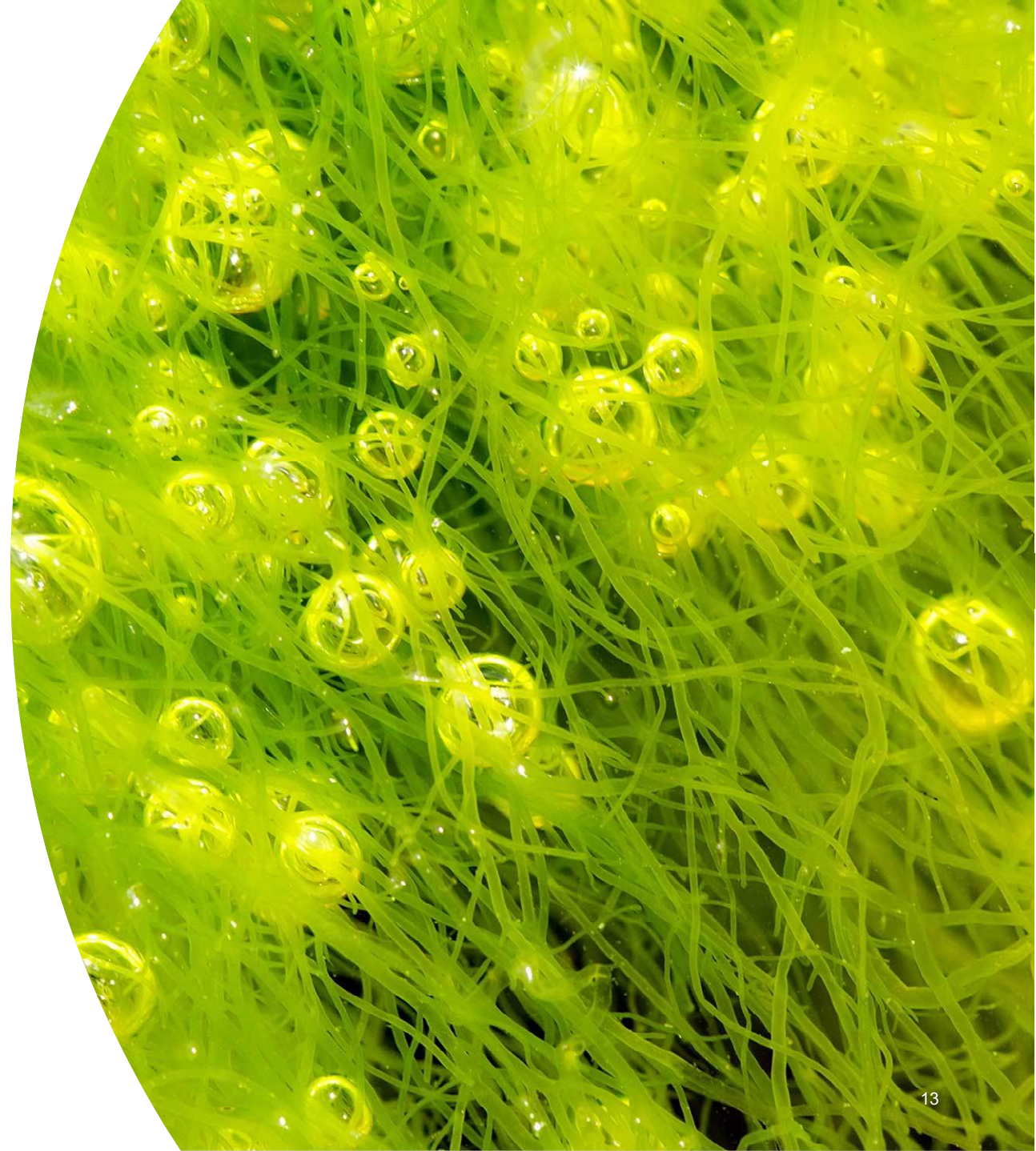
1. Venue and Governing Law
2. Controlling Language
3. Dispute Resolution (including service)



Key Contract Provisions

Venue and Governing Law

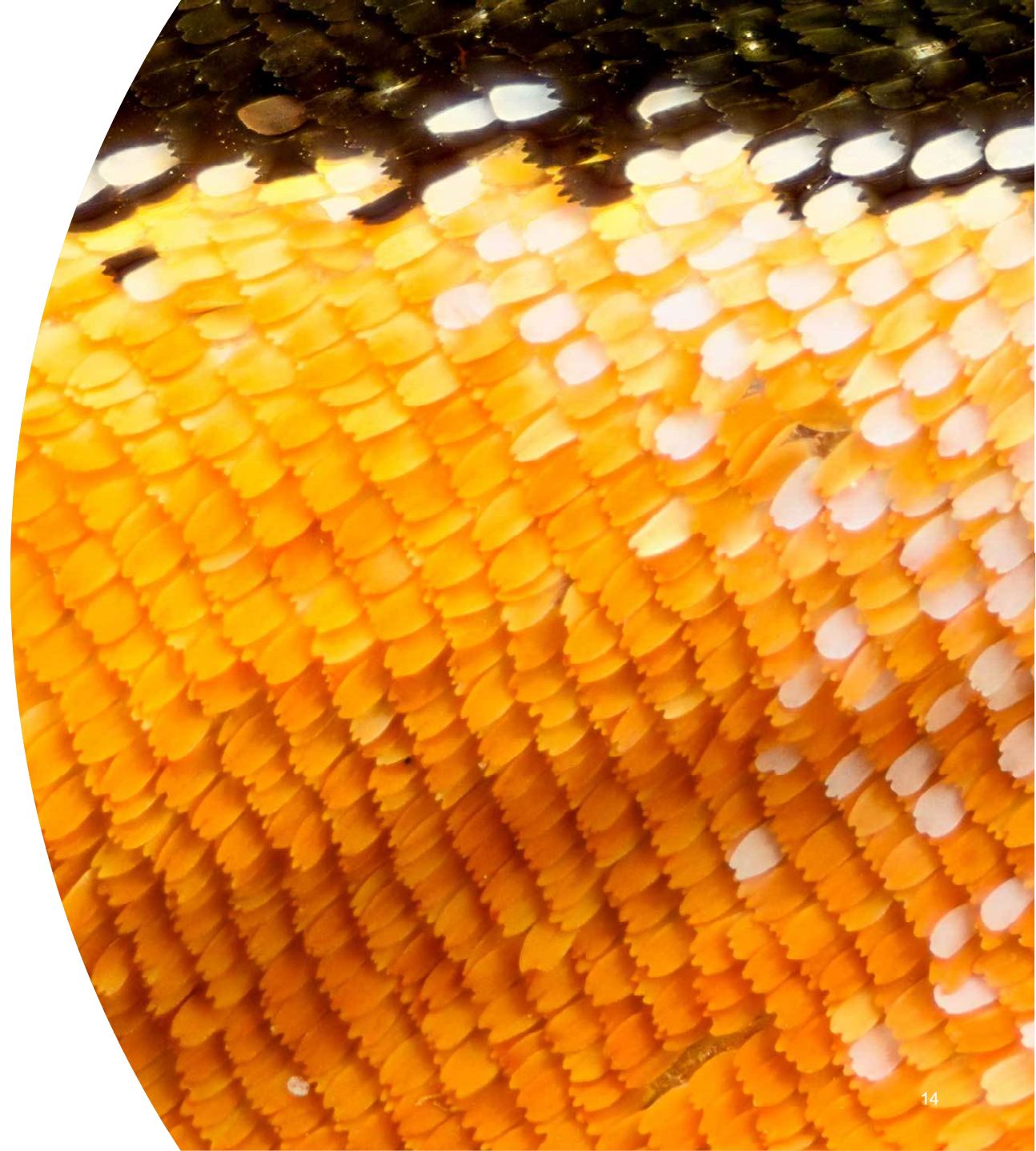
- Venue and governing law provisions will control the location where parties agree to have disputes resolved and the law that will govern interpretation and enforcement of the contract.
- Key Issues:
 - Reliability of outcomes
 - Enforceability of judgments/decisions
 - Speed
 - Confidentiality
 - Cost
 - Access to witnesses or evidence



Key Contract Provisions

Venue and Governing Law – Sample Provision

- **Governing Law:** This [Agreement] shall be construed and enforced in accordance with, and all questions concerning the construction, validity, interpretation, and performance of this [Agreement] shall be governed by the internal laws of [Location] without regarding to any conflict of laws principles.
- **Venue:** The [Parties] agree that any legal suit, action, or proceeding arising out of or relating to this [Agreement] or the transactions contemplated hereby shall be instituted exclusively in [identify forum]. Each of the [Parties] hereby irrevocably waives any objection that it may have to venue of any such suits, actions, or proceedings and irrevocably consents to the jurisdiction of the courts of [identify forum].



Key Contract Provisions

Venue and Governing Law – Additional Sample Provisions

- Additional IP Option: ... except that claims by [Licensor] or payment of fees under this [Agreement] or infringement of [Licensor's] intellectual property rights, which licensor may file in any court with competent jurisdiction.
- Injunctive Relief: Nothing in this [Agreement] shall prevent a [Party] from seeking interim injunctive or other equitable relief in any court of competent jurisdiction to preserve the status quo or to prevent irreparable harm pending resolution of any dispute or from appearing, acting against the other, in any court where a suit arising out of (or in connection with) a [identified matters] is brought by a [Third Party].



Key Contract Provisions

Governing Language

- Agreement on the governing language is important as it will impact interpretation of any contract. This is especially important when the parties are not both native speakers of the same language.
- What language will be the governing language?
- Will there be multiple versions of the contract in different languages?
- Sample Provision:
 - The Parties to this [Agreement] expressly agree that the official language for this [Agreement] and all related documents shall be [English] and that any translation of this [Agreement] for interpretive purposes be done in a manner to be consistent with its meaning in [English]. [Repeat same provision in language of counter-party.]

Key Contract Provisions

Dispute Resolution

- International contracts should specify whether disputes will be resolved in courts or arbitration.
- When deciding whether to opt for judicial or arbitral decision-making consider similar factors used for the decision on venue:
 - Reliability of outcomes
 - Enforceability of judgments/decisions
 - Speed
 - Confidentiality
 - Cost
 - Access to witnesses or evidence
- Consider whether any party outside the forum should maintain an address for the purpose of service of process.

Key Contract Provisions

Dispute Resolution – Arbitration

- Key Issues for Arbitration (not addressed previously):
 - Number of Arbitrators
 - Qualifications of Arbitrators
 - Arbitrator/Arbitral Body (AAA v. ICC, for example)
 - Procedural Rules (if deviating from standards with Arbitral Body)
 - Remedies/enforcement
 - Costs
 - Confidentiality
- Arbitral Forums:
 - AAA
 - International Chamber of Commerce Arbitration
 - International Centre for Dispute Resolution

Key Contract Provisions

Dispute Resolution – Arbitration

- Simple Arbitration Provision:
 - “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the [Insert Arbitral Forum] in accordance with [applicable rules] and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”

Key Contract Provisions

Other Considerations

- Fee-shifting provisions or laws
- Enforcement of ipso facto clauses
- Bankruptcy remote governance provisions

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Employment Considerations

World of Work: Employment Law Considerations

Topics to Discuss with your Legal Counsel:

- At Will Employment versus Employment Agreements;
- Termination of Employment;
- Non-Compete Agreements and Other Restrictive Covenants;
- Employees versus Independent Contractors;
- Leasing Employees;
- Takeaways.

Questions?



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