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Precontractual Documents in Merger or Acquisition Negotiations: An Overview of the International Practice

Ugo Draetta

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Precontractual Documents in Merger or Acquisition
Negotiations: An Overview of the
International Practice

Ugo Draetta*

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I. Letters of Intent and Other Precontractual Documents

The conclusion of international merger or acquisition agree-
ments is generally preceded by a relatively long negotiation phase. During this phase the parties usually exchange a number of docu-
ments, which are usually aimed at reflecting some preliminary agree-
ments or understandings of one or more parties to the future
contract, or having other purposes. These documents are precon-
tractual in light of the future contract to be stipulated by the parties, but they often contain binding commitments directly or indirectly re-
lated to the subject matter of the merger or acquisition contract
under negotiation.

Although the development of international practice with respect
to precontractual documents has been impressive, the practice has
received only limited attention from legal scholars. This is because
legal scholars have traditionally looked at the simpler negotiation

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phase of domestic contracts. In doing so they have concentrated on
the interrelationship between the offer and the acceptance within the
framework of contract formation rules. The only relatively complete
surveys of the international commercial practice regarding precon-
tractual documents address the most common category of such doc-
uments—the letter of intent. The critical issue with respect to such
documents is the difficulty of identifying cases in which letters of in-
tent have a binding nature or other legal effects.

Letters of intent, however, constitute only one type of precon-
tractual document. The parties generally exchange them when a
merger or acquisition negotiation has reached a certain stage of de-
velopment, and the parties wish to memorialize it before proceeding
further toward the possible conclusion of a final agreement.

Before signing a letter of intent, in fact even before actually
starting the negotiations, parties often request other types of precon-
tractual documents to govern certain aspects of their relationship
pending the negotiation process. The most important aspect is the
need to preserve the confidentiality of information regarding the
company to be acquired or the companies to be merged. Oftentimes,
such information is exchanged between the parties at the initia-
tion of negotiations, and is the basis for a decision as to whether or
not negotiations should continue. Consequently, detailed texts of
confidentiality agreements which specifically state the obligations of
the receiving party regarding sensitive information received from the
other party have been developed for international commercial
practice.

Because these confidentiality agreements are signed very early
in the negotiations, they frequently provide a convenient opportu-
nity to settle other concerns of the parties that are only indirectly
related to the confidentiality of the information exchanged. For ex-
ample, recent texts of confidentiality agreements, exchanged during
the negotiation phase of merger or acquisition agreements, address
the seller's concern that the prospective buyer may indulge in "in-
sider trading" activities with respect to the shares, the sale of which
is being negotiated, or that the buyer might launch a hostile takeover
attempt with respect to the company whose sale or merger is under
negotiation. The parties often insert in the confidentiality agree-
ments so called "standstill" commitments, i.e., commitments not to
undertake parallel negotiations with third parties while negotiations
between the parties are in process. Finally, the parties sometimes
insert into their confidentiality agreements clauses preventing the
parties from making employment offers to the other party's key per-
sonnel during the negotiations and for a period of time thereafter.

The following sections will describe: (i) confidentiality agree-
ments in general; (ii) their provisions concerning protection against
insider trading; (iii) their provisions concerning protection against hostile takeovers; (iv) standstill agreements; and (v) prohibitions on making employment offers to the other party's personnel.

II. Confidentiality Agreements in General

The nondisclosure obligation with respect to the confidential information exchanged during negotiations probably derives, even in the absence of a confidentiality agreement, from the general obligation to negotiate in good faith. However, the parties when negotiating a merger or acquisition contract do not normally rely on such general good faith obligations, but prefer to express their respective rights and obligations in detailed confidentiality agreements. Model text of such an agreement, derived from international commercial practice, is found in Appendix 1. The key sentence of this text is:

All information disclosed or furnished by one party to the other, whether orally or in writing, in connection with any discussions pertaining to a potential joint venture or other business alliance between ABC and XYZ in the business shall be deemed to be proprietary and confidential information (Proprietary Information) of the disclosing party. The receiving party agrees that for a period of years from the date of this Agreement, it shall not disclose any Proprietary Information to any third party nor use any Proprietary Information for any purpose other than to evaluate its interest in the potential joint venture or other business alliance referred to above. The receiving party shall protect all Proprietary Information with the same degree of care as it applies to protect its own proprietary and confidential information.

Note that the duration of the commitment by the receiving party not to disclose the information received (left blank in the above reported clause) generally varies from three to five years.

If the nondisclosure obligation is undertaken for an undetermined period of time (which is not unusual), its actual duration, in case of dispute, will be established by a court of competent jurisdiction. The decision will depend on the applicable law. As a rule of thumb, it is likely the owner of the information will be protected only if it can show that it has a continuing interest in the confidential nature of the information.

The party receiving the information promises not only to refrain from disclosure, but also not to use it "for any purpose other than to evaluate its interest in the potential joint venture or other business alliance." This formula indicates the more stringent and explicit

In addition to the obligations to abstain ("not to disclose" and "not to use"), the receiving party also promises to act, i.e., to "protect all Proprietary Information with the same degree of care as it applies to protect its own proprietary and confidential information." This presents the obvious risk of relying on the assumption that the receiving party has a high standard of care in protecting its own information, which may not actually be the case. Consequently, it should be used with caution. It is better to clarify that the protection afforded to the information’s owner by the obligations to abstain constitutes a minimum protection in any event. The obligation to act would be operative only in the sense of offering greater protection for cases where the information’s recipient applies a higher standard of care. The clause would then allow the party supplying the information to benefit from this higher standard.

The second paragraph of Appendix 1 contains limitations or exclusions on the nondisclosure obligation. Notwithstanding the boilerplate nature of such limitations or exclusions, they should always be included in confidentiality agreements for clarity’s sake and to avoid endless disputes. Those appearing in Appendix 1 are particularly elaborate. The first limitation or exclusion states that if the confidential information comes to be within the public domain, then the receiving party is no longer bound by the secrecy obligation. Nevertheless, this exclusion would not apply, according to the clause, if the information comes to be within the public domain due to a violation of the nondisclosure obligation by the receiving party (a clarification which may appear unnecessary to a civil law lawyer). The other limitations or exclusions mentioned by the second paragraph are self-explanatory and do not require any particular comment.

A party bound by a confidentiality obligation may be required, by order of a judge, to disclose the information received. Disclosure which occurs in such a situation would not, of course, result in liability for the disclosing party. Some confidentiality agreements contemplate that if a party receives this disclosure order, it should immediately notify the owner of the information so that it may seek an appropriate protective order.

The third paragraph of the confidentiality agreement in Appendix 1 contains a termination provision. The provision does not affect the duration of the nondisclosure obligation, which generally survives the termination of the contract. It may seem superfluous to

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2 "Nemo de improbitate sua consequitur actionem." Digest 47.2.12(1) (Ulpian, De Furtis) (No one can derive an advantage from his own misbehavior.).

3 See Fontaine, Les Obligations "Survivant au Contrat" dans les Contrats Internationaux, 10 Droit et Pratique du Commerce International 7, 17-18 (1984). Fontaine specifically...
provide for a termination of the confidentiality agreement itself, div- 
vorced from the termination of the secrecy obligation. This clause, 
however, contemplates the possibility that, at a given moment in 
time, one or both parties may want the information to be returned 
from the receiving party to its owner, either because the negotia-
tions have broken off or because they have failed to produce any 
agreement after a given period of time. Hence, the need for a ter-
mination provision for the confidentiality agreement itself, apart from the du-
ration of the secrecy obligation, is recognized.

Note that in the fifth paragraph of Appendix 1, the parties use 
the confidentiality agreement as an opportunity to affirm their free-
dom to entertain parallel negotiations with third parties. The text 
reads: “Nothing in this agreement shall be construed as precluding 
the receiving party at any time from... negotiating with, or entering 
into any agreement with others relating to the general subject matter 
of this Agreement.”

Section V below discusses standstill agreements, which contain 
diametrically opposed clauses. In connection with the clause above, 
it is surprising that the freedom to entertain parallel negotiations is 
established only in favor of the party receiving the information, not 
in favor of the party supplying it.

Finally, the last paragraph of Appendix 1 clarifies that its clauses 
prevail over any legend (such as “strictly confidential”) the parties 
supplying the information might stamp upon the relevant docu-
ments. It is preferable to detail into an agreement the rights and 
obligations of the parties with respect to confidential information, 
rather than leaving them to interpretation or legends of doubtful 
meaning stamped on the documents containing such information.

The confidentiality agreements discussed in this section are 
precontractual documents which, unlike most letters of intent, con-
tain binding obligations of a contractual nature. The violation of 
such obligations constitutes a breach of contract entitling the dam-
aged party to full compensation for the damages suffered, not merely 
for the “reliance damages,” as would be the case under the culpa in 
contrahendo principles for letters of intent.4

Damages will be those reimbursable under the applicable law. 
For the violation of secrecy obligations, however, it is not always easy 
for the damaged party to provide evidence of the damages incurred. 
Additionally, the damages actually incurred might be higher than 
those which can be proven. To overcome this difficulty, the confi-

addresses the confidentiality obligation among those generally surviving the termination 
of the contract, as well as the legal issues created by such obligations. See id. at 21-27.

4 On the consequences of violation of the secrecy obligation, see Fontaine, supra 
note 1, at 96; Morin, Le Devoir de Coopération dans les Contrats Internationaux, 6 DROIT ET 
PRATIQUE DU COMMERCE INTERNATIONAL 9, 11-12 (1980); Schmidt, La Négociation du Contrat 
dentiality agreements sometimes provide: "The parties recognize that the remedy at law for any breach by either of the parties of its obligations hereunder is inadequate and either party shall be entitled to equitable remedies, including injunction, in the event of breach by the other party." However, the practical effect of the above clause is limited since courts cannot apply any criteria in determining the amounts of the damages other than that contemplated by the law. Only an arbitration board deciding on the basis of equity could enjoy greater discretion in its appraisal of damages, but this would create other problems which the parties may want to avoid. It is better to use a penalty clause, with full knowledge of the limitations to which penalty clauses are subject under many national laws.

III. Protection Against Insider Trading During the Negotiations

More sophisticated texts of confidentiality agreements (such as those appearing in Appendices 2 and 3) supplied during the acquisition negotiations contain additional clauses specifically intended to prohibit certain undesired use of the information regarding the company to be acquired. Sometimes these prohibitions are simply intended to reinforce existing statutory provisions of the applicable law; other times they impose new obligations upon the recipient of such information.

The prohibition against using the confidential information except in such a way as to evaluate whether to buy or sell on the stock market shares of the company which is the subject of the negotiations is an illustration of the first type. Examples of such provisions are included in each of the two texts in Appendices 2 and 3. The third paragraph of Appendix 2 reads:

You [the information's recipient] hereby acknowledge that you are aware, and that you will advise such directors, officers, employees and representatives who are informed as to the matters which are

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5 For example, in France such damages are determined according to Code Civil arts. 1150 and 1151 and in Italy according to Codice Civile arts. 1223 and 1225. These provisions contemplate that only damages that are the direct consequence of the breach and are foreseeable at the moment the obligation was undertaken can be reimbursed. British law adopts instead the criteria of "causation" and "remoteness." Though it would appear that these criteria leave little room for equity considerations, in both civil and common law systems there is great incertitude as to the criteria for reimbursement of damages so that often the courts end up issuing decisions based to a considerable extent on common sense and equity.

the subject of this letter, that the United States securities laws prohibit any person who has received from an issuer material, nonpublic information concerning the matters which are the subject of this letter from purchasing or selling securities of such issuer or from communicating such information to any other person under circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell such securities.

Paragraph 5 of the text of Appendix 3 goes even further, imposing upon the recipient of the information a contractual obligation which strengthens the prohibition derived by the law:

The Company [receiving the information] acknowledges that it is aware (and that its representatives who are appraised of this matter have been, or upon becoming so appraised will be, advised) of the restrictions imposed by the United States federal securities laws and other applicable laws on a person possessing material nonpublic information about a company. The Company hereby agrees that while it is in possession of the Information and, for a period of five years thereafter, neither it nor any of its representatives or affiliates will directly or indirectly propose to ABC on behalf of itself or any third party, or in any manner participate itself or with a third party, or assist any third party, in a purchase or an offer or an agreement to purchase any securities or assets of ABC or any subsidiary or other affiliate of ABC.

The first of the illustrations above merely recalls the applicable U.S. laws on insider trading, which are actually included in the Insider Trading Sanctions Act of 1984 as amended by The Insider Trading and Securities Fraud Enforcement Act of 1988, passed by the U.S. Congress.7 The second illustration, after having recalled the applicability of the above statutes, translates some of their provisions into contractual obligations, though with certain important differences. The contractual obligation is narrower than the statutory one, to the extent that it concerns only the purchase, not the sale, of shares of the company to be acquired, and has a time limitation of five years. On the other hand, it does not contain reference to "material" information, as the U.S. insider trading regulations do, but applies in all cases in which confidential information of any kind is supplied by one of the parties to the other. Even where the text of the agreement merely refers to the applicable regulations, such reference is not useless because it draws the recipient party's attention to the need to comply with such regulations in the course of the negotiations between the two parties.

Many large international companies send circular letters to all their employees who are, or could be, aware of the pending negotiations in order to protect themselves against inadvertent violations of similar provisions contained in confidentiality agreements signed by their employees. Such letters are drafted substantially as follows:

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As you know we are considering a potential transaction involving ABC, a publicly-traded company, and have signed with ABC a confidential agreement containing the following clauses. . . . You should consider the fact that such a transaction can be "inside information," i.e., information that could affect the price of ABC stock when and if the information is publicly disclosed. In view of this, you should not, until after either a public announcement relating to this matter or the termination of our consideration of a possible transaction: trade in ABC stock; suggest that anyone else trade in ABC stock; disclose the fact that we are considering this transaction to anyone who does not have a need to know (you should also provide a copy of this letter to anyone to whom you disclose this information).

By doing this, the company separates its liability from that of its employees, who may violate the insider trading regulations or the contractual commitments undertaken by the company. It also establishes a basis for disciplinary action against such employees, as well as for recovering the damages from them. The general applicability of these provisions is affected by their reference to the specific U.S. insider trading regulations. Considering the increasing attention that the EEC8 and many EEC member states are giving to the problems of insider trading, it is easy to predict that this practice will spread (if it is not already spreading) around Europe.

IV. Protection Against Hostile Takeovers During the Negotiations

In some cases, the texts of confidentiality agreements impose upon the recipient of the information certain obligations which are not related to a specific body of legislation such as the insider trading regulations. Clauses preventing the recipient of the information from launching hostile takeover bids that target the company whose acquisition is under negotiation are examples.

Takeovers are "hostile" to the extent that the bidder is acting without the target management's agreement. The use of hostile takeovers is common in the United States, and is rapidly spreading into Europe, as indicated by recent widely-publicized cases in England, France, and Belgium.

When management of a company negotiates, for example, the sale of a company's business activity to a third party, and correspondingly supplies certain financial and technical information to a third party, the company would want to protect itself from the risk that the potential "friendly" acquirer might use the information to establish a price for a hostile takeover bid with this company as its target. This risk is far from theoretical.

The fifth paragraph of Appendix 2 reads (with emphasis added):

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You hereby acknowledge that the Evaluation Material is being furnished to you in consideration of your agreement that you will not propose to the Company or any other person any transaction between you and the Company and/or its security holders or involving any of its security holders unless the Company shall have requested in writing that you make such a proposal, and that you will not acquire, or assist, advise or encourage any other persons in acquiring, directly or indirectly, control of the Company or any of the Company's securities, businesses or assets for a period of three years from the date of this letter unless the Company shall have consented in advance in writing to such acquisition. You also agree that the Company shall be entitled to equitable relief, including injunction, in the event of any breach of the provisions of this paragraph and that you shall not oppose the granting of such relief.

Paragraph 5 of Appendix 3 deals with the issue of hostile takeovers in the following way (with emphasis added):

The Company hereby agrees that while it is in possession of the Information and, for a period of five years thereafter, neither it nor any of its representatives or affiliates will directly or indirectly propose to ABC on behalf of itself or any third party, or in any manner participate itself or with a third party, or assist any third party, in an offer or an agreement to enter into any acquisition, merger or other business combination transaction relating to ABC or any subsidiary or other affiliates of ABC unless any such offer or proposal shall have been specifically invited by the Chief Executive Officer or the Board of Directors of ABC or unless any such proposal shall relate to an immaterial amount of assets or insignificant subsidiary or affiliate of ABC and with respect to which a representative of ABC has invited a proposal by the Company.

In spite of the different wording and duration (three years versus five years) of these obligations, the purpose of both clauses is to prevent the information's recipient from attempting to acquire the company to which the information refers, without the agreement of that company's management.

It is clear that, in case of breach of the obligations contemplated in the clauses reported above, the only effective relief for the damaged party consists of obtaining an injunction preventing the hostile takeover. Should the takeover be allowed, the mere reimbursement of damages would not be an adequate remedy, particularly considering the fact that, following the hostile takeover, the damaging entity would end up controlling the damaged entity. Consequently, the first clause makes express reference to an injunctive remedy for breaches of the obligation not to attempt hostile takeovers.

From a broader perspective, clauses of this kind can be included in so-called "poison pills," i.e., devices (generally of a corporate law nature) by which management attempts to protect itself against hostile takeovers by third parties. "Poison pills" include disposition of the strategic business of the company (making it less attractive to a hostile bidder) and capital increases which dilute share ownership by the third party.

Note that the obligations mentioned in this section generally
survive the termination of the contract, giving rise to the same kind of problems discussed in Section II above with respect to confidentiality obligations.\(^9\)

V. Standstill Agreements

Another recurring concern for the parties to a negotiation is that one of them might secretly entertain parallel negotiations with third parties. The existence of such parallel negotiations could adversely affect the bargaining position of one of the parties. The negotiating strategy for a buyer would be different if it knew that it was really involved in an auction. Potential buyers might not be interested in negotiating in an auction environment.

From a business ethics perspective, no one should falsely lead his negotiating partner to believe that he has a genuine intention to enter into a contract when, for instance, he intends only to push the negotiations up to a particular reference price in order to trigger a first refusal clause involving a third party. Equally condemnable from a business ethics point of view is continuing to negotiate without intending to contract and with the sole purpose of creating the threat of an alternative in the eyes of a third party with whom parallel negotiations are in process.

From a strictly legal perspective, it is generally admissible to entertain parallel negotiations without informing the various partners, with the only limitations being those deriving from considerations of \textit{culpa in contrahendo} in civil law countries.\(^10\) However it is not easy, from a practical point of view, to determine when the good faith threshold has been passed; hence, parties frequently use standstill agreements (such as the one in Appendix 4) under which one of the negotiating parties undertakes the obligation, for a limited time (normally not exceeding two or three months), not to conduct parallel negotiations with third parties.

The text reproduced in Appendix 4 is a letter agreement between ABC and XYZ. ABC, a company of relatively small dimension, was exploiting advanced technology. XYZ, a large multinational company, was selling products that would benefit from this technology. XYZ was interested in buying all or part of ABC's business activities where this technology was being used. ABC, when signing the usual confidentiality agreement, and "in order to continue the negotiation," asked XYZ to commit itself to a "standstill agreement." (Actually the confidentiality clause is not very elaborate and

\(^9\) See Fontaine, \textit{supra} note 3, at 21-27.

\(^10\) See Schmidt, \textit{supra} note 4, at 259 (in the absence of agreement, concurrent negotiations do not constitute \textit{faute délictuelle}). This statement can be substantially shored, except for the case where the nondisclosure of a parallel negotiation can be said to violate the obligation to conduct negotiations in good faith. See generally Farnsworth, \textit{supra} note 1 (regarding parallel negotiations as instances of unfair dealing).
is confined to point 5 of Appendix 4.) By far the most detailed provision of the agreement is that concerning XYZ’s commitments not to enter into negotiations with third parties regarding the possible purchase of competing business activities—not to dispose of XYZ’s business activities concerning the products affected by the proposed agreement with ABC, and not to conclude any agreement with third parties concerning such products over and above the ordinary course of business.

In spite of their limited duration (two months) and the rather routine exceptions contemplated by point 3 of the agreement, these commitments are significantly onerous for XYZ; they find their justification in ABC’s need to be protected from possible bad faith behavior by XYZ, and to be reassured about XYZ’s seriousness in negotiating with ABC.

The enforceability of obligations not to entertain parallel negotiations varies from country to country. Enforceability is generally conceded, but there is difficulty in determining the amount of the reimbursable damages in case of breach. The enclosed text provides a solution to this problem in point 4 which begins by stating that the breach by XYZ of its “standstill” commitment would cause irreparable damages to ABC and that such damages would in any case be very difficult to quantify. The clause further prescribes that in the event of a breach, XYZ would pay ABC two million U.S. dollars, in addition to reimbursing ABC for its out-of-pocket expenses.

The clause also specifies that the two million U.S. dollar payment constitutes “liquidated damages,” not “penalties.” By calling it “liquidated damages,” the parties intended to circumvent the general hostility shown by national laws to “penalties,” i.e., provisions not intended to provide a genuine estimate of damages, but contemplating payments in amounts unrelated to the actual damages incurred in order to function as a deterrent against breaches of contractual obligations. What is permitted is a provision for “liquidated damages,” which constitute an estimate of damages, made by the parties in case of a future breach of an obligation, when the amount of such damages cannot be easily determined.

In the Appendix 4 example, it is doubtful that the mere qualification of this payment by the parties as “liquidated damages” would prevent a court from deeming it a “penalty” considering that there is no reasonable relation between the actual damages incurred as a consequence of the parallel negotiations and the amount of two million U.S. dollars. A common law court would consider the clause invalid and a civil law judge would not feel inhibited, even in the

11 See Schmidt, supra note 4, at 258-59 (referring to the enforceability of obligations not to entertain parallel negotiations under English and French law).
12 See supra note 6.
presence of this qualification, from reducing the amount of the penalty at his own discretion if the law so authorizes.\textsuperscript{13}

VI. Protection Against Employment Offers Made During the Negotiations

Oftentimes, parties negotiating a merger or acquisition protect themselves against attempts by one party to hire key personnel of the other party during the negotiations in their confidentiality agreements. Actions of this type are connected, though indirectly, with the exchange of information, or at least with the obligation of the receiving party not to use such information in any way detrimental to the party supplying it.

Negotiations create excellent opportunities to meet and evaluate key personnel of the other party. For some companies, people are their most important asset. Examples include engineering, software, and project management companies, whose value is really a function of the professionalism and competence of their leaders and key employees. Therefore, it is understandable that the potential buyer of such companies may try to identify these key people by taking advantage of the contacts developed during the negotiations, and then make an employment offer to these people at particularly advantageous conditions. Should this action be successful, the potential buyer will reach substantially the same objective he would have achieved by purchasing the company, but at a much lower cost.

The potential seller of a company or business activity often tries to protect himself against such a risk by obliging the other party (already beginning negotiations) to abstain from making employment offers to key personnel. A clause frequently used to achieve this objective is: “Without ABC’s prior written consent, you will not, for a period of two years from the date hereof, directly or indirectly solicit for employment or employ any person who is now employed by the Business Unit in an executive or technical position or otherwise considered a key employee.”

The practical effect of such a clause must not be overrated. A party willing to circumvent it would simply refrain from making formal employment offers, and would instead informally approach the other party’s employees, making sure that the employees take the initiative, i.e., that they request to be hired. No contractual clause could prevent someone from being hired who is already in the employment market. Obviously the real issue is the ability of the damaged party to prove the violation of the non-hiring obligation. This problem is the same as that of repetitive hiring of a competitor’s employees under unfair competition laws of many nations.

\textsuperscript{13} For example, the French Civil Code and the Italian Civil Code give a judge such power. \textit{Code Civil} arts. 1152(2), 1231 (Fr.); \textit{Codice Civile} arts. 1384, 1526 (Italy).
In order for the non-hiring obligation to have some effect, its duration must exceed that of the negotiations themselves, so as not to create the incentive to break-off negotiations by the party wishing to freely hire the other's personnel. This is why these obligations generally survive both the negotiations and the termination of the confidentiality agreements in which they are inserted.
Appendix 1

Gentlemen:

Representatives of ABC and XYZ have agreed to preliminarily discuss the potential for a joint venture or other business alliance between ABC and XYZ in the ___ business. ABC and XYZ each agrees that during these discussions there will be a need to exchange oral and written information which is considered to be proprietary to it and confidential, and each is willing to disclose such information under the terms and conditions set forth below:

1. All information disclosed or furnished by one party to the other, whether orally or in writing, in connection with any discussions pertaining to a potential joint venture or other business alliance between ABC and XYZ in the ___ business shall be deemed to be proprietary and confidential information (Proprietary Information) of the disclosing party. The receiving party agrees that for a period of ___ years from the date of this Agreement, it shall not disclose any Proprietary Information to any third party nor use any Proprietary Information for any purpose other than to evaluate its interest in the potential joint venture or other business alliance referred to above. The receiving party shall protect all Proprietary Information with the same degree of care as it applies to protect its own proprietary and confidential information.

2. Notwithstanding the provisions of Paragraph 1 above, the receiving party shall have no obligation with respect to any information which (i) is or becomes within the public domain through no act of the receiving party in breach of this Agreement; (ii) was in the possession of the receiving party prior to its disclosure or transfer hereunder and the receiving party can so prove; (iii) is independently developed by the receiving party and the receiving party can so prove; or (iv) is received from another source without any restriction on use or disclosure.

3. Except for the obligations of the parties with respect to Proprietary Information disclosed prior to expiration or termination, this Agreement shall (unless extended by mutual agreement) expire or terminate at the earliest of the following events:
   (a) one (1) year after the date of this Agreement; or
   (b) thirty (30) days after written notice of termination provided by either party to the other.

   Upon such expiration or termination, either party may request from the other party that all documentation (and copies thereof) containing Proprietary Information be returned, and the other party shall so return such documentation forthwith.

4. No rights to any patents or trademarks are provided or are to be implied by any provision of this Agreement or any Proprietary Information exchanged pursuant to this Agreement.
5. Nothing in this Agreement shall be construed as precluding the receiving party at any time from independently developing ideas, negotiating with, or entering into any agreement with others relating to the general subject matter of this Agreement, subject, however, to the provisions of paragraphs 1 and 2 hereof with respect to disclosure and use of Proprietary Information.

6. This Agreement contains the sole and entire agreement between the parties relating to the subject hereof and any representation, promise, or condition not contained herein, or any amendment hereto shall not be binding on either party unless set forth in a subsequent written agreement signed by an authorized representative of the party to be bound thereby.

If the foregoing provisions are acceptable to you, please signify your acceptance by signing and returning the enclosed duplicate copy of this letter. This Agreement shall apply in lieu of and notwithstanding any specific legend or statement associated with any particular document or information exchanged.

Very truly yours,

ABC

ACCEPTED AND AGREED BY:

XYZ
Appendix 2
To XYZ
Gentlemen:

In connection with your consideration of a possible transaction with ABC (the "Company"), you have requested information concerning the Company. As a condition to your being furnished such information, you agree to treat any information concerning the Company (whether prepared by the Company, its advisors or otherwise) which is furnished to you by or on behalf of the Company (herein collectively referred to as the "Evaluation Material") in accordance with the provisions of this letter and to take or abstain from taking certain other actions herein set forth. The term "Evaluation Material" does not include information which (i) is already in your possession, provided that such information is not known by you to be subject to another confidentiality agreement with or other obligation of secrecy to the Company or another party, or (ii) becomes generally available to the public other than as a result of a disclosure by you or your directors, officers, employees, agents or advisors, or (iii) becomes available to you on a non-confidential basis from a source other than the Company or its advisors, provided that such source is not known by you to be bound to a confidentiality agreement with or other obligation of secrecy to the Company or another party.

You hereby agree that the Evaluation Material will be used solely for the purpose of evaluating a possible transaction between the Company and you, and that such information will be kept confidential by you and your advisors; provided, however, that (i) any of such information may be disclosed to your directors, officers and employees and representatives of your advisors who need to know such information for the purpose of evaluating any such possible transaction between the Company and you (it being understood that such directors, officers, employees and representatives shall be informed by you of the confidential nature of such information and shall be directed by you to treat such information confidentially), and (ii) any disclosure of such information may be made to which the Company consents in writing.

You hereby acknowledge that you are aware, and that you will advise such directors, officers, employees and representatives who are informed as to the matters which are the subject of this letter, that the United States securities laws prohibit any person who has received from an issuer material, non-public information concerning the matters which are the subject of this letter from purchasing or selling securities of such issuer or from communicating such information to any other person under circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell such securities.
In addition, without the prior written consent of the Company, you will not, and will direct such directors, officers, employees and representatives not to, disclose to any person either the fact that discussions or negotiations are taking place concerning a possible transaction between the Company and you or any of the terms, conditions or other facts with respect to any such possible transaction, including the status thereof.

You hereby acknowledge that the Evaluation Material is being furnished to you in consideration of your agreement that you will not propose to the Company or any other person any transaction between you and the Company and/or its security holders or involving any of its securities or security holders unless the Company shall have requested in writing that you make such a proposal, and that you will not acquire, or assist, advise or encourage any other persons in acquiring, directly or indirectly, control of the Company or any of the Company's securities, businesses or assets for a period of three years from the date of this letter unless the Company shall have consented in advance in writing to such acquisition. You also agree that the Company shall be entitled to equitable relief, including injunction, in the event of any breach of the provisions of this paragraph and that you shall not oppose the granting of such relief.

Although the Company has endeavored to include in the Evaluation Material information known to it which it believes to be relevant for the purpose of your investigation, you understand that neither the Company nor any of its representatives or advisors have made or make any representation or warranty as to the accuracy or completeness of the Evaluation Material. You agree that neither the Company nor its representatives or advisors shall have any liability to you or any of your representatives or advisors resulting from the use of the Evaluation Material.

In the event that you do not proceed with the transaction which is the subject of this letter within a reasonable time, you shall promptly redeliver to the Company all written Evaluation Material and any other written material containing or reflecting any information in the Evaluation Material (whether prepared by the Company, its advisors or otherwise) and will not retain any copies, extracts or other reproductions in whole or in part of such written material. All documents, memoranda, notes and other writings whatsoever prepared by you or your advisors based on the information in the Evaluation Material shall be destroyed, and such destruction shall be certified in writing to the Company by an authorized officer supervising such destruction.

You agree that unless and until a definitive agreement between the Company and you with respect to any transaction referred to in the first paragraph of this letter has been executed and delivered,
neither the Company nor you will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this or any written or oral expression with respect to such a transaction by any of its directors, officers, employees, agents or any other representatives or its advisors or representatives thereof except, in the case of this letter, for the matters specifically agreed to herein. The agreement set forth in this paragraph may be modified or waived only by a separate writing by the Company and you expressly so modifying or waiving such agreement.

This letter shall be governed by, and construed in accordance with, the laws of this State of ___.

Very truly yours,

ABC
Appendix 3

To XYZ

Re: Confidentiality Agreement

Dear Sirs:

In connection with the consideration by XYZ (the "Company") of the possible acquisition of one of the business sectors (the "Business") of ABC, you have requested certain information from ABC concerning the Business as well as ABC and other of its businesses, which information is either non-public, confidential or proprietary in nature. All written information heretofore or hereafter furnished or made available to you and your "representatives" (which term includes collectively your directors, officers, employees, agents, or other representatives, including without limitation attorneys, accountants and consultants) by ABC or any of its representatives in the course of activities related to your consideration of a possible acquisition of the Business or other transaction with ABC, and all other analyses, computer files (whether or not reduced to written form), compilations, memoranda, notes, reports, data, studies or other documents and all copies and extracts thereof prepared by you or your representatives containing or based in whole or in part on any such information or reflecting your view or evaluation of the Business or any of its subsidiaries, divisions or other businesses or assets, is hereinafter referred to as the "Information."

In consideration of your being furnished with the Information, you agree that:

1. For the period of five years from the date set forth above, the Information will be kept confidential by you and your representatives and will not, without the prior written consent of ABC, be disclosed by you or your representatives, in any manner whatsoever, in whole or in part, and will not be used by you or your representatives for any purpose other than assisting you in evaluating a possible acquisition of the Business by you. Moreover, you agree to transmit the Information only to those representatives who are officers or employees of you or your subsidiaries and who need to know the Information and who agree to be bound by the terms of this Agreement, and to such other of your representatives or affiliates (as used herein "affiliates" includes any person or entity directly or indirectly, through one or more intermediaries, controlling you or controlled by or under common control with you), as we may in writing approve prior to disclosure of the Information who need to know the Information for the purpose of evaluating or subsequently assisting in a possible acquisition of the Business by you and who agree to be bound by the terms of a confidential agreement acceptable to ABC. You agree to notify ABC, prior to the delivery or disclosure of any
Information to your third party representatives or affiliates. You will be responsible for any breach of this Agreement by your representatives or affiliates.

2. Without the prior written consent of ABC, you and your representative will not disclose to any other person the fact that the Information has been made available, that discussions or negotiations are taking place concerning a possible acquisition of the Business by you, or any of the terms, conditions or other facts with respect to such a transaction, including the status thereof, except as is permitted by paragraph 8 of this Agreement. The term “person” as used in this Agreement will be broadly interpreted to include without limitation any corporation, company, group, partnership or individual.

3. You shall keep a record of each location of the Information. In the event discussions with respect to a possible acquisition of the Business or other transaction with ABC are terminated, upon ABC’s request the portion of the Information furnished or made available to you or your representative by ABC or any of its representatives shall be returned to ABC without your retaining copies thereof and all other Information will be destroyed without your retaining copies thereof. Such determination will be confirmed in writing by an officer of the Company.

4. This Agreement shall be inoperative as to such portions of the Information which (i) are or become generally available to the public other than as a result of a disclosure by you or your representatives or affiliates; (ii) become available to you on a non-confidential basis from a source other than ABC, or one of its representatives which has represented to you (and which you have no reason to disbelieve after due inquiry) is entitled to disclose it; or (iii) were known to you on a non-confidential basis prior to the disclosure to you by ABC or one of its representatives.

5. The Company acknowledges that it is aware (and that its representatives who are apprised of this matter have been, or upon becoming apprised will be, advised) of the restrictions imposed by the United States federal securities laws and other applicable laws on a person possessing material non-public information about a company. The Company hereby agrees that while it is in possession of the Information, and for a period of five years thereafter, neither it nor any of its representatives or affiliates will directly or indirectly propose to ABC on behalf of itself or any third party, or in any manner participate itself or with a third party, or assist any third party, in (i) a purchase or an offer or an agreement to purchase any securities or assets of ABC or any subsidiary or affiliate of ABC; (ii) an offer or an agreement to enter into any acquisition, merger or other business combination transaction relating to ABC or any subsidiary or other
affiliates of ABC; (iii) seek any modifications to or waiver of the Company's agreements and obligation under this Agreement; or (iv) make any public announcement with respect to the foregoing, unless any such offer or proposal shall have been specifically invited by the Chief Executive Officer or the Board of Directors of ABC or unless any such proposal shall relate to an immaterial amount of assets or insignificant subsidiary or affiliate of ABC and with respect to which a representative of ABC has invited a proposal by the Company.

6. While you are in possession of the Information and for one year thereafter all your representatives in possession of the Information or otherwise aware of the discussion or negotiations between us agree not to solicit or cause or assist in the solicitation of, the employment of, or employ, any officer or executive or management employee of ABC who is engaged in whole or in part in the Business or with whom you have had contact in connection with your evaluation of the Business.

7. You understand that we have endeavored to include in the Information those materials which are believed to be responsive to your request and reliable and relevant for the purpose of our assisting you, but you acknowledge that neither ABC nor any of its representatives makes any representation or warranty as to the accuracy or completeness of the Information. You agree that neither ABC nor any of its representatives or affiliates shall have any liability to you or any of your representatives and affiliates, it being understood that only particular representations and warranties which may be made by ABC in a definitive agreement in respect of the acquisition of the Business, when, as and if it is negotiated and executed, and subject to such limitations and restrictions as may be specified in such definitive agreement, shall have any legal effect.

8. In the event that you or anyone to whom we transmit the Information pursuant to this Agreement are requested or become legally compelled (by oral questions, interrogatories, request for information or documents, subpoena, civil investigative demand or similar process) to disclose any of the Information, you will provide ABC with prompt written notice so that ABC may seek a protective order or other appropriate remedy or waive compliance with the provisions of the agreement. In the event that such protective order or other remedy is not obtained, and to the extent that ABC has not waived that portion of the Information which your counsel advises you are legally required to disclose, you will exercise your best efforts to obtain reliable assurance that confidential treatment will be accorded such Information.

9. You agree that ABC shall be entitled to equitable relief, including injunction and specific performance, in the event of any breach of the provisions of paragraphs 1, 2, 3, 5, 6, or 8 of this
Agreement. Such remedies shall not be deemed to be the exclusive remedies for a breach of the Agreement by you, your representatives or affiliates but shall be in addition to other remedies available at law or equity.

10. It is further understood and agreed that no failure or delay by ABC in exercising any right, power, or privilege under this agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise of any right, power or privilege hereunder. This agreement may be amended or terminated only by a writing signed by the parties.

11. This agreement shall be governed and construed in accordance with the laws of the State of — applicable to agreements made and performed within such State.

Very truly yours,

ABC
Gentlemen,

The undersigned, ABC, and XYZ, have been discussing for several months a proposed joint venture in the field of the Technology (as hereinafter defined). ABC and XYZ are presently negotiating the terms and conditions of the proposed joint venture and have not reached an agreement in principle. However, in order to continue the negotiations, ABC and XYZ have agreed as follows:

1. Subject to Paragraph 3 hereof, from and after the date hereof until the close of business on —, unless this Agreement is earlier terminated by mutual agreement, XYZ will not, directly or indirectly, (a) solicit, initiate discussions or engage in negotiations with any person, other than ABC, relating to the possible acquisition of any Technology (as hereinafter defined) (whether such negotiations are initiated by XYZ or otherwise); (b) provide information to any person, other than ABC, relating to the possible acquisition of any Technology (whether by way of merger, purchase of capital stock, purchase of assets or otherwise); or (c) enter into a transaction with any person, other than ABC, concerning the possible acquisition of any Technology (whether by way of merger, purchase of capital stock, purchase of assets or otherwise).

2. Subject to Paragraph 3 hereof, from and after the date hereof until the close of business on —, unless this Agreement is earlier terminated by mutual agreement, XYZ will not, directly or indirectly, (a) sell, lease, license, transfer, pledge, mortgage, hypothecate or otherwise dispose of any Technology or any material asset, property or right of or belonging to XYZ relating to the Technology; (b) enter into any transaction relating to the Technology outside of the ordinary course of business; or (c) disclose any confidential or proprietary information contained in or relating to the Technology to any person, other than ABC, its representatives or agents.

3. Notwithstanding anything contained herein to the contrary:
   (a) XYZ and its subsidiaries may discuss licensing arrangements with potential licensees of Technology upon prior notice to ABC and with ABC’s prior consent, which consent will not be unreasonably withheld; provided, however, that each potential licensee shall sign a confidentiality agreement in form and substance acceptable to ABC and XYZ, and ABC shall be given an opportunity to participate in all discussions with such potential licensees;
   (b) XYZ and its subsidiaries may license or transfer all or any portion of the Technology to any wholly-owned direct or indirect
subsidiary of XYZ; provided, however, that such transferee agrees to become a party to and be bound by the terms of this Agreement;

(c) XYZ and its subsidiaries may disclose Technology to their attorneys and other legal representatives and may prosecute patent applications concerning Technology before the relevant patent offices of any country and obtain patents thereon.

4. The parties hereto recognize and acknowledge that in the event (i) XYZ shall enter into an agreement or understanding with any person, other than ABC, concerning the acquisition of any Technology (whether by way of merger, purchase of assets or otherwise) prior to the Stipulated Date (as hereinafter defined); or (ii) XYZ shall breach or otherwise violate Section 1, 2 or 3 of this Agreement prior to the Stipulated Date and, within 30 days after the Stipulated Date, enter into an agreement or understanding with such person concerning the acquisition of any Technology (as aforesaid); ABC will suffer irreparable and material loss and damage, the amount of which is not readily determinable and, accordingly, the parties agree that in such event XYZ shall immediately pay to ABC, as liquidated damages (and not as a penalty), an amount equal to the sum of (A) all reasonable out-of-pocket expenses incurred by ABC in connection with the negotiations and due diligence investigation contemplated hereby (including, without limitation, all attorneys’, accountants’ and other professional fees and expenses) and (B) the amount of US$2,000,000, and upon such payment, this Agreement shall terminate; provided, however, that such payment shall be ABC’s sole and exclusive remedy for the events specified in Paragraph 4 (i) and (ii) above; provided further, however, that nothing contained herein shall limit or otherwise restrict ABC from pursuing any legal or equitable remedy with respect to any other breach or violation by XYZ of this Agreement.

If the foregoing accurately sets forth our understanding with respect to the subject matter hereof, kindly execute this letter where indicated below and return such executed copy to ABC.

Very truly yours,
By: ABC

AGREED TO AND ACCEPTED AS OF THE DATE FIRST ABOVE WRITTEN
By: XYZ