

FIGURE 1: LINKS BETWEEN THE CATEGORIES OF PROVISIONS

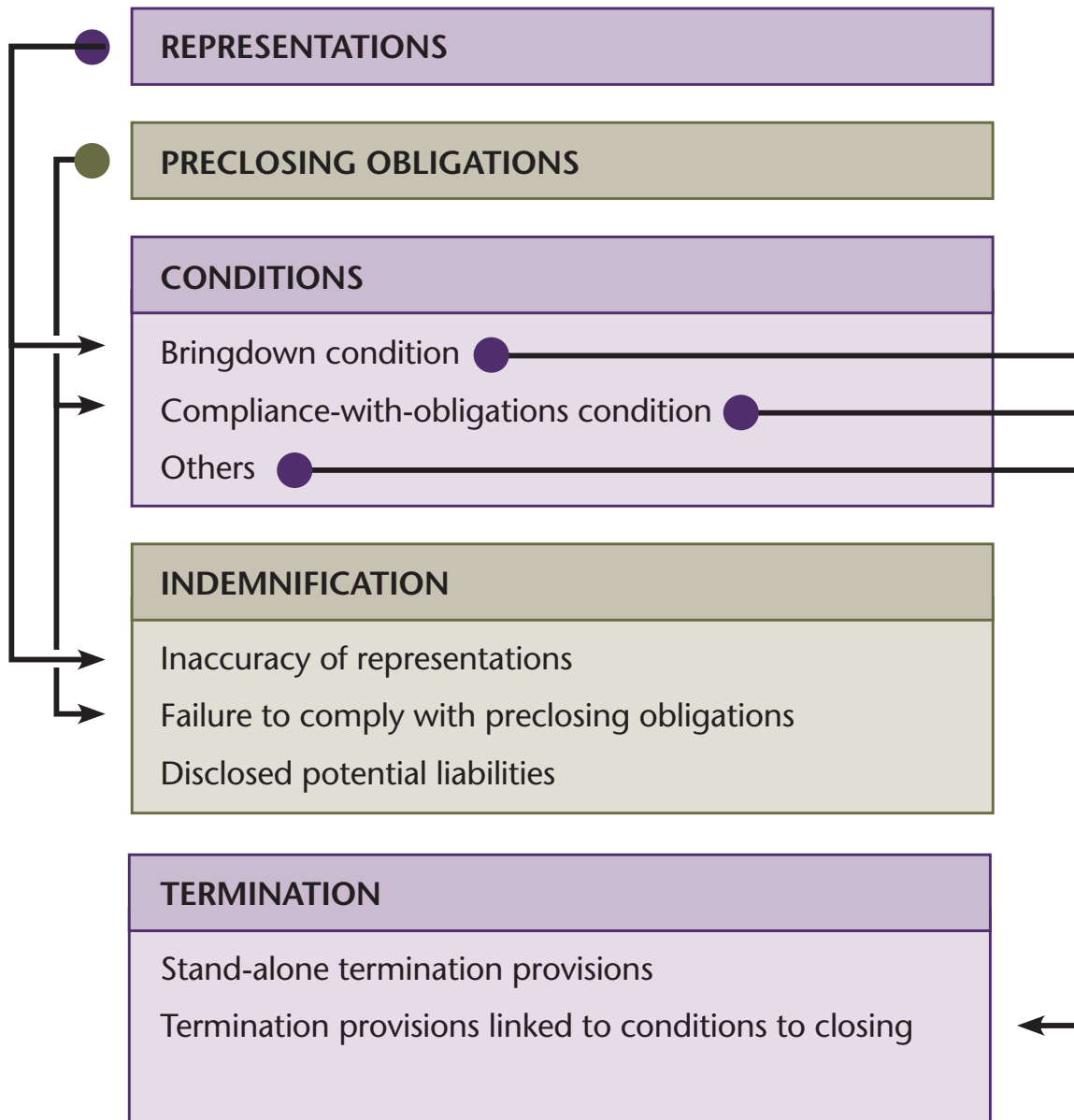


FIGURE 2: WHERE TO ADDRESS A GIVEN ISSUE

In a transaction with a deferred closing, a given issue could be addressed in a representation, a preclosing obligation, a condition, the indemnification provisions, or the termination provisions. Which approach makes most sense depends in part on the nature of the issue. Use of shaded text within thick borders indicates where it would be best to address a given issue.

	<i>Fact Under the Seller's Control</i>	<i>Action Under the Seller's Control</i>	<i>Fact or Action by Person Not Under the Seller's Control</i>	<i>Economic Condition Not Under the Seller's Control</i>
<i>Seller Representations</i>	The Seller is a corporation duly organized, validly existing, and in good standing under the laws of the state of Delaware.	The Seller has granted the Buyer and its representatives access to the Seller's premises between the date of this agreement and the Closing.	Acme has not terminated the Acme Contract.	The price of vanadium is at least \$100 per gram.
<i>Seller Preclosing Obligations</i>	The Seller shall remain a corporation duly organized, validly existing, and in good standing under the laws of the state of Delaware.	The Seller shall grant the Buyer and its representatives access to the Seller's premises between the date of this agreement and the Closing.	The Seller shall cause Acme not to terminate the Acme Contract before the Closing.	The Seller shall cause the price of vanadium to be at least \$100 per gram.
<i>Conditions to the Buyer's Obligations</i>	The Buyer's obligation to consummate the transaction contemplated by this agreement is subject to satisfaction of the following conditions:			
	that the Seller is a corporation duly organized, validly existing, and in good standing under the laws of the state of Delaware;	that the Seller has granted the Buyer and its representatives access to the Seller's premises between the date of this agreement and the Closing;	that Acme has not terminated the Acme Contract;	that the price of vanadium is at least \$100 per gram;
<i>Indemnification</i>	The Seller shall indemnify the Buyer against any Indemnifiable Losses arising from the following:			
	the Seller's not being a corporation duly organized, validly existing, and in good standing under the laws of the state of Delaware;	the Seller's not granting the Buyer and its representatives access to the Seller's premises between the date of this agreement and the Closing;	Acme's terminating the Acme Contract before the Closing;	the price of vanadium being less than \$100 per gram;
<i>Termination</i>	This agreement may be terminated as follows:			
	by the Buyer if the Seller ceases to be a corporation duly organized, validly existing, and in good standing under the laws of the state of Delaware;	by the Buyer if the Seller fails to grant the Buyer and its representatives access to the Seller's premises between the date of this agreement and the Closing;	by the Buyer if Acme terminates the Acme Contract before the Closing;	by the Buyer if the price of vanadium is less than \$100 per gram;
	(For why it would be appropriate to address the issue in the third main column in both a condition and the termination provisions but would be most efficient to address the issue in the fourth main column only in a condition, see 1.16, 6.6, and figure 7.)			

### FIGURE 3: ADDING REFERENCE POINTS AND QUALIFICATIONS TO REPRESENTATIONS

Shading indicates contract language; the unshaded text represents analysis.

Seller Representations	Analysis
Schedule 4.8 lists each contract to which the Seller is party.	This representation is unqualified. See 2.75. Omitting some or all qualifications relating to significance, making satisfaction of the buyer's bringdown condition subject to a materiality qualification, and making the seller's indemnification obligations subject to a basket is an alternative to including numerous materiality qualifications in the seller's representations; see 2.111.
Schedule 4.8 lists each contract to which the Seller is party <i>on the date of this agreement</i> .	If the seller enters into contracts in the ordinary course of business, the buyer might well agree to this qualification—adding the date of the agreement as a reference point. But it would make sense for the buyer to require, in exchange, that the following preclosing obligation be imposed on the seller, as it would give the buyer a measure of control over preclosing change: Without the prior written consent of the Buyer, [which the Buyer shall not unreasonably withhold,] the Seller shall not enter into any contract [other than in the ordinary course of business]. See 2.59–62.
Schedule 4.8 lists each <i>Material</i> contract to which the Seller is party.	Adding an appropriate qualification allows you to limit the scope of a representation to those matters that achieve the specified level of significance. It's standard for that to be accomplished by using the word <i>material</i> . Using <i>material</i> as a defined term would allow you to avoid the ambiguity otherwise associated with the word. See 2.76–85. This qualification using <i>Material</i> couldn't be reworded as a qualification using the phrase <i>material adverse change</i> , or MAC. See 2.97. The buyer might want any significance qualification to be disregarded in determining whether a basket has been "filled." See 5.24–27.
Schedule 4.8 lists each contract to which the Seller is party, <i>except for any contract for purchase of widgets that does not require the Seller to pay more than \$X in the aggregate</i> .	This exception is an example of a bright-line alternative to using the word <i>material</i> . See 2.109.
<i>To the Seller's Knowledge</i> , Schedule 4.8 lists each contract to which the Seller is party	It would be unusual for the buyer to agree to this qualification, as the seller should know what contracts it's party to. See 2.113–116.
No litigation is pending against the Seller.	This representation is unqualified; see 2.75. Omitting some or all qualifications relating to significance, making satisfaction of the buyer's bringdown condition subject to a materiality qualification, and making the seller's indemnification obligations subject to a basket is an alternative to including numerous materiality qualifications in the seller's representations; see 2.111.
<i>On the date of this agreement</i> , no litigation is pending against the Seller.	If the seller's business is such that it can expect to be sporadically subject to lawsuits, the buyer might well agree to this qualification—adding the date of the agreement as a reference point. But it would make sense for the buyer to require, in exchange, that the following be added as a gap-closing condition to the buyer's obligation to close: that no litigation has been commenced against the Seller after the date of this agreement, [except for any litigation that would not reasonably be expected to result in a MAC] [except for any litigation in which the amount at issue is less than \$X]. See 2.66–69.

FIGURE 3: ADDING REFERENCE POINTS AND QUALIFICATIONS TO REPRESENTATIONS (continued)

<i>Seller Representations</i>	<i>Analysis</i>
No <i>Material</i> litigation is pending against the Seller.	Adding an appropriate qualification allows you to limit the scope of a representation to those matters that achieve the specified level of significance. It's standard for that to be accomplished by using the word <i>material</i> . Using it as a defined term would allow you to avoid the ambiguity otherwise associated with <i>material</i> ; see 2.76–85. This qualification using <i>Material</i> couldn't be reworded as a qualification using MAC. See 2.97. The buyer might want any significance qualification to be disregarded in determining whether a basket has been "filled." See 5.24–27.
No litigation is pending against the Seller, <i>except for any litigation that would not reasonably be expected to result in a MAC</i> .	If the buyer is concerned that an inaccuracy in that representation could adversely affect the fortunes of the seller, then it would be clearer to qualify that representation using MAC rather than just <i>Material</i> . But not all qualifications using <i>material</i> can be converted into MAC qualifications. See 2.96-97.
<i>To the Seller's Knowledge</i> , no litigation is pending against the Seller.	It would be unusual for the buyer to agree to this qualification, as the seller should know what litigation is pending against it. See 2.113-116. But a knowledge qualification is standard in representations regarding threatened litigation.
The Seller is in compliance with all laws.	This representation is unqualified; see 2.75. Omitting some or all qualifications relating to significance, making satisfaction of the buyer's bringdown condition subject to a materiality qualification, and making the seller's indemnification obligations subject to a basket is an alternative to including numerous materiality qualifications in the seller's representations; see 2.111.
<i>As of the date of this agreement</i> , the Seller is in compliance with all laws.	It would be unusual for the buyer to agree to this modification, as any failure by the seller to comply with any law could not reasonably be considered to be something that could arise in the ordinary course of business between entry into the contract and closing. See 2.63-64.
The Seller is in <i>Material</i> compliance with all laws.	If a representation contains two nouns that could be modified by <i>Material</i> , it would make most sense to modify the noun that represents the focus of the representation. In this case, the focus is compliance, not the laws themselves. See 2.90-91. The buyer might want any significance qualification to be disregarded in determining whether a basket has been "filled." See 5.24–27.
The Seller is in compliance with all laws, <i>except for any instances of noncompliance that would not reasonably be expected to result in a MAC</i> .	If the buyer is concerned whether a representation inaccuracy could have an adverse effect on the fortunes of the seller, then it would be clearer to qualify that representation by using MAC rather than <i>Material</i> . See 2.96. The buyer might want any significance qualification to be disregarded in determining whether a basket has been "filled." See 5.24–27.
<i>To the Seller's Knowledge</i> , the Seller is in compliance with all laws.	It would be unusual for the buyer to agree to this qualification, as the seller is in a better position to know whether it's in compliance with laws, and the buyer would likely argue that the seller should bear the risk of the unknown. See 2.113-116.
<i>To the Seller's Knowledge</i> , the Seller is not in violation of any Environmental Laws.	If the buyer agrees to this knowledge qualification, it would be appropriate for the buyer and the seller to address, in the definition of <i>Knowledge</i> , whose knowledge would be relevant and whether those one or more persons are subject to a duty to investigate. See 2.120-123.

FIGURE 4: SUBCATEGORIES OF TRANSACTIONAL OBLIGATIONS

	<i>Category</i>	<i>Transactional Obligations</i>
	Ensure-the-conditions-are-satisfied obligation	Subject to section __ [any Seller obligation to take one or more specified actions required to satisfy a particular condition], the Seller shall use reasonable efforts to cause to be satisfied the conditions stated in section __ [Conditions to the Buyer’s Obligations] and section __ [any condition to the Seller’s obligation that needs, or might benefit from, action by the Seller in order to be satisfied].
<b>REDUNDANT</b>	Ensure-the-representations-are-accurate obligation	The Seller shall use reasonable efforts to cause all the representations made by the Seller in article 2 to be accurate as of the Closing.
	Obligation to use efforts to satisfy a specific condition	EXAMPLE: The Seller shall use reasonable efforts to obtain all Consents.
	Obligation stating actions required to satisfy a specific condition	EXAMPLE: [Obligation stating steps the Seller is required to take to obtain shareholder approval or regulatory consents.]
	Obligation to provide information on nonsatisfaction of conditions	The Seller shall promptly notify the Buyer of any event or circumstance as a result of which any of the conditions stated in section __ [Conditions to the Buyer’s Obligations] could not or would not reasonably be expected to be satisfied.
	Other transactional obligations	EXAMPLES: [Obligations requiring that the Seller— <ul style="list-style-type: none"> <li>• give the Buyer access to the Seller premises and records</li> <li>• not disclose any confidential information of the Seller</li> <li>• not enter into any alternative transaction</li> <li>• sign any additional documents and take any additional actions necessary or desirable to consummate the transaction]</li> </ul>

FIGURE 5: CATEGORIES OF CONDITIONS

Lead-in: The Buyer’s obligation to consummate the transaction contemplated by this agreement is subject to satisfaction of the following conditions:			
<i>Related Representation</i>	<i>Category</i>	<i>Conditions to the Buyer’s Obligation to Close</i>	
	Gating conditions	EXAMPLE: that the waiting period under the Hart-Scott-Rodino Act has expired or been terminated;	
		EXAMPLE: that the Seller’s shareholders have authorized the Seller to enter into this agreement and consummate the transactions contemplated by this agreement;	
		EXAMPLE: that the Seller has obtained all [Material] Consents;	
		EXAMPLE: that the Buyer has received the proceeds of the Financing;	
	Bringdown condition	Maintain-the-bargain conditions	that [individually and in the aggregate,] the representations made by the Seller in article __ [Seller’s Representations] were [Materially] accurate on the date of this agreement and are [Materially] accurate at Closing;
	Compliance-with-obligations condition		that the Seller has [Materially] complied [, individually and in the aggregate,] with those of its obligations under this agreement that it is required to comply with before the Closing;
	Gap-closing conditions		EXAMPLE: that no MAC has occurred since the date of this agreement;
	External conditions		that no Proceedings are pending that seek to prevent consummation of the Transaction;
			that there is in effect no Law or Order that prevents consummation of the Transaction;
			EXAMPLE: that the market price of the Seller’s common stock is at least \$23.00;
Transactional conditions	EXAMPLE: that the Seller has delivered to the Buyer the following items: EXAMPLE: that the Buyer has receive from the Seller’s counsel an opinion dated the Closing Date in the form of exhibit __;		

Between January 1, 2011, and the date of this agreement, no MAC has occurred

## FIGURE 6: TERMINATION PROVISIONS

This table contains provisions stating when the buyer would be permitted to terminate. Some of the provisions also apply to the seller, but provisions that apply only to the seller have been omitted.

Most provisions would be appropriate in all contracts; those that are transaction-specific are designated “EXAMPLE.”

<b>Lead-in:</b> This agreement may be terminated as follows:		
<i>Stand-Alone Termination Provisions</i>		<i>Comments</i>
by written agreement of the parties;		Even without this provision, the parties could elect to terminate.
by the Buyer or the Seller if the Closing has not occurred by the Termination Date, except that the right to terminate this agreement in accordance with this clause (2) will not be available to any party whose failure to comply with any obligation under this agreement resulted in the Closing not occurring by the Termination Date;		The termination date is often referred to as the “drop-dead date.”
EXAMPLE: by the Buyer if for any reason it is not satisfied with the results of its due diligence investigation of the Seller;		
EXAMPLE: by the Buyer if the Seller’s board of directors authorizes the Seller to enter into an Alternative Transaction or withdraws the Seller Board Recommendation;		
<i>Related Conditions</i>	<i>Termination Provisions that Refer to Inability to Satisfy a Condition</i>	<i>Comments</i>
Bringdown condition	by the Buyer, if any representation made by the Seller in article __ on the date of this agreement was inaccurate when made such that the condition stated in section ___ [the “bringdown” condition] could not be satisfied;	These are an alternative to a more conventional formulation—“by the Buyer, if any representation of the Seller stated in this agreement was inaccurate when made or
Bringdown condition	by the Buyer, if any representation made by the Seller in article 2 as of the date of this agreement could not be made again on any date after the date of this agreement and before the Termination Date so as to satisfy the condition stated in section ___ [the bringdown condition] (assuming for that purpose that that date is the Closing Date), except that if the Seller is capable of remedying the circumstances preventing that condition from being satisfied, then the Buyer may not terminate this agreement in accordance with this clause x unless the Buyer notifies the Seller of those circumstances and the Seller fails to remedy those circumstances no later than 10 days after the Buyer so notifies the Seller;	becomes inaccurate such that the condition stated in section ___ [the bringdown condition] would not be satisfied.”
Compliance-with-obligations condition	by the Buyer, if the Seller fails to comply with any of its obligations under this agreement such that the condition stated in section ___ [the compliance-with-obligations condition] could not be satisfied;	

FIGURE 6: TERMINATION PROVISIONS (continued)

<i>Related Condition</i>	<i>Termination Provisions that Track the Language of a Condition</i>	<i>Comments</i>
Gap-closing condition relating to absence of a MAC since the date of the agreement	EXAMPLE: by the Buyer, if a MAC has occurred since the date of this agreement;	
<i>Related Conditions</i>	<i>Termination Provisions Specifying an Event that Would Prevent a Given Condition from Being Satisfied</i>	<i>Comments</i>
Gating condition regarding shareholder authorization	EXAMPLE: by the Buyer or the Seller if at the Special Meeting or any adjournment thereof the Seller Shareholder Approval is not obtained;	This is an example of a termination provision that refers an event that would prevent a gating condition from being satisfied.
External conditions that no law or order in effect	by the Buyer or the Seller if any Order permanently enjoining or otherwise prohibiting consummation of the transaction contemplated by this agreement becomes final and nonappealable, on condition that a party wishing to terminate this agreement in accordance with this clause (2) has complied with section ___ [the ensure-the-conditions-are-satisfied obligation] with respect to satisfaction of the condition stated in section ___ [the condition stating that that there is in effect no Law or Order that prevents consummation of the Transaction];	This also in effect serves as a stand-alone termination provision that addresses the issue raised by the condition as to the absence of any proceedings that seek to prevent consummation of the transaction; see figure 7.
	<i>Redundant Termination Provisions</i>	
	EXAMPLE: by the Buyer if there occurs an Event of Bankruptcy with respect to the Seller;	This would presumably be covered by a "Solvency" representation given by the seller. (Note that a court may well hold that termination in the event of bankruptcy is unenforceable.)



## FIGURE 7: THE LINK BETWEEN CONDITIONS AND TERMINATION PROVISIONS

A buyer would want the right to terminate if any closing condition couldn't be satisfied. But in the case of conditions other than the bringdown condition and the compliance-with-obligations condition, various factors make it preferable not to state, in a catch-all termination provision or in individual termination provisions, that the buyer may terminate if any one of those conditions cannot be satisfied. As explored in this table, the factors vary depending on the kind of condition. Shading indicates contract language; the unshaded text represents analysis.

<i>Condition</i>		<i>Termination Provision</i>
<i>Condition that states that a specified event has to have taken place</i>	EXAMPLE: that the Seller has obtained all [Material] Consents;	by the Buyer if the condition stated in section _____ could not be satisfied;  by the Buyer if any Person from whom the Seller is seeking a [Material] Consent refuses in writing to give that [Material] Consent;
<p>ANALYSIS: With respect to this kind of condition, nonoccurrence of the specified event wouldn't necessarily mean that the condition couldn't be satisfied—it could just mean that it hasn't been satisfied yet. So if the buyer wants to terminate by invoking a termination provision that allows the buyer to terminate if any condition, or a specific condition, couldn't be satisfied, the buyer would have to argue that some other event precludes satisfaction of this kind of condition. With respect to the example condition above, the buyer could point to a landlord's having stated in writing that it won't grant a consent.</p> <p>But that approach raises the possibility of dispute. With respect to the example condition above, the seller could claim that it should have until the drop-dead date to get the landlord to change its mind. To avoid such uncertainty, instead of saying that failure to satisfy a given condition is grounds for termination, it would be clearer to specify in a termination provision—as in the example termination provision above—any one or more events that would have the effect of preventing that condition from being satisfied.</p>		
<i>Condition that states that a specified event has to have NOT taken place</i>	EXAMPLE: that no MAC has occurred since the date of this agreement;	by the Buyer if the condition stated in section _____ could not be satisfied;  by the Buyer if a MAC has occurred since the date of the agreement;
<p>ANALYSIS: Unlike conditions that specify that an event has to have taken place, this kind of condition would be impossible to satisfy once the specified event takes place, so the termination provision could simply cross-reference the condition. But for clarity and ease of reading, it would be preferable to do without the cross-reference and instead track the language of the condition.</p>		
<i>Condition that states that a specified circumstance has to be in effect</i>	EXAMPLE: that the market price of the Seller's common stock is at least \$23.00;	by the Buyer if the condition stated in section _____ could not be satisfied;
<p>ANALYSIS: If a condition specifies a circumstance that has to be in effect, absence of that circumstance preclosing wouldn't mean that the condition couldn't be satisfied—it would just mean that it couldn't be satisfied at that point. So if with respect to this sort of condition the buyer wants to terminate by invoking a termination provision that allows the buyer to terminate if any condition, or a specific condition, couldn't be satisfied, the buyer would have to argue that some other event precludes satisfaction of the condition. But with respect to the example condition above, it's not clear what kind of event that might be, and any such event would likely be sufficiently drastic as to be covered somewhere else in the contract. So it's likely that with respect to the example condition above, nothing would be gained by linking a termination provision to this condition. But this sort of analysis should be applied to such conditions on a case-by-case basis.</p>		

FIGURE 7: THE LINK BETWEEN CONDITIONS AND TERMINATION PROVISIONS (continued)

<i>Condition</i>		<i>Termination Provision</i>
<i>Condition that states that a specified circumstance has to NOT be in effect</i>	EXAMPLE: that there is in effect no Law or Order that prevents consummation of the Transaction;	<del>by the Buyer if the condition stated in section — could not be satisfied;</del>
	EXAMPLE: that no Proceedings are pending that seek to prevent consummation of the Transaction;	by the Buyer or the Seller if any Order permanently enjoining or otherwise prohibiting consummation of the transaction contemplated by this agreement becomes final and nonappealable ... ;
<p><b>ANALYSIS:</b> If a condition specifies a circumstance that has to not be in effect, having that circumstance be in effect preclosing wouldn't mean that the condition couldn't be satisfied—it would just mean that it couldn't be satisfied at that point. So if with respect to this sort of condition the buyer wants to terminate by invoking a termination provision that allows the buyer to terminate if any condition, or a specific condition, couldn't be satisfied, the buyer would have to argue that some other event precludes satisfaction of the condition. It would be clearer instead to specify any such event in a termination provision. That's what the example termination provision above does for purposes of the first example condition above, with respect to court orders.</p> <p>And the second example condition above shows that whether this sort of condition can be satisfied might have no bearing on the buyer's concerns with respect to the topic addressed in the condition: it may be that no proceedings are pending against the seller because proceedings that had been pending have concluded, with the seller having lost. So to address in a termination provision the buyer's concerns regarding the issue addressed in this condition would require a stand-alone termination provision. It so happens that the termination provision offered with respect the first example condition above would also address the issue raised with respect to the second example condition above. But how to treat this kind of condition should be considered on a case-by-case basis.</p>		