

CNC®

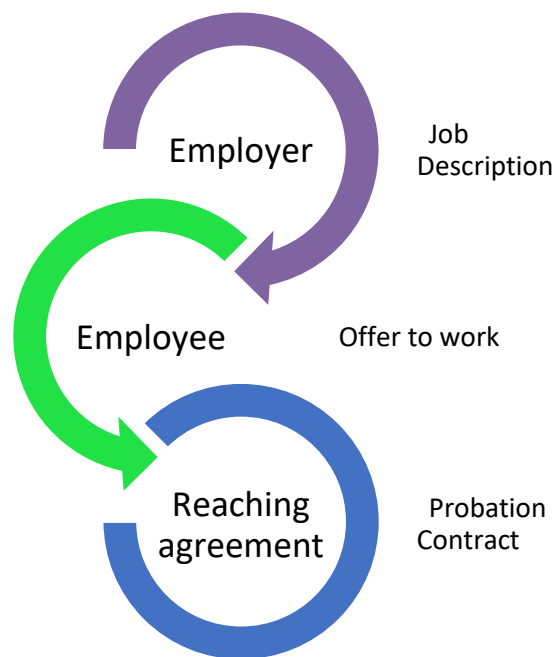
A business law firm



PROBATION CONTRACT: A PRACTICAL GUIDE FOR AVOIDING LEGAL PITFALLS

What is a probation contract?

Purely from a legal perspective, probation contracts reflect the agreement reached between employers and their employees for specified positions. It also helps the parties, during the probation period, to frame a clear picture on how the employer and the employee will work together during the engagement terms.



A widely misused option by employers

However, practice in Vietnam indicates that probation contract can be the hardest part for most employers to comply with. Employers may encounter various legal hurdles, especially in regards to obtaining work permits for foreign employees as well as meeting various insurance contribution requirements for those expats working in Vietnam.

Additionally, the employee's lack of awareness of the benefits within a probation contract might harm employees themselves. Any misunderstanding or lack of cooperation between the parties may threaten the relationship and consequently result in potential disputes upon the expiry of the probation contract terms.

What makes probation contracts different from labour contracts?

Various factors, ranging from period, benefits, to terms and conditions of the probation contract make it different to the labour contract. Outlined below are some of those under law of Vietnam.

1 Criteria

	Probation Contract	Labour Contract
Criteria	Based on the nature and complexity of the job.	Based on types of contract.

2. Period

	Probation Contract	Labour Contract
Various period	Positions requiring professional skills of collegiate education or higher: 60 days.	Indefinite Contract: The contract shall take effect upon the signing date without specifying a defined contract term. The contract shall remain in force until the occurrence of outlined events or conditions needed to terminate the contract.
	Positions requiring professional skills of vocational education or equivalent levels: 30 days.	Definite Contract: the employer and the employee can agree about the period within the limit from full 12 – 36 months.
	Other positions: 6 days.	Seasonal Contract: under 12 months.

3. Salary

Although the salary paid to employee by the employer during the probation period is subject to the parties' agreement, it in fact forms part of the compulsory provisions that each probation contract should have to make it valid.

While salary is a commercial term and can be freely agreeable by parties, legislature requires that employers pay **at least 85% of the salary for that job** once the employee is engaged as a permanent employee.

There is no specific provision for the interval within which the employer shall pay salary to the employee, it is widely recognised and advisable that a fortnight or a monthly payment interval is applicable in most cases.

4. Terms and Conditions

No.	Contents	Probation Contract	Labour Contract
1	Name and address of the Employer or the legal representative.	x	x
2	Full name, date of birth, gender, residential address, identity card number and other legal documents of the Employee.	x	x
3	Job and workplace.	x	x
4	Contract term.	X	x
5	Salary, method of payment, term of payment, allowance and other supplemental payments.	x	x
6	Pay ranges and pay increase.		x
7	Working time, rest time.	x	x
8	Labor protection equipment for the employee.	x	x
9	Social insurance and health insurance.	X	x
10	Training, refresher training for professional improvement.		x
11	Work permit	x	X

As indicated above, there is not much difference between probation contracts and labour contracts aside from the employer's responsibilities with regards to (i) pay ranges and pay increase; and (ii) and provide training, refresher training for professional improvement.

Consequently, instead of engaging employees under probation contracts to identify whether employees are suitable for specific position(s), employers tend to use services contracts, consulting contracts, or consultancy services agreements or others agreements, in order to avoid complicated and unnecessary procedures and obligations required by law.

The employers' misuse of such consulting contracts may eventually lead to a high-risk situation in which proper mitigation is required to ensure compliance with prevailing law. In fact, the unclear answer to the questions "*whether or not an individual, especially foreigner could provide consulting services within Vietnamese territory?*", and "*if so, what is condition precedent?*" causes difficulty for

employers with competent authorities, especially sub-tax division for eligible expenses that have been paid.

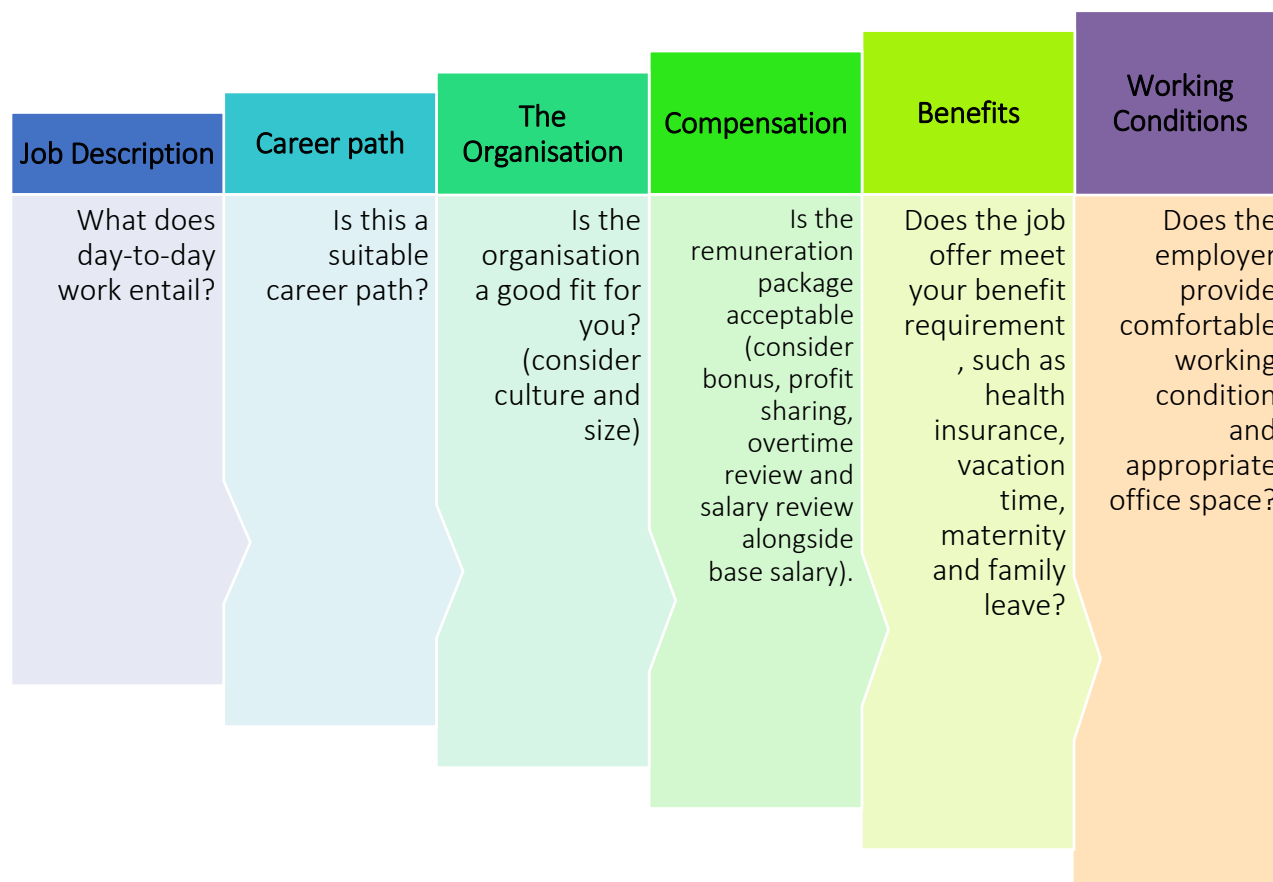
Our recommendation therefore is to follow “honesty is the best policy” concept to avoid any legal hurdles at a later stage.

How the probation contract work?

Step 1: Accepting a Job Offer

Verbal job offers or discussions over various rounds should be converted into a formal written probation contract (job offer) to reflect/record various factors that will enable the employee to accept or decline the job offer.

The various factors to consider before accepting a job offer/signing the probation contract include: compensation, benefits, and working conditions.



Step 2. Implementing the Probation Contract

Unlike labour contracts, probation contracts give parties the freedom of choice over whether to honor the probation contract.

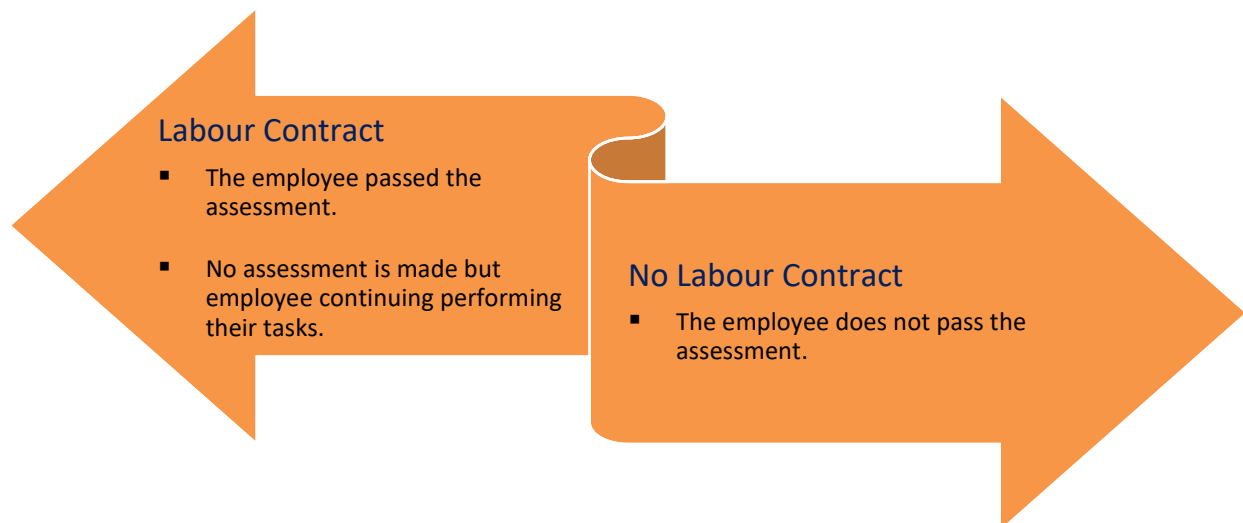
Although both parties are required to adhere to their respective rights and obligations under the signed probation contract, employees are entitled to terminate the probation contract without serving a prior notice or compensating damages or losses.

Likewise, the employers are entitled to dishonor the engagement at their discretion and shall not be liable to compensate the employee, except commensurate compensation for the time the employee has already worked.

Step 3. Assessment after the Probation Contract Term

On the last day of the probation period (at the latest), the employer is required to assess the employee's performance.

The possibility to sign a labour contract is subject to the outcome of the assessment. If the employee successfully demonstrated their potential, it is likely that a labour contract will be considered. Alternatively, if the assessment indicates that the employee fails to show their ability to match the criteria, they shall be served a notice of disqualification.



For positions requiring professional skills of (i) collegiate education or higher and (ii) vocational education or equivalent, the notice of assessment must be given to the employee 3 days prior to the latest expiry date of the probation period.

Can employers extend the probation period?

As previously mentioned, the salary and other benefits that employees may gain during the probation period are much less favorable than those under the labour contract. Therefore, Vietnamese law does not allow employers to extend the probation period since there is only one probation period for a job and there is not any exception or extension for this period.

Any violation to the probation period, including any extension or renewal, will be met with administrative fines.

How to avoid compulsory social insurance contributions during the probation period

In Vietnam any employees working under the **labour contract** (regardless of contract types) in the period from full 03 – 12 months (or under 03 months in the case of labour contracts that have come into effect since 01 Jan 2018) will be subject to compulsory social insurance contributions.

This means, in theory that the employees working under probation contracts are not subject to the compulsory social insurance contributions. However, it is worth noting that if the probation period forms a part in the labour contract term, then compulsory social insurance will apply.

In addition, those employees who are not subject to the compulsory social insurance shall be paid by the employer the extra amount equivalent to the compulsory social insurance contributions (including social insurance, health insurance and unemployment insurance) e.g. 31.5% of the total salary pay to the employees.

Sample

As there is no specific sample of the probation contract that is applicable to every situation, the given agreement on probation sample annexed to this article is for reference purposes only and shall not be considered to be legal advice.

Therefore, there can be not constituted any implied or expressed liability against CNC for any damages or loss that might result due to the use of this form.

Any resemblance with facts known to the public readers would be entirely coincidental.

Conclusion

The probation contract in any form can be a great mechanism for employees to protect and secure their legal interests but at the same time it might impose greater obligations on the employers who are required to obtain work permits and/or pay the compulsory social insurance.

The employers' abuse of consulting contracts is not recommended and may be met with administrative fines and/or costs which are not eligible to be counted as expenses of the employers.

Proper terms and conditions of the probation contracts will ensure that potential disputes can be avoided.

CONTACT

Nguyen Thi Kim Ngan | Senior Associate

T: (+84-28) 6276 9900

E: ngan.nguyen@cncounsel.com

Le Nguyen Hong Nhung | Associate

T: (+84-28) 6276 9900

E: nhung.le@cncounsel.com

CNC® | A Boutique Property Law Firm

63B Calmette Street, Nguyen Thai Binh Ward, District 1,

Ho Chi Minh, Vietnam

T: (+84-28) 6276 9900 | F: (+84-28) 2220 0913

cncounsel.com | contact@cncounsel.com

Disclaimers:

The content herein does not reflect any legal perspective of CNC or any of its partners in the past, present or future. This newsletter is not considered to be accurate and/or suitable for legal issues encountered by clients. In no way does this newsletter constitute a service agreement between CNC and client. CNC objects all liability arising from or relating to client's quoting any content of this newsletter to apply to their own issues. Clients are encouraged to ask for legal advice for each specified circumstance they encounter.



**AGREEMENT
ON PROBATION**

BETWEEN

[*]

AND

MS./Mr. [*]

VIETNAM, [year cited]

AGREEMENT ON PROBATION

THIS AGREEMENT ON PROBATION (hereinafter referred to as the “**Agreement**”) is made at [cite the registered place of the employer] on this [*] day of [*], [*] by and between:

Company : [EMPLOYER FULL NAME]

Registration No. : [*]

Address : [*]

hereinafter referred to as the “**Company**”, which expression shall include its successors and permitted assigns); and

Full name : [EMPLOYEE FULL NAME]

ID No. : [*]

Issuance date : [*]

Issuance authority : [*]

Address : [*]

hereinafter referred to as “**You or Your or Yourself**”.

Each of the aforesaid shall hereinafter be referred to individually as a “**Party**” and collectively as “**Parties**”.

WHEREAS:

- A. The Company has offered to provide You the **Probation** in the Company;
- B. You are desirous of and are willing to take part in the Probation in such capacity; and
- C. The Company and You desire to set forth the terms and conditions of the Program.

NOW, THEREFORE, expressly incorporating the foregoing Recitals as part of the consideration hereof, and in further consideration of the premises and the mutual promises and covenants contained herein, the Company and You hereby agree as follows:

1. Interpretation

1.1. In this Agreement, where the context admits:

“Agreement” and “this Agreement” shall mean this Agreement on Probation and all attached Annexures and instruments supplemental to or amending, modifying or confirming this Agreement in accordance with the provisions of this Agreement;

“Company” shall have the meaning given to such expression in paragraph 1 of the introduction of the Parties.

“Confidential Information” includes any trade/business secret, technical knowledge or know-how, financial information, plans, customer lists, pricing policies and procedures, marketing data, product data, any formula pattern or compilation of information used in the business of the Company or any company of its Group or any clients thereof or their affairs.

“Effective Date” shall have the meaning given to such expression at Clause 2.1 of this Agreement.

“Group” includes the Company, its parent company and any affiliate thereof and shall be construed accordingly.

“Holiday Year” shall have the meaning given to such expression in Clause 7.1 of this Agreement.

“Intellectual Property” means all intellectual and industrial property and all rights therein including, without limiting the generality of the foregoing, all inventions (whether patentable or not, and whether or not patent protection has been applied for or granted), improvements, developments, discoveries, proprietary information, trademarks, trade mark applications, trade names, websites, Internet domain names, logos, slogans, know-how, trade secrets, processes, designs (whether or not registrable and whether or not design rights subsist in them), works in which copyright may subsist (including computer software and preparatory and design materials therefore).

“Month” means a calendar month.

1.2. In this Agreement, where the context admits:

(A) references to any statute or statutory provisions shall include a reference to the statutory amendments thereof;

(B) references to a “person” include any individual, company, body corporate, corporation sole or aggregate, government, state or agency of a state, firm, partnership, joint venture, association, organisation or trust whether or not having separate legal personality and irrespective of the jurisdiction in or under the law of which it was incorporated or exists; and a reference to any of them shall include a reference to the others;

(C) any reference to “writing” shall include typewriting, printing, lithography, photography, telex, facsimile and the printed-out version of a communication by electronic mail and other modes of representing or reproducing words in a legible form; and

1.3. In the event of any conflict between the terms of this Agreement and any other document recording or purporting to record the terms of Your probation by the Company, the terms of this Agreement shall prevail.

2. Appointment

2.1. The Company hereby offers You appointment as and You agree to serve the Company in the capacity of [] with probation effect from [*] (the “**Effective Date**”) to [*] (unless terminated earlier as hereinafter provided) (“**Term**”). However, the Company may assign You to such other roles (with Your acceptance) as the Company may at its sole discretion determine.*

The Company may conduct a background and a medical check on You and You hereby agree and assent to the aforesaid offer being made subject to the satisfactory completion of the same.

2.2. You warrant that, by entering this Agreement and performing Your obligations hereunder, You will not be in breach of any terms or obligations under any subsisting agreement, written or oral, with any third party.

3. Duties and Powers

3.1. Your job description and general responsibilities shall be as assignment of the Company and shall also include such further duties and responsibilities as the Company may delegate to You from time to time.

3.2. You shall perform all such duties as may be delegated to You by the Company and comply with all such directions as Your supervisors may from time to time assign or give to You.

3.3. You shall, during the Term of this Agreement (unless prevented by ill health or accident or as otherwise agreed by the Company in writing), devote Your entire time and attention and abilities to Your probation with the Company and shall use Your best endeavours to promote and protect the general interests and welfare of the Company.

3.4. You shall not, during the Term of Your probation with the Company, be engaged, concerned or interested, either directly or indirectly, in any trade or business or occupation (either for remuneration or otherwise) similar to the business of the Company, in any manner whatsoever. Nor shall You undertake any activities which are contrary to or inconsistent with Your duties and obligations to the Company or with the Company's interests.

3.5. You shall, at all times, promptly give to the Company and/or to any person to whom You operationally report (in writing, if so requested) all such information, explanations and assistance as may be required in connection with Your duties under this Agreement.

3.6. Your hours of work shall be from 08:00 am. to 6:00 pm., 6 (six) days a week. Break time is from 11:30 am to 1:30 pm. However, as the position You are in charge, You are required to be flexible in working hours and work such additional hours as may be necessary for efficient performance of Your duties and powers under this Agreement. You hereby irrevocably waive any overtime payments with respect to any hours worked by You outside normal business hours.

4. Mobility

4.1. You may be transferred, at the sole and absolute discretion of the Company, to any place in Vietnam or outside Vietnam, on terms and conditions not less favourable than those contained in this Agreement.

4.2. Your principal place of work as on the Effective Date shall be at **Ho Chi Minh city** or at such other place as may be designated by the Company.

4.3. You may be required to travel both inside and outside Vietnam on the business of the Company in the due performance of Your duties from time to time.

4.4. The Company may also depute You to any work or assign You to any associate company, branch, office, subsidiary or other companies, concerns, organizations, or firms with whom the Company may make any such arrangement or agreement.

5. Remuneration

5.1. The Company shall support You salary for each month as company's policies from time to time.

5.2. The salary shall depend on Your practical performance and work productivities. However, there shall be no obligation on the Company to pay additionally or review salary at any point of time save and except at its sole discretion.

6. Expenses

6.1. The Company shall pay or refund or procure to be paid or refunded to You monthly in arrears all reasonable travelling, entertainment and other similar out of pocket expenses necessarily and incurred by You wholly in the proper performance of Your duties, subject to production by You of such evidence of the expenses as the Company may reasonably require.

7. Leave & Holidays

7.1. Weekly leave shall be Sunday. Holidays shall be national holidays in Labour Law.

7.2. Any unusual leave must be allowed in writing by the Company.

8. Inventions, Designs, Copyright and other Intellectual Property

8.1. If, at any time during the course of Your probation under this Agreement You make or discover or participate in the making or discovery of any Intellectual Property directly or indirectly relating to or capable of being used by the Company, full details of the Intellectual Property shall immediately be disclosed in writing by You to the Company and the Intellectual Property shall be the absolute property of the Company. At the request and expense of the Company, You shall give and supply all such information, data, drawings and assistance as may be necessary or in the opinion of the Company desirable to enable the Company to exploit the Intellectual Property to the best advantage (as decided by the Company). You shall execute all documents and do all things which may, in the opinion of the Company, be necessary or desirable for obtaining patent or other protection for the Intellectual Property and for vesting the same in the Company, as the Company may direct. No royalty or other payment will be due to You from the Company in respect of any Intellectual Property of the Company and You will, at the Company's request and expense, assign to the Company its title to any Intellectual Property of the Company and to any applications made thereon, and will execute all instruments necessary for the filing and prosecution of any applications in any country or any division or continuation thereof or for any reissue of any patent or other right issued on any such application.

8.2. Documents: All documents, data and other records obtained from the Company or created by You as a result of this Agreement will be and remain the property of the Company. Such documents, data,

disclosed Confidential Information and other records must be kept safely and securely and must be promptly returned to the Company upon expiry or termination of this Agreement.

9. Confidentiality

9.1. As Confidential Information will from time to time become known to You, the Company considers and You agree that, the restraints set forth in this Agreement (on which You have had the opportunity to take independent legal advice) are necessary for the reasonable protection by the Company of its business or the business of the Group, the clients thereof or their respective affairs.

9.2. You shall not, at any time, either during the continuance of or after the termination of Your probation with the Company, use, disclose or communicate to any person whatsoever any Confidential Information which You have or of which You may have become possessed during Your probation with the Company nor shall You supply the names or addresses of any clients, customers, vendors or agents of the Company or any company of the Group to any person except as authorised by the Company or as ordered by a Court of competent jurisdiction.

9.3. You agree that You will not at any time during the continuance of Your probation or on expiry or on termination/cessation of Your probation with the Company or thereafter, issue any statements to the press (whether oral or written) which have not directly been authorised by the Company.

Such restriction shall apply to any statement to any representative of television, radio, film or other similar media and to writing of any article for the press or otherwise for publication on any matter connected with or relating to the business of the Company or any company of the Group.

9.4. The obligations under this Clause shall survive the termination or expiration of this Agreement.

10. Non-Solicitation

10.1. You shall not, after the date of termination or expiry of this Agreement or cessation of Your probation, solicit or entice or endeavour to solicit or to entice or assist any other person, whether by means of supply of names or expressing views on suitability, or by any other means whatsoever, to solicit or entice away from the Company any employee, director, client, dealer, vendor or business associate of the Company.

10.2. The restriction contained in Clause 10.1, on which You have had the opportunity to take independent legal advice, is considered reasonable by the Parties, and necessary for the protection of the legitimate interests and Confidential Information of the Company.

11. Term and Termination

11.1. Termination of this Agreement by the Company beyond the Term for any reason whatsoever, will not entitle You to claim any damages or compensation or any other benefit whatsoever.

11.2. The Company shall be solely entitled to terminate this Agreement if You fail to work effectively as required by the Company. The termination letter shall be sent to You by the Company within 01 week in advance from the date of termination.

12. Representations and Warranties

12.1. You hereby represent and warrant that the You are not and have not been the subject of:

- Any adverse finding, sanction or condition imposed upon Your registration of a professional body by any court, tribunal, professional board, or other relevant body;*
- Any complaint to and/or investigation by a professional board, legal complaints body, or similar body concerning Your professional practice which resulted in an adverse finding against You; or*
- Any complaint by any enforcement agency or government body and/or subsequent conviction for a criminal act of a violent nature or any crime relating to Your professional practice.*

12.2. Compliance with Policies and Standards of the Company

You represent and warrant that it will comply with policies and procedures provided by the Company to You from time to time. You will work cooperatively with Your supervisors in the Company.

13. Notices and Communications

13.1. All notices and communications relating to this Agreement must be directed to the Company Representative and You. Notices must be in writing (including electronic mail transmission or similar writing) and will be deemed given if delivered in person or by registered post or electronic mail or facsimile transmission or by a reputable overnight delivery service addressed to the intended recipient at the address

or electronic mail address or facsimile transmission number identified in the Reference Schedule (or at such other address or number for a Party as may from time to time be specified by like notice).

13.2. Any such notice or other communication will be deemed to have been duly delivered (if delivered personally or by overnight delivery service) immediately upon receipt or (if given or made by electronic mail or facsimile) immediately or (if given or made by letter) 2 business days after posting and in proving the same, it shall be sufficient to show that personal delivery or overnight delivery was made or that the envelope containing the same was duly addressed, stamped and posted or that the electronic mail or facsimile transmission was properly addressed and dispatched.

14. Miscellaneous

14.1. Any provision of this Agreement may be amended or waived, but only if, such amendment or waiver is in writing and is signed, in the case of an amendment, by each Party to this Agreement, or in the case of a waiver, by the Party against whom the waiver is to be effective.

14.2. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement and supersedes all prior arrangement, agreements and understanding both oral and written. No representation, inducement, promise, understanding, condition or warranty not set out in this Agreement has been made or relied upon by either Party.

14.3. In the event that any one or more of the provisions contained in this Agreement are invalid, illegal, or unenforceable in any respect for any reason, the validity, enforceability of any such provision in every other respect and the remaining provisions of this Agreement will not in any way be affected or impaired.

14.4. Neither Party will be liable for its failure to perform any of its obligations, during any period in which performance is delayed due to travel restrictions, fire, flood, war, riot, outbreak of disease, acts of terrorism and any restrictions placed by any authorities as a result of such outbreak or a reasonable unforeseeable intervention of any government authority, provided that the relevant event or circumstance is beyond the affected Party's control and occurred without the fault or negligence of the affected Party and the Party suffering such a delay promptly notifies the other Party of the reasons for the delay. Where such delay exceeds 3 months, either Party may terminate this Agreement by providing the other Party 14 calendar days prior written notice of such intention to terminate.

14.5. The provisions of this Agreement are binding upon and inure to the benefit of the Parties and their respective permitted successors and assigns; provided that save as expressly provided, You may not delegate, assign nor transfer any of Your rights and obligations under this Agreement except with the prior written consent of the Company. Any assignment without such consent will be cause for immediate termination of this Agreement by the Company. Any other attempts to transfer this Agreement will be void. Notwithstanding, the Company at its sole discretion may assign this Agreement or any of the Company's rights or duties set out in this Agreement in whole or in part to any legal entity controlling, controlled by or under common control with the Company.

14.6. This Agreement may be executed on separate counterparts, each of which when so executed and delivered shall be an original, but the counterparts shall together constitute one and the same instrument.

14.7. Each Party agrees to execute such agreements, deeds and documents and do or cause to be executed or done all such acts and things as may be reasonably necessary to give effect to this Agreement.

14.8. This Agreement is made and executed in the English and Local Language. Should there be any inconsistencies between the English and Local Languages, the English Language prevails.

IN WITNESS WHEREOF, the Parties to this Agreement have caused their respective duly authorized representatives to execute this Agreement on the day and year first above written:

SIGNED AND DELIVERED BY: Signed for and on
behalf of [*] by:

Signed:

Name: Sir/Madam. [*]
Position: [*]

Name: [*]

