



This document was prepared by the ICA for use by its members as an educational resource and is not intended to be used as a form. It should not be used unless in conjunction with the member obtaining the advice of a qualified domain name lawyer. Copyright ICA 2020. Any other use or reproduction is prohibited except with the prior written consent of ICA. Please note that every domain name transaction is unique, and that ICA does not warrant and is not responsible in any way for the adequacy, sufficiency, applicability or suitability of any this educational resource. The ICA bears no liability for the use of this educational material. The ICA maintains a list of qualified domain name lawyers on its website however makes no representation or warranty as to their suitability, competence, or expertise.

## **Domain Name Purchase and Sale Agreements – What to Watch For**

*August 2020*

Congratulations! You've made the decision to either buy or sell a domain name and now it is time to put the deal to paper. Whether or not you negotiated with the help of an online domain marketplace or utilized the help of a domain name broker, your transaction should be documented and accepted by both parties to ensure the sale closes without issue and that the rights and duties of the parties are clearly delineated, helping to avoid wasting time or money in the future.

Purchase and sale agreements may take different forms but tend to include the same basic sections outlining the rights and responsibilities of the parties, as well as their representations and warranties. The purchase and sale agreement should also include a step by step plan for the closing process with clear duties for either side to perform with associated deadlines.

If you negotiated the sale with the help of an online domain marketplace or domain name broker, they likely provided you with standard agreement built around their experience closing sales for their clients. If a purchase and sale agreement was not provided to you, you may be able to find one that is suitable online, but we recommend seeking the advice of a qualified attorney before proceeding.

To help you better understand the terms you will likely encounter, below is an analysis of an industry standard purchase and sale agreement for a sale negotiated with the help of an independent domain broker unaffiliated with one of the larger domain trading platforms.

### **DOMAIN NAME PURCHASE AND SALE AGREEMENT**

*This Domain Name Purchase and Sale Agreement ("Agreement") is entered into as of \_\_\_\_\_ (the "Effective Date") by and between \_\_\_\_\_ with an address of \_\_\_\_\_ ("Buyer"), and \_\_\_\_\_ with an address of \_\_\_\_\_ ("Seller").*

Do you know who you are contracting with? If it is a company, it may be advisable to conduct a company search to confirm its existence, exact name, address, and officials. If it is an individual, consider asking for photo identification such as a driver's license. If an issue were to arise, these preliminary steps can help avoid a situation where you have a contract with an entity that does not exist or an individual who hasn't provided his or her real name. Consider also, whether the other party is in a country that is subject to sanctions or may be involved in money laundering.



*WHEREAS, Seller is the sole owner of the domain name \_\_\_\_\_ and any and all associated goodwill and other intellectual property and proprietary rights therein (the “Domain name”), and wishes to sell and assign to Buyer, and Buyer wishes to purchase from Seller, the Domain name.*

The Seller is asked to represent and warrant that it is the sole owner of the Domain Name below, under “Representations and Warranties”. Have you confirmed that the Seller is the recorded Whois registrant? Although the Whois database does not necessarily show “legal title” to a domain name, it may at least provide some comfort that the Seller you are contracting with is the recorded registrant. If the registrant differs from the Seller, that may raise questions that are worth asking to clarify the situation. A Buyer may want to request that the Seller reveal Whois so this initial determination can be made. In addition to comparing the Seller’s name to the Whois database, it can sometimes be helpful to conduct more due diligence, such as tracing back the chain of title.

*NOW THEREFORE, in consideration of the mutual representations, warranties, covenants, and agreements, and upon the terms and subject to the conditions set forth in this Agreement, and for good and valuable consideration, the parties agree as follows:*

A legal agreement involves “consideration”. Consideration is a legal term referring to what each party gives to the other party in exchange. In this case, each party is providing the other party with certain promises, the Seller is providing the domain name, and the Buyer is providing the payment of the purchase price.

**1. PURCHASE AND SALE OF DOMAIN NAME:**

*Subject to the terms and conditions of this Agreement, and in consideration of the Purchase Price specified below, Seller hereby sells, assigns, transfers, conveys, and delivers exclusively to Buyer free and clear of all liens, charges, restrictions, mortgages, pledges, security interests and other encumbrances, and Buyer hereby purchases and acquires from Seller, all right, title and interest in and to the Domain name.*

A Buyer will want to ensure that it is buying all rights in the domain name, not just certain or limited rights, and is getting the domain name free and clear. Unlike with real estate or other personal property transactions, there is usually no certain way of determining if title is clear by performing a search so due diligence may be advisable on the chain of title or the Buyer may just have to rely upon this promise from the Seller.

**2. CONSIDERATION:**

- a. *Purchase Price: In consideration of the sale of the Domain name, Buyer agrees to pay Seller \_\_\_\_\_ DOLLARS \$USD (US\$\_\_\_\_) for the Domain name (the “Purchase Price”). The Purchase Price shall be submitted, via wire transfer to \_\_\_\_\_(Escrow Agent), no later than three (3) business days after the Effective Date of this agreement.*

This provision assumes that the Purchase Price will be paid in a single lump sum, however it is also possible to structure the payment in two or more installments.



- b. Transfer: Upon execution of this agreement by the Buyer and Seller, Seller shall initiate a transaction at \_\_\_\_\_ (“Escrow Agent”) between Buyer and Seller, per the terms of this agreement. Upon acceptance of such terms by Buyer and Seller, Buyer shall submit payment in full by wire transfer per the instructions provided by Escrow Agent. Upon receipt and confirmation of payment by Escrow Agent, Seller shall submit transfer of Domain Name to Buyer’s account at a domain name registrar specified by Buyer and Buyer shall confirm receipt to Seller and Escrow Agent. Escrow Agent shall then immediately release funds to Seller. Escrow Agent may also release funds to Seller upon manual confirmation of the public WHOIS record that domain name is in name of Buyer or associated entity.

*The Buyer is responsible for all Escrow Agent fees and charges.*

If you are closing the sale without the assistance of a large domain trading platform such as Afternic or Sedo, using an escrow agent is generally advisable. Sellers will not want to transfer the domain name before receiving payment, and Buyers will not want to send payment before receiving the domain name. Independent escrow services provide comfort to each party by helping to secure the transaction, but please note additional fees will likely apply and you should establish which party is responsible for any associated fees. When selecting an independent escrow agent, it is important to ensure they are well established, credible, licensed, and insured.

What happens if the Buyer fails to confirm receipt of the domain name? Have you determined whether the receiving registrar and receiving account enables Whois publicity as opposed to privacy so that it can be used as evidence of a successful transfer? To avoid this problem, consider using a service that will itself receive the transfer and then either turn over the receiving registrant account to the Buyer, or alternatively, receive the domain name itself and then transfer the domain name to the Buyer.

Consider who should pay the Escrow fees. Should they be shared, or will one party or the other be responsible for them?

Also consider whether a “push”, otherwise known as an intra-registrar transfer, is preferable to a registrar to registrar transfer, as it often saves time to use a “push”.

### **3. REPRESENTATIONS AND WARRANTIES:**

- a. Best Efforts; Further Assurances: Each party shall use its best efforts to take, or cause to be taken, all action, and to do, or cause to be done, all things reasonably necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement. .

This clause is called a ‘further assurances’ clause and is common in agreements. It basically says that the parties agree ‘to do what is necessary’ to ensure that the transaction goes as intended, even if the precise step required is not specifically set out in the agreement itself. It is included ‘just in case’.

- b. Ownership: Seller represents and warrants that it is the sole and exclusive owner of the Domain Name. BUYER EXPRESSLY AGREES THAT EXCEPT AS OTHERWISE EXPRESSLY PROVIDED ABOVE IN SECTION **Error! Reference source not found.**) AND 3(b), IT IS PURCHASING RIGHTS TO THE DOMAIN NAME "AS-IS" AND “WHERE-IS” AND AT BUYER’S SOLE RISK. EXCEPT AS EXPRESSLY STATED ABOVE IN SUCH SECTIONS, SELLER



DISCLAIMS ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE. NOTWITHSTANDING ANYTHING TO THE CONTRARY, SELLER MAKES NO EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY THAT THE DOMAIN NAME WILL HAVE ANY VALUE OR WILL MEET BUYER'S REQUIREMENTS OR EXPECTATIONS, THAT BUYER WILL BE ABLE TO ATTAIN ANY SPECIFIC RESULTS OR VALUE ASSOCIATED WITH THE DOMAIN NAME OR THE USE THEREOF, OR THAT THE DOMAIN NAME CAN BE REGISTERED AND USED BY BUYER WITHOUT INFRINGING THE RIGHTS, INCLUDING BUT NOT LIMITED TO INTELLECTUAL PROPERTY RIGHTS, OF THIRD PARTIES.

The provision that says that the Buyer is purchasing the Domain Name 'as is' is very important for the Seller to include in order to avoid claims from the Buyer that the domain name did not live up to the Buyer's expectations. This provision shifts the responsibility to the Buyer so that it is the Buyer who must satisfy itself that the Domain Name meets its requirements and if not, it is the Buyer's problem, not the Seller's.

- c. *Authority: Each of the parties hereto represents and warrants that as of the date of this Agreement, it has the right and authority to execute this Agreement on its behalf and has obtained all necessary approvals required to consummate this transaction.*

The provision is sometimes particularly relevant when dealing with a company as sometimes more than one company official person needs to decide to sell the domain name, or sometimes special internal approvals must be obtained.

- d. *No Litigation: Each of the parties represents and warrants that there is no action, suit, proceeding, arbitration, governmental inquiry, or proceeding pending or threatened against either party relating to the Domain Name, nor is either party aware of any facts that could lead to such an action being threatened or instituted. Without limiting the generality of the foregoing, Seller is not aware of any past or current trademark or copyright infringement demands, claims, or proceedings related to Domain Name and has not received notice of such.*

The Buyer is not being assured that there will be no domain name dispute or infringement claim in the future, but at least wants to know from the Seller that the Seller isn't aware of any past or current issues with the Domain Name that the Seller is aware of.

- e. *No conflicts: Seller represents and warrants that neither the execution and delivery of this Agreement or associated documents, nor the transfer of the Domain Name, nor the consummation by each of the parties of any of the transactions contemplated hereby will conflict with or violate any provisions of any agreement between Seller and a third party.*

The main purpose of this provision is for the Seller to promise to the Buyer that there is not already some other agreement to sell the Domain Name to a third party.

- f. *No Claims or Liens: Seller represents and warrants that to the best of Seller's knowledge, there are no claims existing arising out of the Seller's use of the Domain Name, nor any liens encumbering the Domain Name, and the Domain Name is being transferred and assigned free of any liens, encumbrances or security Interests. Seller further represents that Seller is aware of no facts that would give rise to a potential lien or*



*claim which could encumber the Domain Name, including but not limited to any actual or potential tax liability that would encumber the Domain Name.*

The main purpose of this provision is to promise to the Buyer that the Domain Name is not subject to liabilities.

- g. Disclaimer of Warranties. Except as otherwise provide in this Agreement, Seller makes no warranties, either express or implied, regarding the Domain Name, including but not limited to the warranty of merchantability or fitness for any particular purpose. The exclusion of implied warranties is not permitted by some jurisdictions.*

If it isn't promised by the Seller in this agreement, there are no enforceable promises about the Domain Name.

- h. Brokers. If either Seller or Buyer has engaged a third party in connection with this transaction, including but not limited to a broker, the party who retained such third party is solely responsible for the third party's fees and/or commissions and indemnifies the other party for any such claims that may arise.*

This provision attempts to avoid the situation where the transaction is completed and a broker pops up and makes a claim for a commission. If a commission is payable by a party, then it should be specified here.

#### **4. NOTICES:**

*All notices, requests, instructions, consents, and other communications to be given pursuant to this Agreement shall be in writing either by hand or electronic means such as email and shall be deemed delivered (a) on the day of delivery if by (i) facsimile or email (if proof of transmission is retained); or (ii) receipted hand-delivery; or (b) on the date of receipt if by certified or registered mail; or (c) two (2) business days after being sent by Federal Express or other nationally recognized overnight courier service. Notices shall be delivered to the parties at the addresses shown on the signature page below.*

Often it is advisable to specify the contact details for Notices in this section.

#### **5. MISCELLANEOUS:**

- a. Buyer and Seller agree that this Agreement shall not be assignable without the consent of the other party.*

Consider whether you want to instead, allow this Agreement to be assigned. For example, as the Seller, do you want to permit a subsidiary to take over the transaction, or as the Buyer, do you want to be able to 'flip' the Agreement to another Buyer? The invalidity or unenforceability of a particular provision of this Agreement shall not affect any other provisions, and the Agreement shall be construed so as to limit the application of such affected provision by the least extent possible so as to make it valid and enforceable and, failing that, such invalid or unenforceable provision is deemed omitted.

- b. This Agreement constitutes the entire agreement between the parties, and supersedes any and all prior agreements or understandings, written or oral, relating to the subject matter hereof. No other promises, agreements, or understandings, written or oral, shall be binding upon the parties with respect to this*



*subject matter unless contained in this Agreement.*

- c. This Agreement may be executed in counterparts and facsimile copies of signatures shall be deemed original for all purposes. This document alone is admissible in any proceeding to interpret or enforce this Agreement.*
- d. Each party acknowledges that the other party will be irrevocably harmed and will have no adequate remedy at law if a party fails to perform any of its obligations under this Agreement. It is accordingly agreed that, in addition to any other remedies which may be available, each party shall have the right to obtain injunctive relief to restrain a breach or threatened breach of, or otherwise obtain specific performance of the other party's covenants and other agreements contained in this Agreement.*

This provision is sometimes referred to as a 'specific performance' clause. For example, if the Seller refuses to close the transaction by transferring the Domain Name, the Buyer may be able to rely upon this clause in order to force the Buyer to transfer the Domain Name instead of just paying damages for breach of contract.

- e. Recovery of Litigation Costs. If any legal action or any arbitration or other proceeding is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default or misrepresentation in connection with any provision of this Agreement, the successful or substantially prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in that action or proceeding, in addition to any other relief to which it may be entitled.*

If a dispute arises between the parties, for example if good title is not conveyed by the Seller to the Buyer, and as a result litigation is commenced by the Buyer, including this provision will help to ensure that the court hearing the dispute awards the Buyer a reimbursement of its legal fees in addition to any damages that have occurred.

- f. This Agreement is governed by and construed in accordance with the internal laws of \_\_\_\_\_, applicable to contracts entered into and to be performed in \_\_\_\_\_, without regard to the principles of conflicts of law. The parties consent to the exclusive jurisdiction of any court of competent jurisdiction in \_\_\_\_\_. Each party hereby waives an objection based on jurisdiction or venue with respect to any action instituted in any such court, and agrees that any dispute concerning the relationship of the parties or the conduct of any party in connection with this Agreement, or otherwise, shall be heard only in the courts described above.*

The selection of the jurisdiction and forum for disputes is a matter for negotiation. There is no rule of thumb as to where this should be. It may be the Seller's or the Buyer's location, or even a neutral third location. By having both parties agree to a specific jurisdiction for disputes and by also agreeing to which jurisdiction's laws will apply, the parties are limiting objections that a party can make to have the jurisdiction or venue changed.

- g. The parties have read, understand, and agree to the terms of this Agreement and are duly advised and have had the opportunity to consult with counsel regarding this Agreement.*



*IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered as of the date first written below.*

*(Seller)*

*(Buyer)*

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Address:

Address:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

T: \_\_\_\_\_

T: \_\_\_\_\_

E: \_\_\_\_\_

E: \_\_\_\_\_

It may go without saying, but always ensure that your agreement is properly signed and dated by both parties. An agreement that has not been signed by the other party may not be enforceable and the dates included in the agreement may impact the deadlines for payment or transfer of the domain.

If you have any further questions about domain name purchase and sale agreements, please seek the assistance of an attorney qualified in domain name sales.