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Forming and Managing the On-Going Customer-Vendor Relationship in Technology Transactions

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I. INTRODUCTION

There are many types of technology transactions including licensing, outsourcing, development, software, hardware, platform and service agreements. As opposed to one-and-done deals, for example, a one-time purchase of goods or the sale of a company, most technology transactions establish customer-vendor relationships that continue for long periods of times. Technology transactions have many other unique features as well, such as intellectual property licensing and ownership and feedback provisions, data privacy and security features, acceptance testing, ongoing risk shifting provisions, as well as many others. This article does not, however, address all of the features of technology transactions. Rather, this article focuses on the contractual

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terms that can be used to form and manage the on-going customer-vendor relationship in technology transactions.

The ongoing nature of the customer-vendor relationship requires that the parties determine up-front how they will address all the various issues that could arise in the relationship. Without a crystal ball it's impossible to know exactly what will arise throughout the life of these types of contracts. The parties, however, can anticipate a number of potential issues. For example, what if the customer's transition to the new vendor technology is delayed or the transition identifies issues not originally in-scope? What if the technology performs, but not as well as the customer had expected? What if the technology purchased is modified by the vendor to remove the very features the customer purchased it for? What if the customer's needs change? What if the laws governing the products/services change during the term of the contract? What if the vendor ceases to focus on technology that has become critical to the customer? What if the vendor is sold, or the customer sells off the division that uses the technology? What if a hurricane results in the complete loss of a critical data center supporting the technology? Identifying a list of horribles, and then pruning the list down to (i) the most likely to occur risks and (ii) the less likely to occur but likely to wreak the most havoc risks, is an integral part of risk-review for any long-term technology transaction. Then, having mechanisms in your contract to help the parties: (x) reach decisions at key milestones, (y) problem solve and (z) resolve disputes is critical.

This article provides examples of contract clauses[1] that help customers and vendors navigate their ongoing relationship (including its termination) and explanations of those clauses, beyond the oft-discussed termination, indemnification and limitation of liability clauses. In particular, this article discusses contract terms used in transition, steady state and termination assistance.

II. TRANSITION

For many technology transactions, before technology can be used as desired or before services can perform in a "steady state" (or, ongoing services phase), there is an involved implementation or transition period to move over to the applicable technology or services.

A. Transition Plan.

Transition or implementation plans are a good tool to define the roles and responsibilities of each party to get from the current state to proper use of the technology/services. Transition plans often do not form part of the contract, and sometimes the plans aren't even completed before the contract is executed. When considering the importance of making the plan part of the contract, the parties should determine if there is anything in the plan that is a dependency which, if not performed, would affect a party's ability to proceed (including the structure of fees). For example, if the vendor cannot take over a service without the customer performing a certain obligation, but the vendor is incurring costs in anticipation of taking over the service, the vendor should consider including the customer obligations as prerequisites in a transition plan in the contract. Conversely, if the customer is paying the vendor from the date of execution of the

[1] The sample clauses were taken from technology transaction agreements that were negotiated to apply to specific customer-vendor deals. As such, none of the clauses should be used without careful consideration. Each clause is provided for exemplary purposes only.

contract, so the vendor has little financial incentive to transition the customer quickly, the customer may consider including the plan and particular milestones in the contract, so it can ensure a quick and smooth transition. The plans themselves take various forms, often similar to statements of work. The language introducing the plan into the contract will vary depending on whether the plan forms part of the contract. For example:

> Implementation Plan. Within thirty (30) days of the Effective Date of each Order Form, the parties will mutually create and execute an Implementation Plan that specifies the milestone dates for the performance of Implementation Services as well as all prerequisite tasks that each party shall complete in preparation for, and during, the implementation process, which shall include any milestones specified in an Order Form. The Implementation Plan may also include hardware, software, environmental, connectivity, and other specifications regarding items or conditions that must be made available prior to implementation.
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> Transition. Each Party will perform the functions and services necessary to accomplish the transition to Vendor of the Services and the commencement by Vendor of performing the Services in accordance with the transition plan initially attached as Exhibit [A] as updated as agreed by the Parties (the "Transition Plan"). The Transition Plan sets out key transition responsibilities and deliverables to be completed by the dates set forth therein. Each party shall bear its own costs of performing its respective transition services. The Parties will carry out the transition without causing unnecessary disruption to the business of Customer. In the event that Customer has fulfilled its obligations under the Transition Plan and the transition is not completed within [X] of the target start date, either Party shall have the right to terminate this Agreement upon thirty (30) days prior notice to the other Party. Notwithstanding the foregoing, the Parties shall work together in good faith to minimize delays in transition and to accomplish the completion of the transition services by the target start date or as soon thereafter as possible.

B. Structuring Performance and Fees.

How fees are structured during transition can help incentivize the correct behavior to get technology or services implemented on time and properly. Milestones with associated payments are a useful way to make sure that each stage of implementation occurs as agreed. Holding back steady state fees until steady state begins can direct the vendor's timely implementation. However, if a vendor does not have control over the implementation, due to dependencies of the customer or a third party, the vendor may reasonably require steady state fees prior to steady state beginning. Customers can protect themselves from failing to begin steady state by suggesting drop dead dates after which the customer could terminate if steady state has not begun (as in the second example in Section II.A above), and not incur the steady state fees. To be fair to the vendor, these dates could be pushed out by delays caused by the customer or third parties.

C. Governance.

In addition to the governance that may be implemented for steady state (described below), for critical transitions the parties may desire to set up a specific transition governance to complete

this phase smoothly. This transition governance body could sit within a larger governance structure, or exist only until steady state ends.

III. STEADY STATE

A. Background.

Technology transaction contracts typically contain many covenants designed to outline and, in some cases, guarantee the performance expected under the contract. In addition to the remedies that you typically see in all contracts if such performance is not accomplished (such as indemnification and termination rights), in a contract that establishes a long-term relationship you often see additional remedies that are supposed to acts as sticks (or carrots) to encourage ongoing good behavior of each party without the nuclear option of terminating the agreement or making a claim for damages. There are multiple reasons for thinking about additional creative remedies in relationship contracts: the parties may have good reason to expect some things to go wrong — such as a short-term outage or unavailability of a service; the parties may be committing large amounts of investment upfront in the relationship and want to ensure that the agreement continues even if something is going wrong, so they can see a return on the investment; one party may need the revenue stream so it may not desire an easy out in the contract; change may be difficult if the technology is irreplaceable; or changing the vendor may be extremely disruptive and particularly disruptive during certain time periods.

In addition to covenants and remedies, long term contracts also contain other mechanisms for managing the relationship, such as change management, governance and escalation clauses. In this section we'll focus on these various tools.

B. Covenants and Remedies.

1. Service Level Agreements.

Service level agreements ("SLAs") are used in contracts where the vendor performs a service or process for the customer with respect to which the continuity or stability of the performance is important, such as in software or platform as a service agreements, or the provision of a call center or outsourced business process.

(a) *Service Levels.*

In these types of contracts, the vendor agrees to have certain services perform within specified metrics — some of the metrics are pretty standard across the industry, for example, servers hosting customer data will be available 99.X% of the time or a help desk call center will answer X% of calls within 60 seconds — but some of the metrics are highly specific to the type of business process being outsourced or service being performed. The metrics typically include: (a) details on how to measure the metric; (b) the monitoring or other tool used to measure the metric and how it is measured: (c) any exceptions to be taken into account; (d) the period of measurement; and (e) the frequency of reporting. Examples of some different service levels are set forth below:

System Availability.

"Scheduled Downtime" means the total amount of time during any calendar month, measured in minutes, during which Client or Authorized Users are not able to access the features and functions of the Platform due to (a) scheduled system maintenance performed by Vendor, as set forth in the table below, and (b) downtime that results from a Force Majeure Event. Vendor will perform any scheduled system maintenance that will cause an interruption in Service only from [X] PM on Monday, Tuesday, Wednesday, and Thursday to [X] AM Central Time the following morning.

"Unscheduled Downtime" means the total amount of time during any calendar month, measured in minutes, during which Client or Authorized Users are not able to access the Platform other than Scheduled Downtime.

"System Availability" means with respect to any particular calendar month, the actual availability of the Platform during such month calculated as follows:

(Total Time – (Scheduled Downtime + Unscheduled Downtime)) ÷ (Total Time – Scheduled Downtime) x 100

"Total Time" means, with respect to any particular calendar month, the total number of hours.

When Scheduled Downtime will occur on a regular basis:	Purpose of Scheduled Downtime:	Maximum Duration of Scheduled Downtime
Each week	Minor system, database or application maintenance	1 hour
Once per calendar month (Sunday only)	Major maintenance or upgrades	2 hours

Minimum Service Level = System Availability equals or exceeds 99.95% during each calendar month.

Service Commitment

Vendor will provide the Services with a Latency (as defined below) of no more than 5 milliseconds ("ms") measured over each calendar month (the "Service Commitments"). In the event Vendor does not meet either Service Commitment, or its Issue Resolution commitment set forth below, in a given calendar month, Customer will receive a Service Credit.

Definitions

- "Monthly Uptime Percentage" is calculated as follows:

$$\frac{\text{Total minutes in a calendar month} - \text{Total minutes of Unavailability during that calendar month}}{\text{Total minutes in that calendar month}}$$

Monthly Uptime Percentage measurements exclude downtime resulting directly or indirectly from any Permitted Exclusion defined below. Vendor (or if Vendor utilizes a hosting provider, Vendor's hosting provider) shall monitor and measure Vendor's compliance with its Service Commitments and provide a report to Customer of Vendor's compliance within five (5) calendar days following the end of each calendar month.

- "Latency" means the average maximum roundtrip response time from an inbound server request from Customer's servers to transmission of a response to Customer's servers measured over each calendar month.

- "Unavailable" and "Unavailability" mean any period of time during which the Service cannot be accessed, times out, fails to resolve or respond, materially affects the ability for Customer to operate its business, or otherwise disables or materially impairs any major function of the Service or Customer's use of any major function of the Service.

  Vendor agrees to take reasonable industry standard precautions to mitigate the risk of Unavailability, including but not limited to (a) use of anti-virus and anti-Trojan software; (b) prompt installation of available hardware and software patches, and immediate installation of critical patches; (c) implementation of industry standard firewalls; (d) implementation of disaster recovery and business continuity plans; (e) implementation of backup power generation facilities, security systems, scheduled backups, and fire protection systems; and (f) maintaining redundant internet providers.

  Unavailability does not include downtime (i) caused by factors outside of the reasonable control of Vendor and its cloud hosting provider, including any force majeure event or disruption of the Internet backbone; (ii) that results from the equipment, software or other technology of Customer, its employees or agents; or (iii) that result from any scheduled maintenance of the Service or its cloud hosting environment, provided such maintenance is performed between the hours of 4am and 6am Central time and provided Customer is provided no less than 72 hours prior notice of such maintenance. For the avoidance of doubt, emergency maintenance shall not be considered scheduled maintenance.

Issue Resolution

Vendor shall resolve issues in accordance with the following table, based on the severity of such issue as defined below. In the event an issue could be classified within more than one Severity Level, Vendor shall initially classify the issue acting reasonably. In the event Customer disagrees with Vendor's classification or reclassification, as appropriate, the parties shall meet as soon as commercially feasible to discuss when a further reclassification of the issue is appropriate.

Severity Level	Impact	Classification	Acknowledgement	Issue Resolution
Level 1	High	Service is fully or partially Unavailable	As soon as possible but no later than one (1) hour, with updates every four (4) hours thereafter	As soon as possible using continuously diligent efforts
Level 2	Medium	Some impact to Service; however, not vital to immediate performance or availability	As soon as possible but no later than two (2) hours	As soon as possible using continuously diligent efforts
Level 3	Low	Minimal impact to Service	Within two (2) business days	Vendor will evaluate and incorporate into hotfix or release as deemed appropriate

For the purposes of this table, the "Acknowledgment" shall mean the time when Vendor first learns of a problem to Vendor's initial contact to Customer by email or telephone acknowledging such reported issue; and "Issue Resolution" shall mean when Customer substantially resolves the issue or commences implementation of a project to make changes to functionality or systems to resolve the issue, whichever occurs first.

(b) ***Monitoring and Reporting.***

For most SLAs, the vendor is in the best position to monitor the service levels and such monitoring is often built into the technology. As the party monitoring the service levels, the vendor should be required to report whether the service levels have been met during specific time periods, and this reporting would include any information on breaches of the service levels. The contract should specifically state which party will monitor and report the service levels. Customers may want an audit right to verify the monitoring and reporting and may also develop its own mechanisms for tracking service levels.

Measurement and Reporting

Vendor will measure compliance with the Service Levels in accordance with the measurement methodology for each Service Level described in Exhibit [X]. Vendor will implement measurement and monitoring tools and procedures required to measure Vendor's performance of the Services, and to report on such performance at a level of detail that is sufficient to verify compliance with the Service Levels. Vendor will provide Customer with online access to all performance reports available to Vendor and to the raw data from such measurement and monitoring tools at a frequency agreed by the parties in Exhibit [X]. Upon request by Customer, Vendor will provide Customer and its designees access to and information concerning such measurement and monitoring tools, procedures and performance information for purposes of

audit, inspection and verification. Vendor will provide to Customer the reports set forth in Exhibit [X-1] detailing Vendor's measurement of and compliance with the Service Levels.

(c) *Credits.*

When SLAs are breached, the vendor typically offers remedies. The remedy we see most often for breach of SLAs is for the vendor to credit the customer a certain amount of the fees due, such as a percent of the monthly invoice. Service credits are intended to compensate the customer for their pain and incentivize the vendor's performance, but are not usually "make whole" remedies (although some vendors do offer a 100% credit as a sole and exclusive remedy). Typically, certain service level defaults will carry higher credits, such as defaults for mission critical services, during critical time periods, or with respect to services for c-level officers. Some service level defaults carry no credits, such as defaults for minor service levels or for key performance indicators. There are multiple different ways to draft service level credits, including tiering, enhancing factors for continued breaches, repeat breaches within a period and for breaches during critical periods. Credits are often capped at a certain percentage (sometimes a very low portion of the fees or "at risk" amount). Sometimes the customer is given the option to weigh which SLA is more important to the customer and add more credit potential to that service level. Below is an example of service level credits for the service availability SLA set out above:

SL Credit.

Service Level Default – Actual System Availability	SL Credit*	SL Credit during Critical Service Window
99.9-99.949%		
99.5-99.89%		
99-99.49%		
80-90%		
<80%		

* enhanced by a factor of [X] for each failure during the business hours of [X] and for each additional Service Level Default in the same month

The aggregate Service Credits payable in a month are capped at [100]% of the monthly fee for such month.

(d) ***Earnbacks.***

Some vendors will want to have the right to earnback the service level credits that they pay to a customer. Earnbacks may make sense if the customer receives beyond normal service from the vendor which acts as an actual benefit to the customer. However, when structuring earnbacks, customers should consider whether the better service that triggers the earnback really outweighs the poor service that triggered the credit in the first place. Often the damage caused by the default cannot later be "fixed" by better than guaranteed performance. An example clause is:

Earnback Credits.

Vendor shall have the ability to receive financial incentives for performing better than the defined Service Levels. Earnback Credits can only be earned back by meeting the defined expectation metric as described in detail for each Service Level, and each Earnback Credit shall equal the amount of one Service Level Credit paid by Vendor for the same Service Level. Only one Earnback Credit can be earned against each Service Level Credit paid. Vendor shall have earnback opportunities with respect to Service Level Credits only within the 12 month period after such Service Level Credit was incurred as follows:

a. Within [X] days after each calendar quarter, Vendor shall provide a report to Customer that will include, with respect to each Minimum Service Level for which there was a Minimum Service Level Failure during the preceding Contract Year, the following:

   i. Metrics on Vendor's monthly performance during the preceding Contract Year for all Service Levels;

   ii. The total amount of Service Level Credits imposed for Minimum Service Level Failures; and

   iii. The metrics regarding whether Vendor is entitled to an Earnback Credit based on the specific criteria.

b. Such report will be reviewed with the Operations Committee. Upon validation of the data by Customer, Vendor will be entitled to bill the Earnback Credits to Customer on the next quarterly invoice for the Earnback Credits earned in the prior Contract Year.

c. In no case will Vendor be able to earnback more credits than Service Level Credits issued in a particular Contract Year.

(e) ***Root Cause Analysis.***

If the breach of the SLA is for a mission critical service or occurs frequently, or simply occurs, the customer may require the vendor to perform a root cause analysis at the vendor's expense. At the end of the root cause analysis, the parties should amend the applicable SLA or service in

order to reflect the outcome of the analysis. This type of remedy is useful to make the vendor pay attention to items that are critical to the customer, and to try to get to the bottom of bad defaults. Here is an example clause:

Root Cause Analysis.

With respect to Vendor's failure to provide the [Services] in accordance with the applicable Service Levels, Vendor shall, as soon as reasonably practicable, but not later than five (5) days after such failure (except as provided below in this Section), (a) perform a root-cause analysis to identify the cause of such failure, (b) provide Customer with a report detailing the cause of, and procedure for correcting, such failure, (c) implement such corrective procedure, including obtaining Customer's consent to such implementation, and (d) provide Customer with a written action plan satisfactory to Customer that specifies the steps Vendor has taken, or shall take, to prevent such failures following the implementation of the procedure. If Vendor, using all reasonable efforts, cannot complete its obligations under clauses (a), (b), (c) or (d) above within the five (5) day-period, Vendor shall, on a regular basis until such obligations are completed, review with Customer Vendor's progress in completing such obligations (and provide written summaries thereof and a schedule for completion). Vendor shall address and resolve any concerns raised by Customer in connection with such reviews.

(f) ***Termination Rights.***

The typical remedy of termination for uncured breach does not really work for service level breaches because the cure period is usually too long for a customer to wait for the breach to be fixed. For example, if the service level is "availability" of 99.9% (i.e., that the applicable service will be available for use most of the time) and the customer only has a right to terminate if the vendor does not fix the default in the standard termination cure period of 30 days, then the service could be down 29 days out of every 30 day period and the customer would never be able to terminate the contract. Therefore, additional termination rights are frequently requested for repetitive SLA defects (either of the same SLA within a period or of different SLAs in a period) and for extended outages (shorter than 30 days). For example:

Repeated SLA Failures.

In the event that there are [-] Service Level Defaults in a rolling span of [X] months or more than [x] Service Level Defaults in [x] out of [y] months, Customer may terminate the Agreement (and all SOWs) without penalty.

(g) ***Other Remedies.***

The customer may request other remedies from the vendor if the SLAs are breached. For example, (i) if the contract has minimum use requirements, those could be waived; (ii) the customer could require the vendor to publish breaches; and (iii) the parties could require meetings with executives where vendor assures future performance.

(h) ***Escalation.***

The right to escalate a failure to timely remedy a default per the SLA is an appropriate remedy for a customer to seek, particularly if the SLA default that is not being remedied is of a mission critical or high priority nature. Some vendors offer escalation within an overall governance framework. Some vendors offer personal phone numbers for various roles in the event of a failure to correct an SLA default. In either case, this option is supposed to get the attention of the vendor at the right level within specified time periods to ensure that the issue is being worked on even if it has not yet been resolved. For example:

Escalations

The parties shall work together to define the escalation workflow and document it within the Client Service Manual. The standard escalation contacts, as of the SOW Effective Date are:

Vendor Contact	Priority 1 Escalation Time	Priority 2 Escalation Time
Role A	[X] minutes	[X] hours
Role B	[X] hour	[X] hours
Role C	[X] hours	[X] hours

(i) ***Sole and Exclusive Remedies.***

Vendors will often want these SLA default remedies to be the sole and exclusive remedies so that losses with respect to the nonconformity or SLA breach are limited. Customers will want the remedies to be cumulative so that they benefit from both the remedies plus have the opportunity to terminate under the normal contract terms and claim monetary damages as well with respect to the SLA breach. If a vendor agrees to allow other remedies under the contract (subject to the usual contract disclaimers and limitations on liability), the vendor may require the applicable contract cap to be reduced by the amount of any paid credits so that the cap is not effectively increased by the amount of the credit. If the contract includes sole remedies, the customer should be clear that other remedies are available if there are other non-SLA breaches under the contract. An example of language requiring the SLA remedies to be sole and exclusive remedies follows:

SOLE AND EXCLUSIVE REMEDY.

THE REMEDIES SET FORTH IN SECTION [X] SHALL BE THE CUSTOMER'S SOLE AND EXCLUSIVE REMEDY AND VENDOR'S ENTIRE LIABILITY FOR ANY SERVICE LEVEL DEFAULT UNDER THIS SERVICE LEVEL AGREEMENT.

2. Customer Satisfaction Surveys.

Another tool for measuring the performance of vendors are customer satisfaction surveys. These surveys can be structured: (a) for different audiences, such as employees or executives; (b) for different periods, including annually, quarterly, or biannually; and (c) with questions that the customer coordinates with the vendor. Once the surveys have been established, they can be used as service levels with similar remedies as described above. For example:

Baseline Customer Satisfaction Index.

Vendor shall submit to Customer, for Customer's approval, the identity of the [unaffiliated baseline surveyor] that shall conduct a baseline customer satisfaction survey of those End-Users designated by Customer (the "Customer Satisfaction Survey"). Upon Customer's approval of such third party, Vendor shall engage such third party to conduct the Customer Satisfaction Survey, as approved by Customer. The Customer Satisfaction Survey shall be (1) of the content and scope set forth in Schedule [X], (2) administered in accordance with the procedures set forth in Schedule [X], and (3) subject to Customer's approval. The results of the Customer Satisfaction Survey shall be the baseline for measurement of any changes in customer satisfaction as measured pursuant to the next Section.

Customer Satisfaction Survey.

At least once every Contract Year during the Term, Vendor shall, upon Customer's request, engage an unaffiliated third party approved by Customer to conduct a customer satisfaction survey in respect of those aspects of the Services designated by Customer. The survey shall, at a minimum, cover a representative sampling of End-Users, as specified by Customer. The timing, content, scope and method of the survey shall be consistent with the Customer Satisfaction Survey and shall be subject to Customer's approval. Vendor agrees that (a) increased or decreased measured customer satisfaction shall be a key performance incentive for the compensation of the Vendor Key Employees and (b) customer satisfaction shall be measured as a Designated Service Level pursuant to Section [X].

In the event that Customer disputes the results of the customer satisfaction survey, Customer may engage a third party, reasonably acceptable to Vendor, to conduct the customer satisfaction survey pursuant to this Section. The results of such survey shall be binding on the Parties.

3. Benchmarking.

A tool that can be used to measure ongoing performance of a vendor and the charges for its services is benchmarking the vendor's services and charges against other services/charges in the industry (for which a benchmark exists). For example:

Commencing 12 months after the effective date of the Agreement, Vendor will undertake annual reviews of the Services, their associated charges and the underlying technology used to deliver the Services and bring to Customer Vendor's plan to improve performance and reduce charges. In the event Customer and Vendor do not agree to a plan for improved performance or reduction in charges, then Customer will have the right, at its expense, to use a specialist third party to benchmark the Vendor's performance of and charges for any element of the Services, selecting such a bench marker from a list of bench markers mutually approved by Customer and Vendor and attached to the Agreement.

Vendor shall automatically adjust the charges for benchmarked Services in accordance with the results of a benchmark to bring them back within the [1st] quartile of the market range, considered from the perspective of Customer's benefit, for the provision of services similar in scope and performance requirements to the benchmarked Services within 30 days of the completion of the benchmark.

Vendor may dispute the outcome of a benchmark, and in the event that after exhaustion of the governance and dispute resolution processes Customer and Vendor are unable to agree on adjustments to the performance of and charges for the Services following a benchmarking exercise, Customer shall have the right to insource or resource the benchmarked Services or to terminate the Agreement for cause.

4. Right to Insource or Resource.

If the services or technology are not meeting the applicable performance levels, the customer could use the remedy of insourcing or resourcing (i.e., use a third party to perform) the defective services (or the defective services and dependent services) rather than terminating the entire contract. Insourcing or resourcing is effectively shrinking the contract with respect to the technology/services that are insourced or resourced on a permanent basis. For example:

Customer Insource/Resource Right. If there is a Service Level Issue [defined as number of breaches of SLAs], then Customer may deliver to Vendor notice of such Service Level Issue, along with evidence of such Service Level Issue. On receipt of such evidence, Vendor shall prepare an improvement plan designed to cure the Service Level Issue as soon as is reasonable under the circumstances ("Improvement Plan"). Vendor shall promptly implement such Improvement Plan. If the Improvement Plan fails to achieve compliance with the failed Service Level(s) that caused the Service Level Issue within [X] days following Customer's notice to Vendor ("Correction Period"), Customer may give Vendor notice of such failure within sixty (60) days of the end of the Correction Period (such period is the "Notice Period"). Customer will then have the right with notice to Vendor within such Notice Period to insource or resource (to a third party) the applicable defective portion of the Services.

5. Step-In Rights.

A short term alternative to insourcing or resourcing is for the customer to have the remedy of step-in rights to take over defective services, or a failure to perform services, on a temporary basis until the vendor is ready to resume the services. For example:

> In the event that Vendor is failing to deliver all or part of the Services, Customer may assign Customer staff or third parties to step in and perform any failing elements of the Services until such time as Vendor can demonstrate the ability to resume provision of such Services. All costs associated with the exercise of such step-in rights shall be borne by Vendor. Customer's exercise of its step-in rights shall not constitute a waiver by Customer of any rights.
>
> or
>
> If any Force Majeure Event results in a failure of Vendor to deliver any portion of the Services, then Customer may, upon notice to Vendor, procure the affected portion of the Services from an alternate source or perform the affected portion of the Services for itself until the failure is cured. In such event, Customer shall be excused from paying Vendor for the portion of the Services that Vendor fails to deliver. If any Force Majeure Event results in a failure of Customer to provide any of the Customer Resources required under this Agreement and such failure lasts for more than [X] hours from the receipt of notice of such Force Majeure Event, then Vendor may, upon notice to Customer, procure such Customer Resources from an alternate source until the failure is cured. In such event, Customer shall continue to pay Vendor for the Services and Customer shall be liable for payment to such alternate source.

6. Disputed Fees.

Contracts typically include a covenant requiring the customer to make payment to the vendor at various points (periodically in advance, in arrears, upon completion of services, upon achieving certain milestones, etc.). Fees in a contract are often the subject of dispute. The dispute could be over a simple matter, such as a failure to deliver on time, or delivery of the wrong item. The dispute could be over credits due on fees and how to calculate them. Or, the dispute could be over how complicated revenue sharing provisions have been calculated and take months to resolve (if possible). The simple remedy for a failure to pay on time is termination for uncured breach, or suspension of services until the dispute is resolved. Customers may not want to terminate the contract or lose the service, and instead may want to withhold fees until the dispute is resolved. Vendors, however, cannot usually continue to perform indefinitely without payment.

A remedy available to vendors who do not want customers to be able to withhold all disputed fees is to cap how much a customer can withhold in disputed fees. For the portion of fees that is permitted to be withheld (in good faith), vendors may also require evidence that the customer can in fact pay when the dispute is resolved, by way of escrowing the disputed fees. Below is an example of such a clause:

In the event of a good faith dispute between Customer and Vendor regarding any Fees due under this Agreement, Customer shall notify Vendor of the amount of and reason for the dispute promptly, but in no event later than the day on which the payment is due, and the dispute shall be referred to the [name committee] for prompt resolution. Customer may withhold the disputed portion of the Fees until resolution of the dispute by the [name committee], provided, however, that at any one time, Customer shall not withhold, in the aggregate for the affected SOW(s), amounts in excess of five percent (5%) of the cumulative Fees paid by Customer to Vendor over the past twelve (12) months under the applicable SOW ("Disputed Fees Cap"). If Customer withholds any amounts over the Disputed Fees Cap, Vendor may terminate the affected SOW(s) (including any SOW(s) dependent on the SOW(s) to which the Disputed Fee Cap relates) with written notice to Customer if Customer does not cure such breach within thirty (30) days of written notice from Vendor.

C. Changes.

Whenever a party enters into a relationship contract, it is entering into the contract in the state the parties are at that moment. With on-going relationship contracts you have to consider how changes that affect either party or the technology or services covered by the contract could affect the nature of the relationship between the parties.

1. Types of Change.

Changes can take many forms:

(i) Modifications to technology, for example, as part of bug fixes or product updates;

(ii) Changes to how services are performed by the vendor, for example, due to offshoring;

(iii) Changes in regulations governing the technology or services, for example, changes in the data privacy and security laws;

(iv) Changes, reductions or additions to the scope of services, for example, the addition of a new module;

(v) Changes to the use made by the customer, for example, if the technology is based on the number of users and the customer shrinks drastically;

(vi) Acquisitions or divestitures by the customer altering the scope of use of the technology or services;

(vii) A change in ownership or sale of vendor's or customer's business;

(viii) Force majeure event affecting performance of either party; or

(ix) Bankruptcy of either party.

2. What to Address.

Each of these changes may have a significant impact on the customer-vendor relationship. The parties should determine up front: (a) the process by which changes will be addressed; (b) which party pays the cost of changes; (c) if the other party's consent is required to the change; and (d) whether the vendor or customer have the ability to accept or reject changes (some vendor changes may be systemwide and affect all customers, in which case the customer may not have approval rights and instead would need to rely on the changes not materially altering the technology or services).

3. Simple Clause.

Some of these changes are handled in a specific change control type clause or addendum to a contract. But some of them are hidden in other clauses in the contract, for example, a customer may have a right to terminate a contract if the vendor has a change in ownership or a vendor may prohibit a customer from assigning a contract in the event a customer is sold. Change control clauses that are simple may look something like this (this is a one-sided clause):

> Change Order Process.
>
> Unless otherwise specified in a Statement of Work, if Customer desires to modify the Services or Deliverables in any Statement of Work, Customer shall provide written notice to Vendor and describe the modifications or additional services or deliverables to Vendor (a "Change Notice"). Within five (5) days of its receipt of a Change Notice, Vendor shall submit a change order proposal (a "Change Order") to Customer for Customer's approval, which shall include a statement of any additional charges (with a maximum amount thereof), and any necessary adjustments to the delivery schedule in such Statement of Work resulting from the proposed Change Notice. On Customer's written approval of the Change Order, the Change Order will be attached to the applicable Statement of Work and become a part of that Statement of Work and this Agreement. Any additional deliverables or changes to the Deliverables described in the Change Order shall be subject to acceptance testing as described in the relevant Statement of Work and/or Change Order. Vendor shall quote all charges for the Change Orders at its standard charges unless otherwise agreed in the Statement of Work. Vendor shall not proceed to implement any such change without Customer's prior written approval.

4. Change Order Addendum.

More complicated change order processes can take many pages and would typically cover: (a) a description of what constitutes a change; (b) what types of changes require the other party's consent, (c) what type of changes are at the vendor's expense; (d) what type of changes could result in changes to the fees; (e) the process for requesting changes and the form of documentation used to document the request and the proposed response to it; and (f) how to handle emergency changes.

5. Governance.

The parties may appoint a governance body specifically responsible for dealing with changes under the contract. For example:

> Vendor and Customer may appoint a Change Management Board (the "Change Management Board") made up of a number of people identified by the parties. The parties will determine the composition, roles and responsibilities and meeting requirements for the Change Management Board. [Typically the roles and responsibilities would be set out in the contract.] The members of the Change Management Board will not have separate voting rights; all actions of the Change Management Board under this Agreement will require the mutual consent of the parties. If a participant on the Change Management Board does not have the authority to bind the party on the Change Management Board, such participant shall provide such information to the other party and the dispute shall be escalated to the next level of escalation.

D. Governance.

1. Background.

Governance clauses are useful for dealing with a number of different ongoing relationship aspects whether for a specific period, a specific function or for the overarching relationship. The objective of governance provisions may include: clarifying roles and establishing committees, teams or working groups; setting project or strategic direction; enabling the parties to meet their respective business intents; monitoring the vendor's performance, quality and effectiveness; providing a structure for adjusting the vendor's services to meet the dynamic needs of the customer's business; providing a structure for dealing with change; facilitating the early and effective resolution of escalated issues; providing proactive risk mitigation, problem prevention and resolution, and open and active communications; and facilitating the ability of the parties to fulfill their respective commitment and obligations under the agreement. The parties can create as much structure as they believe they need to govern the ongoing steady state portion of a contract. The key is to have in place a structure that works for both parties and is helpful, not disruptive. Sometimes vendors already have a structure in place, which the customer can fit into. Other times customers have their own ideas of what structure is needed, and may push a particular structure at the front end of the contracting process to get comfort around the idea, and then as the contract progresses the parties may end up removing some of the structure to simplify it.

These clauses all typically include: (a) a description of the purpose of the applicable committee; (b) the roles within the committees; (c) the qualifications of the people who will fill the roles (or the identification of the people, if key people are necessary); (d) any time limitations around changing of key personnel filling the roles; (e) a description of the subject matter of the committee; (f) the processes around meetings, what forms a quorum, who can vote, whether either party has veto rights, and how to reach agreement; and (g) the escalation structure from such committee to other committees or otherwise, or a description of how the committees interact.

2. Clauses for a Specific Period.

These types of clauses typically cover a specific timeframe of critical importance to the contract, and once the period is over the committee can be dismissed. For example, if transition to a service is very involved, the parties may have a transition committee; if wind down of a particular service could be painful the parties may have a termination assistance committee; or if the technology or services are in a development phase, then there may be a development committee.

Transition Committee.

(a) Composition of the Transition Committee. The Transition Committee shall be composed of four (4) members, consisting of (a) two (2) Customer representatives, one (1) of whom will be the Customer Transition Manager and (b) two (2) Vendor representatives, one (1) of whom will be the Vendor Transition Manager. In each case, Transition Committee members will be appointed and serve at the pleasure of Customer and Vendor, respectively. The Transition Committee will be responsible for review of transition issues.

(b) Meetings and Actions of the Transition Committee. The Transition Committee will meet at least weekly during the Transition Period to discuss the achievement of Customer's transition to Steady State and how Vendor is progressing toward Steady State. A quorum shall exist at a meeting of the Transition Committee if three (3) of the four (4) members are present at the meeting. The consent or approval of three (3) of the four (4) members, including at least one (1) Customer representative and at least one (1) Vendor representative, is required for the Transition Committee to take action. Each party may include such professionals as it may deem appropriate and useful in making its presentation to the Transition Committee. If the issue(s) cannot be resolved at such meeting, then the parties shall submit the dispute to the Operations Committee, as set forth in Exhibit [X].

(c) Role of Transition Committee. The Transition Committee shall be responsible for the following: [roles].

(d) Dissolution of Transition Committee. Within ninety (90) days of Steady State, the parties shall dissolve the Transition Committee.

3. Clauses for a Specific Function.

Specific functions that could be filled by a governance structure include development, idea management, operations, service levels, and change management. Below is an example of a clause for a specific function, a joint development committee:

Joint Advisory Committee; Development Roadmap.

(a) Establishment of Joint Technical Committee. Vendor and Customer shall each appoint two (2) members to a joint advisory committee to address strategic issues relating to the Website and to provide a forum to discuss and resolve disputes arising under this Agreement (the "Joint Advisory Committee"). During the initial period beginning on the Effective Date and continuing through the term of this Agreement, one of Vendor's appointees will be its chief executive officer and one of Customer's appointees will be its chief executive officer. Except as expressly provided in this Section [X], each party may remove any of its appointed members to the Joint Advisory Committee for any reason at any time by written notice to the other party, and each party may name a replacement for any member of the Joint Advisory Committee so removed.

(b) Meetings. The Joint Advisory Committee shall hold regular meetings at least quarterly. In addition, the Joint Advisory Committee will meet from time to time for special meetings if required to resolve disputes within the scope of the Joint Advisory Committee's authority as set forth herein.

(c) Purpose and Authority. The Joint Advisory Committee will provide oversight and general direction for relationship of the parties. At each regular meeting of the Joint Advisory Committee, in addition to any other matters that the members may wish to address, Vendor shall provide a summary of the performance of the Website and an update on the quantity and quality of the Website Content, using metrics and procedures developed and approved by the Joint Advisory Committee. At least annually, the Joint Advisory Committee shall review the Development Roadmap and discuss strategies for ensuring that all milestones are met. In addition, at any regular or special meeting, the Joint Advisory Committee may resolve disputes informally between the parties. Any such dispute may be resolved only if all members of the Joint Advisory Committee are present, the decision is unanimous and the resolution is in writing and signed by all members of the Joint Advisory Committee. If a dispute brought to the Joint Advisory Committee is not resolved within thirty (30) days from the date on which notice of the dispute is given, either party may seek any remedy available to it under this Agreement. The Joint Advisory Committee shall have no authority to resolve any dispute regarding a breach of [the confidentiality or intellectual property sections of this Agreement].

4. Clauses for Overall Contract Relationship.

In material contracts, in addition to the ongoing operational type committees described above, the parties may need some relationship management or executive committees to ensure that the strategic direction of the relationship is being properly supervised. Here is an example of a clause that creates roles plus the committees in which those roles fit for an overarching relationship governance:

(a) Customer Program Sponsor. Customer will appoint an individual who shall have ultimate responsibility for Customer responsibilities and Customer's involvement in this Agreement (the "Customer Program Sponsor"). Primary responsibilities include:

(i) provide executive sponsorship of Services;

(ii) meet regularly with the Vendor Executive Sponsor to inform Vendor of strategy and key initiatives and business goals in order to assist the Vendor Executive Sponsor with the establishment and maintenance of the Information Technology "roadmap" and review execution of the strategy;

(iii) inform Vendor of key initiatives that require Vendor and Customer to examine current offerings and service levels and discuss potential impacts or necessary adjustments (i.e., a new Customer acquisition);

(iv) jointly host the Steering Committee meetings with Vendor;

(v) resolve escalated issues according to the applicable governance escalation procedures;

(vi) provide assistance in negotiating all change orders and amendments to this Agreement that are required.

(b) Vendor Executive Sponsor. Vendor will appoint an individual who shall oversee Vendor's performance of this Agreement (the "Vendor Executive Sponsor"). The Vendor Executive Sponsor is a Key Personnel.

- Objective: Ensure the overall health and alignment of the long-term relationship
- Primary responsibilities include:

(i) provide executive sponsorship of Services;

(ii) serve as primary issue escalation resource for the Vendor, and participate in the escalation and disputes process in accordance with this Exhibit;

(iii) resolve escalated issues in accordance with the applicable governance escalation procedures;

(iv) jointly host the Steering Committee meeting with Customer;

(v) meet regularly with the Customer Program Sponsor to support the execution of the strategy;

(vi) provide assistance in negotiating all change orders and amendments and updates to this Agreement that are required; and

(vii) confirm relationship strategy between Vendor and Customer.

Steering Committee.

(a) Committee. Vendor and Customer will appoint a Steering Committee (the "Steering Committee") made up of a number of key executives from each party (inclusive of the Vendor Executive Sponsor and the Customer Program Sponsor, which will meet quarterly, and at such additional times as set forth in an Statement of Work and as necessary for ad hoc meetings and to resolve disputes escalated.

(b) Roles and Responsibilities. The roles and responsibilities of the Steering Committee as shared jointly between Customer and Vendor include the following:

(i) review and analyze the monthly Services performance report for the preceding period and the parties' overall performance under this Agreement;

(ii) review progress on the resolution of issues;

(iii) provide a strategic outlook for Customer's business and operational goals;

(iv) examine trends and observations from both parties in order to drive innovation activity and performance improvement;

(v) review communication from prior period to ensure it has been timely;

(vi) review leading practices, risk exposure and mitigation and data security issues;

(vii) attempt to resolve, or designate individuals to attempt to resolve, any disputes or disagreements under this Agreement that are escalated to this level, escalating appropriate issues to the senior executives. The members of the Steering Committee will not have separate voting rights; all actions of the Steering Committee under this Agreement will require the mutual consent of the parties. If a participant on the Steering Committee does not have the authority to bind the party on the Steering Committee, such participant shall provide such information to the other party and the dispute shall be escalated to the next level of escalation; and

(viii) Within 30 days of the Effective Date, the parties will determine an appropriate schedule of meetings and/or telephone conference calls to be held by the Steering Committee.

E. Escalation.

There will inevitably be disputes over the lifecycle of an on-going technology agreement. Escalation clauses are the clauses that deal with the steps prior to formal dispute resolution (such as mediation, arbitration or litigation). These types of clauses typically detail: (a) what issues warrant escalation; (b) the steps the parties will take to escalate issues; (c) timing for escalating through various steps, including accelerated timing for critical matters; and (d) how the issues

addressed and materials created following the escalation procedures will be used in future formal dispute resolution. Escalation clauses are intended to promote efficient settlement of issues and prevent entering into more formal dispute resolution measures. There follows a sample escalation clause:

Escalation Clause. Prior to the initiation of litigation, the parties will first attempt to resolve any dispute, controversy or claim arising under or in connection with this Agreement informally in accordance with the process below:

(a) Notification. Customer and Vendor shall use their best efforts to informally resolve any problem or dispute by consulting and negotiating with each other in good faith, recognizing their mutual interests and attempting to reach a timely and equitable solution satisfactory to both parties. The escalation process, from the first attempt to resolve a dispute (as stated in point (i) below) until the earliest of 10 days after reference to additional senior executive to resolve (point (iii) below) or such lesser period if faster escalation (as stated in point (iv) below), shall be referred to as the "Discussion Period".

(i) A dispute shall first be referred to the roles identified in an Statement of Work, or, if none is stated, the parties shall go straight to step ii;

(ii) If the parties are unable to resolve the dispute in step one within twenty (20) business days, the dispute shall be referred to the Steering Committee;

(iii) If the parties are unable to resolve the dispute in step three within twenty (20) business days, or earlier if agreed by the Steering Committee, the dispute shall be referred to additional senior executives, and if, there is no resolution within 10 days (as may be extended by the executives), either party may pursue litigation or any other remedies; and

(iv) Faster escalation is permitted if the issue is of a critical nature as determined by the party raising the issue.

Exceptions. Notwithstanding any of the escalation procedures, either party may initiate formal proceedings rather than following the specified procedure with written notice to the other party if there is less than one (1) month before the limitations period governing a claim arising out of an issue shall expire. None of the escalation processes set forth above shall limit either party from claiming breach of this Agreement or using any termination right set forth in this Agreement. In addition, none of the escalation processes set forth in this Agreement shall restrict either party from seeking injunctive relief or other equitable relief where appropriate. Neither party will be relieved of its obligations under this Agreement while the escalation processes or dispute resolution process is being carried out.

Documentation. Both parties will jointly develop a short briefing document that describes the issue, relevant impact, and positions of both parties for disputes raised to step ii, iii and iv (above). Written or oral statements of position or offers of settlement made in the course of the escalation process shall not:

(i) be offered into evidence or disclosed in any litigation between the parties; or

(ii) constitute an admission or waiver of rights by either party in connection with any litigation.

Each party shall promptly return to the other party, upon request, any such written statements or offers of settlement, including all copies thereof.

IV. TERMINATION ASSISTANCE SERVICES

A. Background.

At some point, the relationship will come to an end. Wherever the end of the agreement would leave the customer with a gaping hole in its ability to proceed without the vendor (either through loss of technology or loss of a service), establishing termination assistance processes for the end of the relationship is advantageous. These clauses typically cover: (a) the types of services provided during termination assistance (both the steady state services and additional termination assistance to decouple the relationship); (b) the cost and duration for termination assistance services; (c) any necessary interaction and cooperation with a new third party vendor; (d) what deliverables (reports, process manuals, etc.) the vendor is required to provide customer; (e) the fees to be paid to the vendor, including prepayment if terminated by the vendor due to customer's failure to pay; (f) details on how the customer's data will be returned to customer; (g) any terms governing ongoing licenses between the parties (and whether the terms are to be purchased on an arms-length basis or on some broader terms given the long-term nature of the relationship); and (h) the assignment to the customer of any dedicated vendor resources.

Larger outsourcing agreements may include detailed disengagement plans. A customer may want the disengagement plan produced as part of the transition to the services, updated routinely through the term. The vendor may not want to take the time and resources to create a disengagement plan till closer to termination. Non-solicitation clauses should be taken into account with respect to termination assistance services, as the customer may want to solicit specific roles at the vendor, particularly if dedicated to the customer.

B. Example Clauses.

(1) In connection with any termination of this Agreement, Vendor will assist and comply with Customer's reasonable directions to cause the orderly transition and migration of the Services to Customer or a third party contractor to whom Customer chooses to transfer the Services (the "Termination Assistance"). Customer, its employees, and agents will cooperate with Vendor in connection with such Termination Assistance and Customer will

perform its obligations under the Termination Assistance Plan (as hereinafter defined). As part of the Termination Assistance, Vendor will perform the following obligations at Customer's expense unless otherwise stated below or as mutually agreed in the Termination Assistance Plan:

(a) Vendor and Customer will work together to develop a termination assistance plan (the "Termination Assistance Plan") setting forth the respective tasks to be accomplished by each party in connection with the orderly transition and a schedule pursuant to which the tasks are to be completed.

(b) Vendor will provide Customer with detailed specifications for hardware or other equipment which Customer will require to properly perform the services and procedures previously performed by Vendor.

(c) [Customer may purchase from Vendor at its [net book value], and subsequently assume the leases (provided such leases are assumable) for, any hardware owned or leased by Vendor and which is dedicated to providing the Services to Customer as of the effective date of such termination.]

(d) [Vendor will deliver to Customer a reasonable number of copies of such documentation for the operation and management of the Systems as used by Vendor at the time of termination of this Agreement.]

(e) Vendor will provide appropriate training for the Customer employees who will be assuming responsibility for operation of the Systems.

(f) Notwithstanding any provision to the contrary in this Agreement, Customer may offer employment to any Vendor employee who is then dedicated to providing the Services to Customer."

(2) Upon termination of this Agreement, Vendor will grant to Customer a license to use, execute, operate, reproduce, display, perform, distribute, modify, develop and distribute, and create Derivative Works from, all Vendor-Owned Software and Documentation, and the right to sublicense third parties to do any of the foregoing. In furtherance of the foregoing, Vendor will provide to the Customer copies of source code and object code for any Vendor-Owned Software for use by the Customer as a part of and in connection with the Customer Business, upon terms and prices to be mutually agreed upon by the Parties (which prices shall not be greater than those offered to other similarly situated customers or, in the case where no similarly situated customers exist, other third parties). If Vendor has licensed or purchased and is using any generally commercially available Third-Party Software to provide the Services to Customer at the date of termination, Customer may elect to receive transfer or assignment of the license or ownership of such software (and any attendant maintenance agreement), provided that Customer agrees to reimburse Vendor for the portion of the initial license or purchase charges for such Third-Party Software that has not been recovered, or deemed to be recovered, based on an assumed 5-year amortization by Vendor of the original out-of-pocket costs of such purchase or license. Customer shall also be required to pay any transfer fee or charge imposed by the applicable

vendor. If to provide the Services Vendor is using any Third-Party Software which is, at the time of termination, simultaneously being used by Vendor to support other substantial operations of Vendor or other customers of Vendor in a shared environment, Vendor shall not be required to furnish such Software to Customer but shall, upon request by Customer, assist Customer in obtaining licenses for such Software on terms reasonably acceptable to Customer.

(3) Upon termination or expiration of this Agreement or any Statement of Work entered into under this Agreement, Vendor shall, upon Customer's written request, provide termination assistance services (the "Termination Assistance Services") to Customer at Vendor's then-current hourly rate for a period of six (6) months from the date of termination or expiration (or such shorter time as Customer may request), in compliance with the service levels and subject to the terms and conditions of this Agreement, as may be further specified in an Statement of Work. The Termination Assistance Services include those services necessary to enable Customer to transition the Services provided by Vendor at the time of termination or expiration over to be provided by Customer or a third-party vendor of Customer without interruption or loss, including with respect to mapping, extraction, conversion, transfer and loading of Customer's data onto new systems provided by Customer or a third-party vendor of Customer. Such data will be provided to Customer in industry-standard formats to ensure ease of transition. Vendor shall also provide Customer with all reports, materials and information specified in this Agreement.

V. SUMMARY

In conclusion, long-term customer-vendor relationship, differ from other transactions where the parties do not intend to work together in the future. Clauses that help the parties form and navigate the ongoing nature of such a customer-vendor relationship (including its termination) are essential for the parties to set expectations at the beginning of the relationship and successfully direct the relationship through the entire lifecycle of the contract.

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