



Technology Contracting – Traps That Can Trip Up Even the Most Experienced Attorney

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What is Unique About Technology Transactions?

- Depends upon how you define a technology transaction.
- We are focusing on some key differences in technology licensing transactions as a result of the relationship aspects that they contain.
- The materials cover clauses that you can use to manage an ongoing relationship contract (outside of the standard clauses).

Summary

1. Negotiation Aspects
2. Determining Business Goals
3. Managing the Ongoing Relationship

Negotiation Aspects – Vendor Tactics

10. No we can't send the agreement in Word, we only do pdfs
9. We don't have the authority to negotiate that
8. Maybe you don't know who we are, we're the number one vendor for [____] in the US
7. You're slowing the deal down
6. I know the contract doesn't say that, but it's our practice
5. That will affect our revenue recognition

Negotiation Aspects – Vendor Tactics (cont)

4. We don't give our customers our documentation before they sign the agreement
3. We take offense to your position that we might [lose your data/breach the warranties etc.]
2. We can schedule your implementation after we sign
1. No-one has ever asked us for that before

Negotiation Aspects – How to Tackle Tactics and Preserve Your Relationship

1. Follow the perfect contracting process:
 - a) Draft RFQ – with your key contract terms
 - b) Involve attorneys right away – so you can identify what will be the major issues right away
 - c) Involve your business specialties right away – such as IT, security, real estate, HR and compliance
 - d) Engage more than one vendor – always have a back up plan

Negotiation Aspects – How to Tackle Tactics and Preserve Your Relationship

2. Consider how you negotiate:
 - a) Focus on items that are truly unfair.
 - b) Be willing to walk away.
 - c) Good cop bad cop.
 - d) Isolate difficult negotiators.
 - e) Use face to face negotiation when you can.
 - f) Be respectful.
 - g) Money where the mouth is.
 - h) Ask about their insurance coverage.

Determining Business Goals

1. Why is the customer purchasing the technology/services?
2. What is the vendor's goals?
3. Can the relationship be expanded beyond the initial implementation?
4. Under what circumstances would either party walk away – if any?

Managing the Ongoing Relationship – Steady State - Covenants and Remedies

1. Service Level Agreements

a) Service Levels

- i. How to measure
- ii. Monitoring tools
- iii. Exceptions
- iv. Frequency of measurement and reporting

b) Remedies

- i. Service level credits and earnbacks
- ii. Root cause analysis
- iii. Additional termination rights
- iv. Escalation
- v. Sole and exclusive?

Managing the Ongoing Relationship – Steady State - Covenants and Remedies

2. Customer Satisfaction Surveys
 - a) Audience
 - b) Period of measurement
 - c) Questions?
 - d) SLA? Remedy?
3. Benchmarking
4. Right to Insource or Resource
5. Step-In Rights
6. Disputed Fees Cap

Managing the Ongoing Relationship – Steady State - Changes

1. Types of Change:

- a) Modifications to technology or services
- b) Changes to how services are performed by the vendor
- c) Changes in regulations governing the technology or services
- d) Change, reduction or addition to the scope of services
- e) Changes to the use made by the customer
- f) Acquisitions or divestitures by the customer altering the scope of use
- g) Change in ownership or sale of vendor's or customer's business
- h) Force majeure event affecting performance of either party
- i) Bankruptcy of either party.

Managing the Ongoing Relationship – Steady State - Changes

2. What to Address

2. the process by which changes will be addressed
3. which party pays the cost of changes
4. is consent needed?

3. Governance

Managing the Ongoing Relationship – Steady State – Governance and Escalation

1. Objectives

- a) clarify roles and establish committees
- b) set project or strategic direction
- c) enable parties to meet their respective business intents
- d) monitor performance, quality and effectiveness
- e) provide a structure for dealing with change
- f) facilitate resolution of issues
- g) provide proactive risk mitigation
- h) facilitate fulfillment of obligations

Managing the Ongoing Relationship – Steady State – Governance and Escalation

2. Specific Period
 - a) Transition
 - b) Development
 - c) Termination assistance
3. Specific Role
 - a) Operations
 - b) Change management
 - c) Service levels
4. Overall Relationship

Managing the Ongoing Relationship – Steady State – Governance and Escalation

5. Clauses cover:

- a) description of purpose
- b) roles within the committees
- c) the qualifications of the people who will fill the roles
- d) time limitations around changing of key personnel filling the roles
- e) description of the subject matter
- f) processes around meetings, quorum, voting, veto rights
- g) escalation structure

Managing the Ongoing Relationship – Steady State – Governance and Escalation

6. Escalation clauses:
 - a) issues warranting escalation
 - b) steps to escalate issues
 - c) timing through various steps, including accelerated timing
 - d) how the issues addressed and materials created following the escalation procedures will be used in future arbitration or litigation.

Managing the Ongoing Relationship – Transition and Termination Assistance

1. Transition

a) Transition Plan

- i. Part of the contract or not?
- ii. Dependencies?

b) Structuring Fees and Payment

- i. Milestones
- ii. Pay steady state fees during or after?
- iii. Drop dead dates

c) Governance

Managing the Ongoing Relationship – Transition and Termination Assistance

2. Termination Assistance

a) Plan/clauses cover:

- i. types of services provided during termination assistance
- ii. cost and duration
- iii. interaction and cooperation with a new third party vendor
- iv. deliverables (reports, process manuals, etc.) the vendor is required to provide customer
- v. details on how the customer's data will be returned to customer
- vi. solicitation

b) Ongoing licenses

- i. Proprietary vendor materials
- ii. Third party materials
- iii. Customer content

Consider

1. How you approach negotiating relationship contracts
 - a) Relationship
 - b) Goals
2. Whether your contracts have sufficient tools to effectively manage a relationship throughout its life



Questions?