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Good Deals Gone Bad – Structuring Transactions to Reduce the Risk of Litigation

*Technology Dispute Resolution:
Tips For Avoiding Disputes And Prevailing When
Disputes Are Inevitable*

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The Challenge of Dispute Resolution



Key Causes of Contract Disagreements

Structural issues — e.g., ambiguities and mismatched expectations regarding the demarcation of in-scope vs. out-of-scope services and fixed price vs. incrementally billable services



Underperformance — e.g., lack of accountability for service level or other performance failures, failure to achieve expected savings or profits



Deal points requiring later negotiation — e.g., the pricing of new services or incrementally billable services



Changes in objectives, customer needs, market alternatives, technology, etc.



Causes can be minimized with clear drafting, but contract disagreements arise in every deal

What Happens When Disputes Cannot Be Resolved?

- Issues accumulate and fester
- Deadlines, business objectives and financial goals are missed
- Upward communications become guarded, self-serving, inaccurate and/or incomplete
- Governance teams don't trust each other
- Communications become defensive, adversarial and/or emotional
- People see their careers threatened and focus on allocating blame
- One or both parties feel compelled to accept unfair or unfavorable resolutions to avoid adverse business impact



Dos and Don'ts – Ten Lessons Learned the Hard Way

1. Take the time necessary to negotiate a clear, thoughtful and reasonably comprehensive agreement:
 - Avoid ambiguity, “trust-me”s and agreements to agree
 - Create a clear description of the services to be performed, with clearly defined milestones, dates, deliverables and performance standards
 - Include a dragnet/sweeps clause
2. Define a governance and dispute resolution process that works for you:
 - Don't rely on cookie cutter templates
 - You need an effective mechanism to manage the relationship, facilitate collaboration, escalate problems, resolve disputes and involve senior management

Dos and Don'ts – Ten Lessons Learned the Hard Way

3. A well drafted agreement provides leverage that a customer can use to resolve disputes to its advantage, e.g.:
- Right to in-source or use third parties – existing and new services
 - Ability to withhold consideration for future sourcing opportunities
 - Right to withhold disputed charges
 - Mandatory use of the customer as a reference
 - Right to terminate in whole or part for convenience or cause
 - Approval/removal of Key Service Provider Personnel

But wield them with care and with full knowledge of the potential impact on the relationship

Dos and Don'ts – Ten Lessons Learned the Hard Way

4. The contract gives the customer rights that are of value to the provider and can therefore be traded to obtain concessions not foreseen at contract signing:
 - The negotiations didn't end when the parties signed the agreement
 - Know when you are giving something that the provider isn't otherwise entitled to
 - Collect "IOUs" when you grant concessions
 - The granting of concessions is, and must be, a "two-way street"
5. Clear communications; get it in writing:
 - Be as clear as possible in your communications with provider
 - Remember, under most contracts, only written waivers, consents, etc. have any effect and the best records are contemporaneous records
 - Remember, email is typically a "writing," except perhaps for major events (such as termination)

Dos and Don'ts – Ten Lessons Learned the Hard Way

6. Maintain a clear written delegation of authority:

- Under Mayer Brown contracts, the Customer Authorized Representative typically holds all authority unless he or she delegates authority in specific areas
- Avoid internal confusion and inconsistent positions
- Don't let the vendor “shop” for favorable responses

7. Make time for internal coordination:

- Meet/confer frequently regarding contract management issues
- Establish consistent priorities and positions
- Maintain a “united front” within and across towers and geographies

Dos and Don'ts – Ten Lessons Learned the Hard Way

8. Keep careful records:

- Keep files of all consents, waivers, notices, etc.
- Consider maintaining a “Frequently Asked Questions” site for internal use by governance team
- Maintain a record of all contract amendments and the resolutions of all disputes for the governance team's use

9. Remember precedent:

- The positions taken and agreements reached by the parties can be viewed as precedent in their future dealings
- Look to such precedent for guidance in resolving disagreements
- And, if certain decisions are situation-specific and not to be treated as precedent, make that clear

Dos and Don'ts – Ten Lessons Learned the Hard Way

10. Avoid impacting your business, while minimizing any resulting impact on the provider and/or relationship:

- Require the provider to proceed with the project, new service or other request if directed to do so
- Define an accelerated informal process that is fully integrated with the governance process
- If not successfully resolved within a specified period, require the customer to begin paying a defined percentage of the disputed amount
- Once resolved, true-up the charges based on the outcome

Proactive Contract Management

Guiding Principles

1. Follow the contract
2. Develop a strategy upfront
3. Establish and maintain a clear, consistent and compelling written record
4. Recognize that how you perform the contract may affect how the contract is interpreted
5. Specify who can modify the contract and how

Examples of Potential Problem Areas

- New Services

- Get it right from the beginning
- Determine organizationally who will decide whether the services are new
- Act consistently with your determination
- Consider the precedential impact of your decision

Examples of Potential Problem Areas

- Change control
 - Specify in writing who can make changes and how
 - Be careful in approving procedure manuals
 - Specifically address whether minutes of governance meetings are sufficient to document changes in the agreement
 - Be clear as to whether agreement on a remedial plan waives rights under the original agreement regardless of whether the remedial plan is fully performed

Examples of Potential Problem Areas

- Excused Performance

- Require timely written notice of alleged interference with performance
- Specify who must receive notice and the form of notice
- To coordinate efforts and preempt excuses, establish logs to track requests for action and responses

Examples of Potential Problem Areas

- Quality of Performance
 - Monitor governance reports to make sure they accurately describe the quality of performance
 - Notice of material breach and opportunity cure can be tools to obtain improved performance
 - Notice of material breach should describe nature of breach and adverse impact on non-breaching party's business in reasonable detail
 - Notice of material breach should be understandable and compelling to an ultimate decision-maker, such as a senior executive not involved in day-to-day operations, a judge, jury or arbitrator
 - If supplier fails to cure, consider taking steps to cure and deducting cost from supplier's fees

Examples of Potential Problem Areas

- Termination

- Termination for cause is risky because the standard for determining whether a breach is material is vague
- Consider worst case if finder of fact determines termination was wrongful (usually the cost of termination for convenience)
- Consider seeking declaratory judgment before terminating

The Bottom Line

- Proactive Contract Management
 - Take charge early to increase your chances of success and lower your overall cost of dispute resolution
 - At every step, create a clear written record that will persuade an objective reader that your position is correct
- Three practical questions to keep in the back of your mind:
 - What will I have to prove to prevail?
 - How am I going to prove whatever I need to prove?
 - How can I structure communications to avoid having to dig through hundreds of e-mails to prove what I need to prove?

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Questions?

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