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Governing Provider Relationships: Tips for Protecting Your Deal After the Ink Is Dry

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Technology Transactions Practice



- More than 50 lawyers around the world focused on helping clients develop and manage relationships with providers of critical services and technology
- Advised on more than 400 significant outsourcing transactions valued at an aggregate of more than \$200 billion

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“They are very good at being able to communicate and synthesize information in a useful and easily understandable way.”
~ *Chambers USA* 2016

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~ *Chambers USA* 2015

“An excellent team of people for outsourcing agreements globally - pragmatic in their approach, with a wealth of experts they can call on.”
~ *Chambers Global* 2014

“Their knowledge in this area is tremendous. They know us so well they blend into our deal teams and become a natural extension to our in-house team.”
~ *Chambers USA* 2014

Presenters



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Robert Kriss is a litigation partner in Mayer Brown’s Chicago office. He has handled many technology and Internet-related disputes and has substantial experience with mediation and arbitration and other forms of alternative dispute resolution. He has tried cases before judges, juries and arbitrators and has served as an Adjunct Professor of Trial Advocacy at Northwestern Law School.



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Brad Peterson is a leader of Mayer Brown’s Technology Transactions practice and based in the Chicago office. He has represented clients in dozens of large outsourcing transactions and hundreds of software license and services agreements. With both an MBA from the University of Chicago and a JD from Harvard Law School, he provides practical, business-focused advice and completes transactions efficiently and effectively.

Today's Focus



- Motivating suppliers to deliver on their promises
- Preserving remedies if suppliers fail to deliver



The Problem We See



- Time and money are spent on drafting the contract
- People managing the relationship:
 - Are not familiar with what the contract says
 - Do not understand how their communications and conduct can affect the company's legal rights
- As a result:
 - Contract benefits are lost
 - Disputes arise that could have been avoided
 - Disputes result in losses that could have been wins



Today's Agenda



- Hypothetical case study
 - Common governance challenges
 - What might have helped
- Tips for managing provider relationships
- The case for clarity



Case Study



- Last year, provider agreed to run legacy systems, transform data bases and implement a software product to provide new functionality
- Customer's team has already identified serious problems:
 - *Legacy system operation* – so many problems and trust issues that the business wants to terminate for material breach now
 - *Data base transformation* – project is far behind despite heroic efforts by customer's team members to help get the job done
 - *System implementation* – the new system isn't meeting customer's needs and performance is too slow
 - *Data security* – systems have not been brought to "best practice" standards

Terminating Legacy Systems Operation



- Trouble

- Customer

- As you know from our weekly meetings, your performance has been bad
 - We have decided to terminate for material breach
 - We expect you to cooperate and pay our costs of the move

- Provider

- There haven't been any problems. You have never sent a breach notice. Our dashboard has always been green.
 - Look, it's fine if you want to terminate. Just be honest about it. You are terminating for convenience and need to pay the termination charges.



Terminating Legacy Systems Operation



- Better approach
 - Send polite written breach notices when concern first develops and after each subsequent breach
 - Each breach notice should request a root-cause analysis when events are fresh and provider can fix the problems
 - Provide enough background in notice letter so an outsider could understand what happened and why it matters
 - Object in writing to incorrect statements from provider, including in status reports
 - If not satisfied, follow up with a written warning as to required performance and possible remedies including termination or hiring additional resources

Charging for Database Transformation Costs



- Trouble

- Customer

- Because you failed again and again and were going to miss milestones, we added people to the project, including in leadership roles
 - Thanks to those people, the project is a success
 - The cost of those people is direct damage that we are charging you

- Provider

- We agreed to partner on this according to the procedures manual approved by your staff after contract signing
 - Your people caused the problems by failing to do what they agreed to do
 - You chose your own level of collaboration
 - As you said, the project is a success



Charging for Database Transformation Costs



- Better approach –
 - Send a notice at the start identifying one customer representative authorized to speak for the customer on contract topics
 - Develop a clear view of each party’s responsibilities and make it known by all participants
 - Require an evergreen log accessible to the customer-authorized representative in which provider enters requests and when answers are needed to stay on schedule
 - Instruct staff not to approve procedure manuals or make agreements with provider and instead refer matter to the customer-authorized representative
 - Do not do the provider’s work except after giving notice, providing an opportunity to cure, giving notice of failure to cure, and explicitly adding resources as a way to mitigate damages.

Refund for Failure to Meet Requirements



- Trouble

- Customer

- The new system has serious performance problems
 - Also, it doesn't meet the needs that we talked about in team meetings
 - We cannot use it and want to stop the project and get a refund

- Provider

- There are no performance requirements in the contract
 - Our software works
 - You caused the problems with your numerous changes
 - Your own engineers question whether our software is to blame



Refund for Failure to Meet Requirements



- Better Approach

- Start by defining *minimum* functionality and performance in writing if not in the contract
- Require provider to notify your authorized representative if customer is interfering with or delaying the work
- Brief customer team early on, avoiding harmful, speculative statements as to causes of problems
- Use change control with agreed change orders showing effect of each change
- Request that the provider make available test data that shows the standard software meets performance requirements
- If first go live date is missed, provide a second opportunity, but only if provider delivers a root cause analysis and gives written assurance of new completion date.”

Upgrading Security to Reasonable and Appropriate Levels At No Charge



- Trouble
 - Customer
 - Contract calls for provider to implement “reasonable and appropriate” data security in all services and systems
 - Data security does not satisfy applicable laws
 - Provider
 - Let’s look at the history here: Customer employees asked for a budget estimate for the security upgrades and only after they didn’t get a budget they liked did they develop the story that this is in scope
 - Current security systems are reasonable and appropriate
 - We will do anything that you want done, but this is out of scope and requires an additional fee

Upgrading Security to Reasonable and Appropriate Levels At No Charge

- Better Approach

- Review the contract for important but loosely-defined terms
- Send notices as early as possible providing detail on those requirements to surface scope disputes earlier rather than later
- Instruct the customer team not to ask for budgets for additional work without first consulting your authorized representative
- Instruct your authorized representative to work with the law department to make sure that the work is not required and to use language reducing the risk of waiving claims that work is within the scope



The background of the slide is a dark blue, futuristic digital globe. The globe is covered in glowing blue circuit patterns, including lines, dots, and circular nodes, suggesting a global network or data flow. The lighting is bright and vibrant, creating a high-tech, digital atmosphere.

SEVEN TIPS TO PROTECT YOUR DEAL

1. Control Messaging and Contractual Communications.



- Designate in writing *all* employees authorized to speak and on behalf of the company for purposes of the contract. All others should defer to those authorized employees.
- Example:

Dear [*Provider Relationship Manager*]:

I'm writing to notify you that _____ and I are the only employees authorized to sign change orders, work orders, approvals, waivers, or other documents under our contract. Communications are only binding if provided to one of us in writing.

Sincerely,



2. Require a Log of Provider Requests and Notice of Company Failures



- Require a log showing requests and responses on contractual matters.
- Notify the provider that it must quickly identify in writing to an authorized employee any of the company's actions that might excuse a provider obligation.
- Example:

Dear *[Provider Relationship Manager]*:

For our mutual success, we need to know what you need from us. To achieve that, we expect you to maintain an evergreen log of all requests that *[provider]* makes to us and their status and to notify us promptly if any of our conduct may adversely affect your ability to comply with the contract.

With best wishes,



3. Keep the Written Record as Clear, Complete and Accurate as Possible.



- Clarify parts of the contract that are not clear as soon as possible in writing.
- If the provider makes an incorrect assertion, send a written correction.
- Example:

Dear *[Provider Relationship Manager]*:

Your summary of our last meeting incorrectly stated that we had accepted Milestone 3 and you would complete the open items. In fact, we stated that the Milestone 3 deliverable would be ready for acceptance testing again when the open items are complete. We look forward to your next submission and ask that you also update the status log.

Yours very truly,



4. Send Timely Breach Notices.



- Do not ignore breaches. If the provider breaches, send a written notice including enough information so that an outsider can understand the breach and why it matters to the company.
- Example:

Dear *[Provider Relationship Manager]*:

We learned recently that you are not encrypting our data in transit between your facilities. That encryption is required by both of the general requirements in Section 13.2 of our MSA and Section 7.5 of our Information Security Policy attached as Exhibit 2. This breach could expose us to regulatory action, loss of data, reputational harm and other damage.

Cordially,



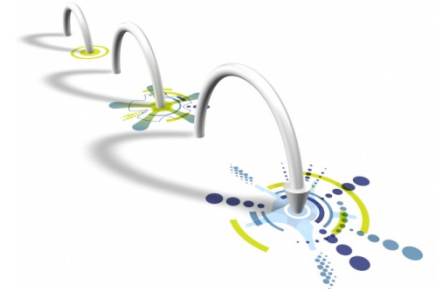
5. Before Doing the Provider's Work, Demand that the Provider Do Its Work.



- Do not add resources to or assume direction of a provider's work under a contract without demanding a cure and warning of the cost.
- Example:

Dear *[Provider Relationship Manager]*:

I am following up on my notice of last Thursday regarding the lack of management talent and Hadoop specialists required by Section 12 of SOW 14. Unfortunately, the problem has not been corrected. If it is not corrected within 10 days, we intend to add resources from our own team to make up for delays. These team members will be doing work that you agreed to do within the fixed price, and thus we will deduct their fully loaded cost from any future milestone payment.



6. Trade Waivers for Future Assurances.



- If asked for a waiver, send written requests for adequate assurances, root cause analyses and other concessions as a condition to granting additional time to perform.
- Example:

Dear *[Provider Relationship Manager]*:

I am responding to your request that we waive the Milestone 3 Credit of \$50,000. After due consideration, we are willing to do that if you (1) add \$50,000 to the Milestone 4 at Risk Amount, (2) deliver a root cause analysis of the failure acceptable to us by Monday and (3) correct the identified root causes by the end of this month. Please respond as to whether you accept this offer.

Yours very truly,



7. Involve Lawyers Early.



- Lawyers can find rights that are not apparent on the face of the contract.
- Lawyers can help resolve issues more successfully.
- Communications with lawyers can be privileged.
- Examples of when to involve a lawyer:
 - When there are signs of a potential dispute involving a breach of the contract
 - When the provider asks for new charges for what you believe to be in-scope work
 - When amending or modifying the master agreement
 - Before contributing resources to a joint project beyond what the company had agreed to contribute
 - Before threatening termination, litigation or self-help remedies
 - When receiving correspondence threatening a claim
 - When hearing that the provider has been sued by a third party



Final Message: Clarity Is a Win-Win



- With greater clarity comes greater certainty as to how a dispute would be resolved in court or arbitration if the parties did not settle.
- Greater certainty increases the likelihood that the dispute will be settled or fairly adjudicated.
- Greater clarity also reduces the cost of dispute resolution because it generally reduces the amount of effort necessary to prove the relevant facts.
- Greater clarity is in the interest of all parties if they are acting in good faith.

The image features a central globe with a complex network of glowing blue lines and nodes, resembling a global data network or a futuristic circuit board. The background is a dark space with stars and additional glowing blue lines. A semi-transparent blue horizontal band is positioned across the middle of the image, containing the text "QUESTIONS?".

QUESTIONS?

Reminders and Upcoming Webinars



- As a reminder, if you are applying for CLE credit, please include the code below on the Attorney Affirmation form.
- A recording and link to the materials from this program will be distributed by email to you in the next day or two.
- For those applying for CLE credit, please note that certificates of attendance will be distributed within 30 days of the program date.
- Watch for our next webinar invitation coming in the next week or so.
- To submit topic ideas for future programs, please email us at TechTransactions@mayerbrown.com.

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