

Contracts:

Business Ins & Outs of Which to be Aware

Business & Legal: Let's work together!

- Business wants to focus on business and not be involved in legal
- Assumes the lawyers will deal with the legal terms
- The problem is that business and legal terms inherently work together in the agreement
- Ask yourself:
 - What am I buying?
 - How much does it cost and how will I pay?
 - If I don't like it, what can I do?
 - Can I walk away? If so, how? If not, then what?
 - If something goes wrong, what are my options?

Goods, Services, or Both?

- Agreement provision: Describes the nature of the services and/or the goods
- Expectation: Understand what you are buying or what you are selling
- Why? Because if you don't understand what you are buying, you can't fully consider performance obligations, risk exposure, and what options you want available to deal with issues
- Also, pay attention to the pricing
- Business headaches
 - Unclear performance obligations
 - Deadlines not met (e.g., financial impacts, impacting other business functions, etc.)
- Negotiation tip: Create a detailed list of the services and/or goods and any obligations discussed at length with the vendor
 - This makes it easier to make sure the agreement matches what was discussed

Warranty

- Agreement provision: Lays out the performance expectations and obligations for faulty goods/services
- Expectation: What do you want to happen if something doesn't perform as expected (e.g., doesn't meet the specifications)?
- Business headaches
 - Too short of a warranty or inadequate support
 - Not understanding the full impact of interruptions caused by a warranty issue
- Negotiation tip: Think about the importance of the goods/services being provided *as it applies to your business needs*. This sounds simple but so many business teams don't stop to think about this.

Term

- Agreement provision: Outlines the length of the agreement
 - Initial term only or an initial term with renewal term(s)
 - Separate contractual implications (e.g., pricing adjustments) upon renewal(s)
- Expectation: How long do you want the agreement to last?
- Business headaches
 - Consequences of locking in for too long
 - Maintenance for auto-renewals
- Negotiation tip: If you are going to have auto-renewals, recommend strongly pushing for the right to terminate without cause



Termination

- Agreement provision:
 - Without cause
 - With cause – e.g., breach, insolvency, force majeure (we will discuss later)
 - Effects of termination
- Expectation: Details the ways the parties can walk away from the arrangement and end the agreement
- Business headaches
 - Not being able to walk away when you want or need to
 - Lack of clarity around the exit strategy
- Negotiation tip:
 - Without cause, termination tends to be heavily discussed
 - Buyer typically wants this right, and vendor does not
 - Use the term length as back-up as most agreements tend to propose multi-year terms

Confidentiality

- Agreement provision: Typically defines what confidential information is and outlines the parameters for which the parties can share and use it
- Expectation: Know what information is being/needs to be shared and which parties are disclosing and receiving it
- Business headaches
 - Disclosing something that isn't protected
 - Maintaining confidentiality once information has been received
- Negotiation tip:
 - Pay attention to when the protection starts
 - Consider how long you need to maintain confidentiality

Force Majeure

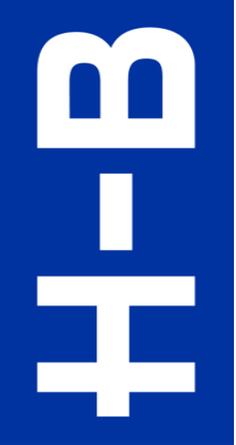
- Agreement provision: Outlines events that allow a party to excuse its performance under the agreement (e.g., COVID-19 pandemic)
- Expectation: Understand the events that trigger force majeure and what you want to have happen once an event occurs
- Business headaches
 - Including an event that you don't want (e.g., COVID-19 pandemic)
 - Can you walk away if force majeure lasts for a certain length of time? (Remember I said we'd talk about termination here)
- Negotiation tip: Think about which interruptions are likely given the goods and services being provided and the location of your business and the vendor

Insurance

- Agreement provision: Details the types of insurance coverages (and potentially dollar limits) required in connection with performance under the agreement
- Expectation: Know which coverages make sense based on what you are buying
- Business headaches
 - Running counter with your own company's risk/insurance requirements
- Negotiation tip: Talk to your broker

Indemnification and Limitation of Liability

- Indemnification: risk allocation tool
- Limitation of liability: limitations on the types/amounts of damages
- Lawyers typically draft and heavily negotiate these terms
- But the business should always consider what the most significant business risks are based on what's being purchased, the vendor involved, and then talk to the legal team about it
- Indemnification will allow you to shift some of that risk to the vendor
- Limitation of liability will allow you to cap what you want and carve-out what you don't



Thank you for your time!

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