Technology Contracts and Boilerplate Language: Be Aware of the Pitfalls

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All contracts follow a similar pattern in their structure. They first contain an introduction (known as "Recitals") that sets forth the purpose of the contract and the expectations of the parties in entering into the contract. Contracts then have provisions discussing the items being sold, bought, transferred or licensed along with a price and payment requirements. The contract will then discuss the term or length of the agreement. If the contract is for technology development or professional services, it will often have a Scope of Work (SOW) attached as an addendum or anticipate that a SOW will be added at a later date (especially when the contract is a "Master Services Agreement"). In addition to these sections that set forth the operative contractual relationship, all contracts contain "boilerplate" language that is often viewed as "legalese" with little meaning and even less understanding. In fact, we often hear from clients that they do not believe that the language is enforceable. In technology contracts, however, this language has evolved over time to include highly technical terms that can have significant negative effects on the relationship between the contractual parties and also on relationships with existing and future third parties.

These core contractual sections are most often negotiated and agreed upon at high levels (in a "term sheet") with sometimes protracted discussions, and then make their way into a formal contractual document. When the contract is reviewed, the review consists of ensuring that the terms of the term sheet match the terms in the contract. If they do, it is not unusual for a contract to be signed.

Boilerplate language cannot be overlooked

In this process, the most dangerous terms of a contract are often ignored and overlooked. Those are the terms in the "boilerplate." The term "boilerplate" comes from the turn of the twentieth century and originally referred to printing press plates that were distributed across the country with articles that were generic in nature and reprinted using the prefabricated printing press plates. Similarly, boilerplate legal language received its moniker from the standardized use of terms that are included in all contracts.

Because similar boilerplate language is included in all contracts, many parties ignore the language as unimportant "legalese" that has no real effect on the contractual relationship and is only understood by lawyers. While there is boilerplate language that is standard and is looked at only in passing (such as the ability to sign the contract in counterparts or the fact that changes to the contract must be in writing signed

by the parties), technology contract boilerplate language has become increasingly complex and important to the relationships of the parties.

Certain provisions remain negotiable

Some examples of technology boilerplate language that need attention in contract reviews are limitations of liability, indemnification, confidentiality, choice of law, subcontracting, termination and warranties. These provisions often contain unique language that has become standardized in technology contracts but remain negotiable and critical to the business relationship.

For limitations of liability, the contractual provisions will often limit the liability of the seller or licensor to payments made under the contract for a certain period of time (usually 6-18 months). Thus, if a software developer provides a product that does not perform as expected and may even cause significant losses to the licensee, the licensor is only responsible to refund the licensee an amount equal to the amount paid for the license during the specified period. While all software developers will require some limitation on liability, the amount and the timeframe are negotiable and are often dependent on the type of software being sold (such as whether a problem will be known immediately or only after a period of time).

Technology boilerplate language terms are enforceable

Indemnification language is similarly important, especially when unique technology is being developed or provided. While it is standard for each party to indemnify the other for third party claims caused by a party's acts and omissions, indemnification language is often necessary to address patent and other IP infringement. Connected with the limitations of liability clause, there is often a need to carve out IP infringement matters from the standard limitations of liability clauses as well.

In the financial industries field, the subcontracting clause can be a very important clause to both scrutinize and negotiate. Under FDIC guidelines, financial institutions are warned against allowing subcontracting by vendors to entities that have operations in foreign countries. Contracts need to address this issue by either prohibiting subcontracting or, at the very least, requiring that subcontractors be approved by the customer. When offshore subcontracting does occur, the contract needs to address how the subcontractor will comply with U.S. cybersecurity and privacy standards.

These examples demonstrate how technology contracts have unique boilerplate language concerns. The other types of clauses have similar unique issues such as confidentiality of customer financial information and vendor access to electronic records, choice of law is often in far off jurisdictions, termination can be difficult when systems are integrated and warranties need to address and incorporate service level agreements that are often referenced in the contract and direct the customer to embedded standards in web sites. The bottom line for technology contracts is that technology boilerplate language is unique and the terms are enforceable.

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