Best Practices for Software Agreement Negotiation

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VELN advises businesses not to miss easy opportunities to improve their positions under agreements with software providers. Almost any software agreement can be improved simply by requesting changes, and important software agreements certainly should be improved to avert unnecessary risk. This white paper outlines methods for managing smooth negotiations and arriving at better results.

Never Assume the Agreement is Not Negotiable

Most software providers will insist on using their standard agreement. Often, that is not an undesirable starting point because standard agreements are typically tailored to the provider's products and services. The provider's insistence on their "paper," however, is not typically accompanied by an outright refusal to negotiate its terms. All but vendors of commoditized software are open to negotiations and have lawyers and contract managers on hand to speedily negotiate changes.

Focus on Key Provisions

By far, the parties' focus should be on key provisions that allocate risk and establish service level expectations; i.e., representations and warranties, limitations of liability, insurance requirements, indemnification obligations, intellectual property rights and data security requirements. Together, these provisions establish performance requirements and define the allocation and magnitude of liability resulting from performance failures. They effectively serve in the same manner as an insurance policy. For example, the provider may warrant that their system will not expose the customer's system to viruses; yet, without negotiation, the provider's liability for a failure resulting in damage to the customer may be capped at a very low level. In this example, therefore, the customer has an insurance policy without much coverage.

Beware of What Constitutes the "Entire Agreement"

Many software companies' standard agreements include hyperlinks to additional terms that are made a part of the parties' agreement. Often, the additional terms are critically important, even though their presence online may lead one to believe that they are unimportant and not intended for negotiation. They, too, should be reviewed and negotiated; and in our experience they, too, are often highly negotiable.

Consider Implications to Your Business

The key provisions of a software agreement relate to unfortunate real-world circumstances, like service outages, data leaks and cyber-attacks. Therefore, context regarding the likelihood of events and resulting consequences is helpful with respect to negotiating the key provisions. Here are some examples:

What is the probability of service failure, and how badly will one impact your business? If there is a high probability of serious impact, then the customer will need protections in the form of service level requirements and warranties that trigger prompt corrective actions.

What data will the provider have access to? Personally identifiable information? Sensitive trade secrets? Sensitive corporate documents? The prospect of information like this being shared with a software provider calls for assurances that security systems will be deployed by the provider and that they have cyber-security insurance coverage.

Start by Opening Lines of Communication

Clarity regarding each party's positions on a software agreement's most important issues should be established early in the negotiating process. The bulk of negotiations will likely involve the key provisions. When the major issues within those provisions are smoked out in an early dialog, then the parties' will already be within striking distance of finalizing the agreement. This is a better approach than protracting negotiations without prioritizing the key provisions, especially if the parties' only communications are emails with revised drafts that set demands without explanation. That approach can create frustration and intransigence on both sides of the table.

Deploy Your Strategy

In negotiating software agreements, the customer has to either respond with positions that would optimally protect it; or it can respond with middle ground proposals. VELN generally recommends the former strategy to determine the provider's flexibility with respect to key provisions. Software providers' lawyers and contract managers typically know which provisions they will accept and which they will reject. So, why not take an assertive early position?

An exception arises when the provider's paper is fairly balanced with respect to the key provisions. This is seen among sophisticated software providers that choose expediency over negotiating and, on the whole, arrive at results within the same range as would otherwise be the case. Given a fairly balanced agreement, the provider will be less easily compelled to move from its positions, so working within the middle ground established by the provider makes sense.

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VELN is a contemporary legal services enterprise. We are exclusively focused on handling clients' commercial contracts, business transactions and disputes in an excellent manner. Our lead attorneys are seasoned contract architects and negotiators who have practiced at major law firms and in the upper echelon of business. Industries they deeply understand include biotechnology, pharmaceuticals, technology, electronics, manufacturing, automotive, advanced mobility, electronics, telecommunications, entertainment and professional services.

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