

Tech Contracts for Salespeople

Closing SaaS, AI, and other Software and IT Sales

Presented by David W. Tollen



CONTRACTS AS DEAL CLOSERS



Contracts as deal- closers

- You're negotiating a contract from day 1 until signature
- There are no "legal terms": it's all business
- "Contract-for-sale" mindset": and always-be-closing tool
- *Proactive and reactive contracting*
- You become the salesperson who walks on water – *close faster w/ less struggle and fewer lost deals*

If you don't address the contract proactively ...

- Sticker-shock ... when the customer finally sees the terms
- Loss of trust ... ditto
- Late-in-the-game delays
- Tons of work on deals that ultimately can't get done



What we're selling from a contracting/business point of view

On-premise software: on customer computers

IT hardware

IT professional services

- Programming
- Tech support
- Installation and implementation
- Consulting

Other: edge-of-industry offerings

- DaaS (data-as-a-service)
- Cloud-delivered marketing, entertainment, online bazaar, etc.

Cloud services

- IaaS (AI-as-a-service)
- SaaS and PaaS
- IaaS

Channel sales

- On-premise software distribution
- Hardware distribution
- Cloud services resale

Course Agenda

- A. Selling Your Contract: The Basics
- B. Software and Services Terms in General
- C. Key Liability Terms (a.k.a. Deal-Blockers)

Section A

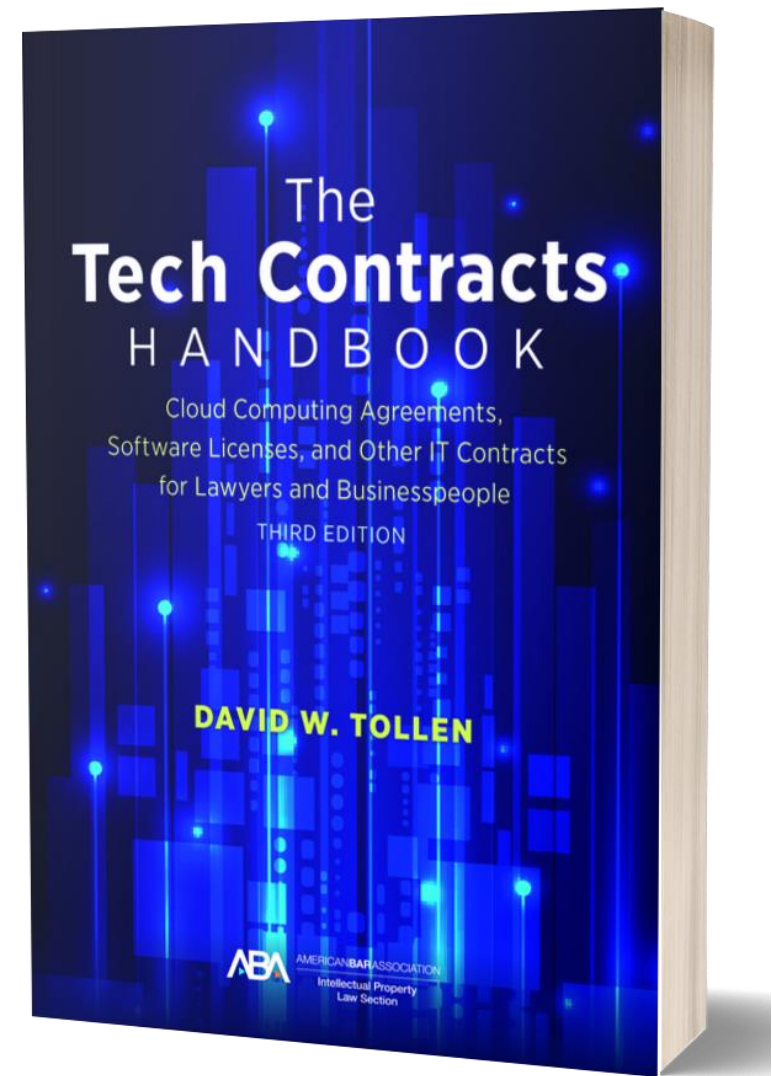
1. Contracts as Deal-Closers
2. Contracting 201

Related Resources

www.TechContracts.com

- ❑ **Training on contracts for AI, SaaS, IT services, etc.**
- ❑ **Clauses and info in [“Artificial Intelligence Contracts: An Issue-Spotter”](#)**
- ❑ **Clauses and contracts to download:** all the sample terms in *The Tech Contracts Handbook*
- ❑ **Articles and other resources** about IT contracts.

Plus, [The Tech Contracts Handbook, 3rd ed.](#)



TECH CONTRACTS
ACADEMY

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Lesson 2



A large white circle is centered on a blue background. A dashed green line follows the top-left curve of the circle, and a solid green circle is positioned at the bottom-right edge of the white circle.

CONTRACTING 201

(Contracting, not contracts ...)



Debunking contract myths

- Not just about minimizing risk – *contract creates playbook for relationship*
- Not about winning lawsuits – *good fences make good neighbors*
- No such thing as “legalese” – *yes, you can understand it*
- No difference between “legal” and “commercial” terms – *any clause can block your deal*



Your lawyers and contract managers

They don't "paper the deal"

- There is no deal until all terms agreed

Deal prevention department?

- Their incentives *do* include closing deals
- They're more focused than you on protecting company
- Don't argue w/ professional arguers: help them balance risk and reward
- Involve them early?



Selling your paper – or not

- In IT, provider paper fits better, reducing revision and negotiation cycles
- Let's not kid ourselves: each side's paper is slanted
- If it can't avoid customer paper, provider does most contract work – so get stakeholders involved early

Using AI for your contract

Gen-AI is well-suited for contracts, but ...

- It will reproduce typical *human* mistakes
- It will hallucinate
- It will answer queries confidently, as if the answer were clear, even if it's not

And of course, it's no substitute for a lawyer



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B. Software and Services Terms in General

Course Agenda

- A. Selling Your Contract: The Basics
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- C. Key Liability Terms (a.k.a. Deal-Blockers)

Section B

3. Software Rights
4. Selling Your SLA
5. Selling Your Data Protection Terms
6. Selling Gen-AI: Special Rights and Restrictions
7. SoWs and Other Project Descriptions
8. Agile and Other TBD Deliverables Projects
9. Navigating Special Revenue Issues
10. Term and Termination

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Lesson 3



SOFTWARE RIGHTS



On-premise software license

License rights: yes or no

- **Reproduce**
 - ✓ Fixed # of copies
 - ✓ Unlimited enterprise license
 - ✓ Copies per server, core, virtual computer, etc.
- **Modify** (create derivative works):
Necessary to use?
- **Distribute or sublicense**: Do customer's service-providers need to copy software?

Other key scope: *optional*

- **Seats**: # of computers *or* people who can access
- **Concurrent users**: # of people who can access at one time
- **Named users**: list of authorized users
- **Duration**
- **Internal use**
- **Geo territory**: Country, state, etc.?
Site license?
- **Exclusivity**: for custom deliverables

SaaS/cloud subscription

License rights: *none!*

Other key scope terms

- **Seats:** # of computers *or* people who can access
- **Concurrent users:** # of people who can access at one time
- **Named users:** list of authorized users
- **Duration**
- **Internal use**
- **Restriction on usage events,** API calls, transactions, or other events (or extra fees) – *often calls for additional fees, not actual restriction*
- **Others** (rare): geo territory, exclusivity ...

Talking your customer out of *owning* software



- Ownership would tie provider hands (more than your competitors' hands)
- Confidentiality needs NDA, not ownership
- Ownership unnecessary unless they sell software
- Broad, perpetual license \approx ownership
- Market efficiency: offer discount instead?

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Lesson 4



SELLING YOUR SLA



Warranty vs. SLA

SLA	Warranty of Function
Terms re what software <i>won't</i> do	Terms re what software <i>will</i> do
Small subset of functionality	All functionality in the specs
No breach involved	Breach of contract
No right to terminate (w/ exceptions)	Right to terminate
Limited predefined remedies	Unlimited or broader predefined remedies

Let's be honest: your SLA's a paper tiger

- “‘Downtime’ means all requests fail.”
- “Downtime begins when Customer submits a trouble ticket.”
- “System failures lasting less than __ minutes are not counted toward Downtime.”
- “‘Scheduled Maintenance’ means any period of maintenance, provided Provider has given Customer written notice __ in advance.”
- “The remedies listed in this SLA are Customer’s sole and exclusive remedies for any Failure.”
- “‘Critical Error’ means a severe and sustained error in a major system.”
- “Provider may amend this SLA at any time ...”



Justifying your non-promise

- These terms are industry standard – our competitors do it
- The SLA still motivates us and compensates you
- We've been successful so far
- You still have the warranty (if applicable)
- Credits w/o refund are also industry standard



What's negotiable in a non-negotiable SLA?

Size of credit?

Exclusivity of
remedy?

Start and stop
time for
downtime?

Specification of
certain failures
as critical?

Other?

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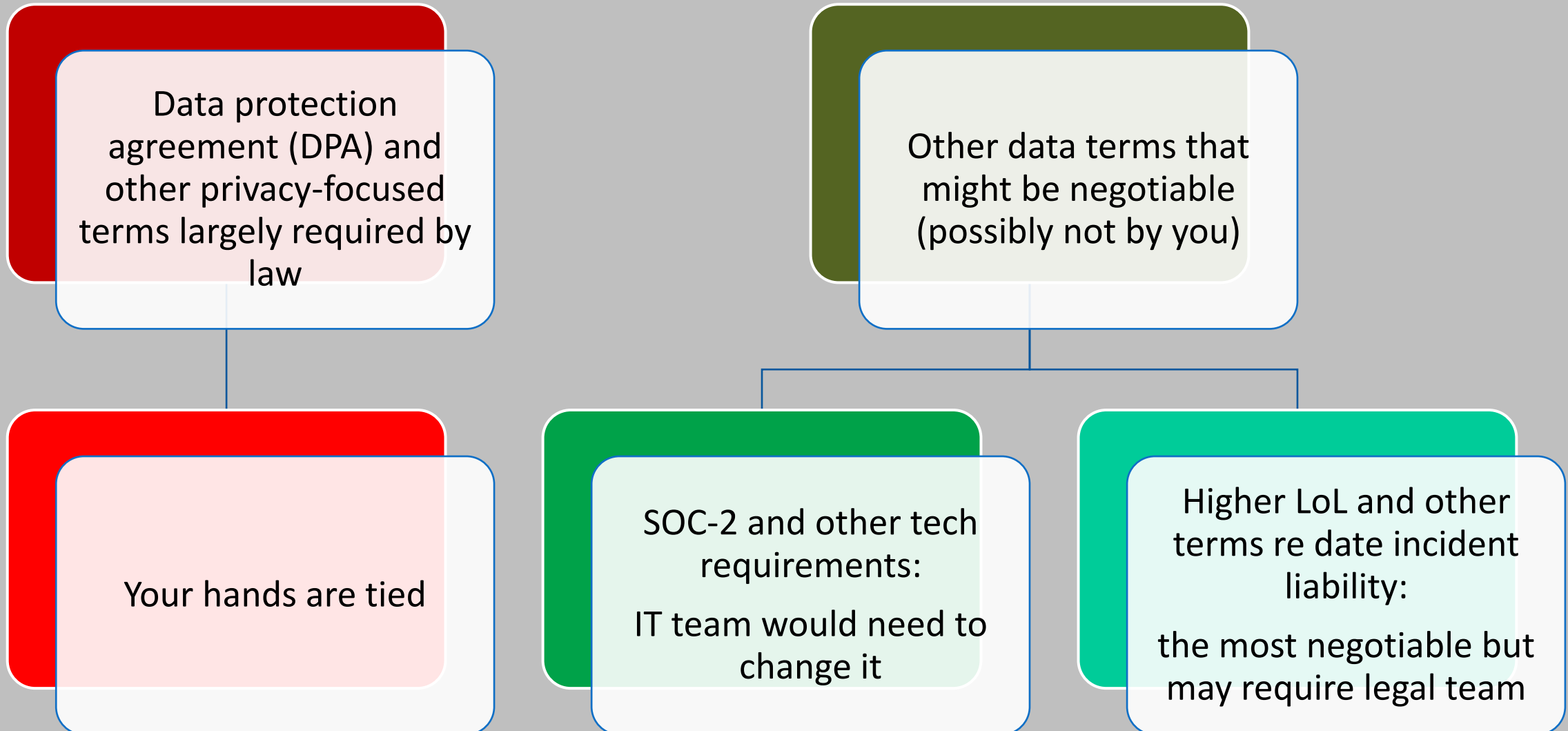
Lesson 5



SELLING YOUR DATA PROTECTION TERMS



Data Protection Terms Breakdown



What can you negotiate about data terms?



Higher limit of liability? – 3x normal?



Notice and cooperation terms?



Right to terminate for data incident (w/o cause)?



Pass-through of remedies from 3rd party cloud host?



Other? Ask the customer for suggestions?

Why won't you promise to comply w/ privacy *law*?

*Have you been working for
organized crime all this
time? No.*

- The law doesn't need your promise (with some exceptions). It's the law.
- It's hard to comply w/, or even identify, all applicable data laws.
- *Do your competitors promise?*



Promises from the customer

Reasonable data protection: passwords, security systems, etc.

Compliance w/ privacy law ...?

- Regs may require customer promise it or say you're liable for customer misuse: e.g., AI regs, regs re financial data you provide, etc.



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Lesson 6





SELLING GEN-AI: SPECIAL RIGHTS AND RESTRICTIONS

Unusual issues

- Mysteries around ownership of outputs
- Worries re ownership of inputs
- Inputs and outputs as training data

On top of all sorts of other questions ...

Gen-AI Parties and Deals

The parties

- *Model provider*: small and large LLMs, etc. – provides AI itself
- *Application provider, a.k.a. implementor, distributor, etc.*: builds software on top of AI model – standalone AI or as part of larger system
- *Customer*: consumer or enterprise
- *Data licensors and joint developers*: provide data or tech for AI development

The deals

- Model provider to app provider
- Application provider to customer
- Model provider to customer
- Data licensors and joint developers to anyone



Ownership of AI inputs and outputs

Inputs: you probably don't care

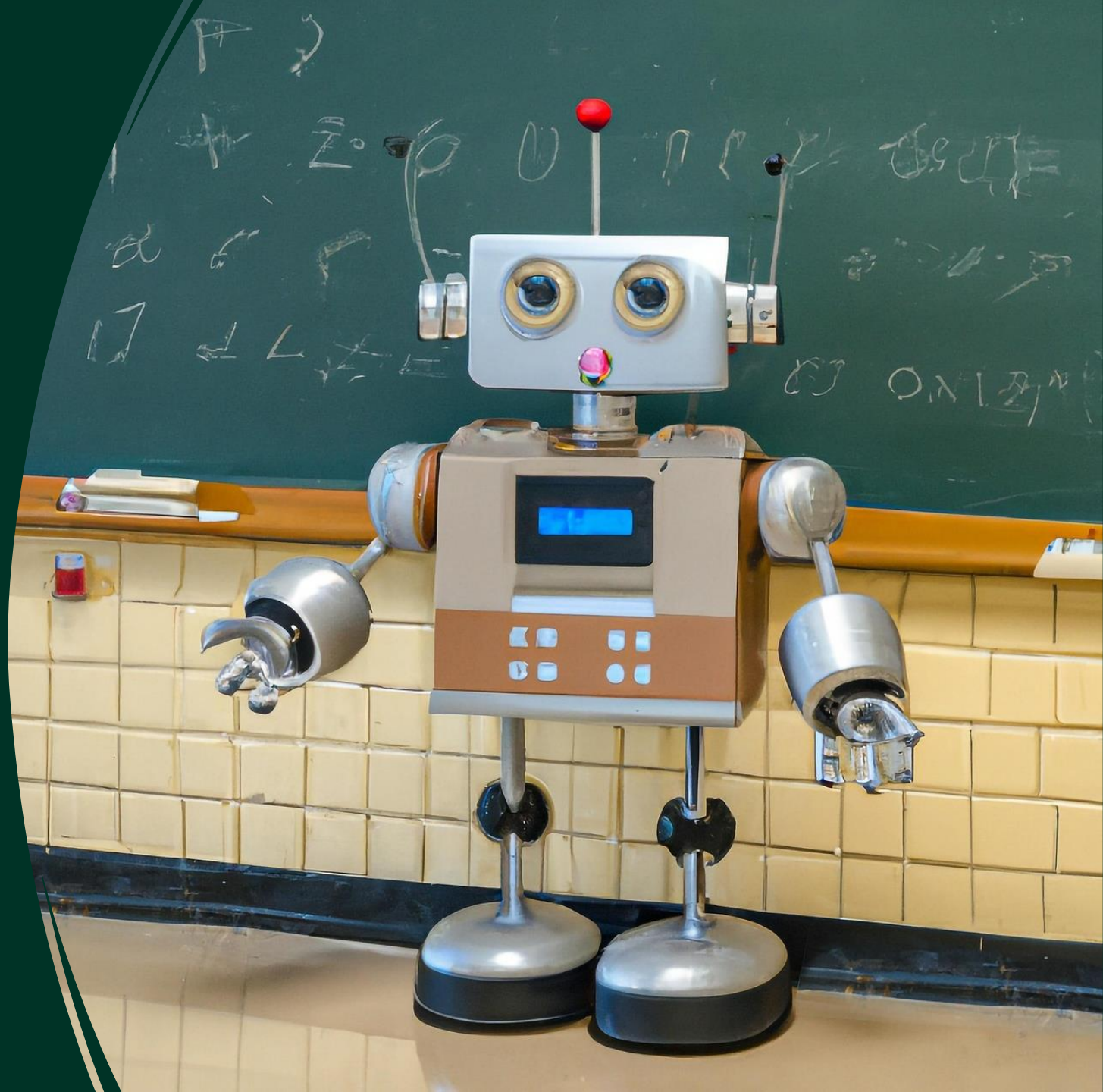
- No-contest is best: "Provider makes no claim to ownership of Inputs."

Outputs: you've got nothing to give and only care about existing assets

- No-contest / no claim is best
- Assignment or license w/ NDA-type carveouts
- Disclaimer too?

Using Inputs or Outputs to Train Your Gen-AI?

- No
- Yes (B2C usually)
- Just training for customer's own instance or copy



Does your customer's (awful) AI policy become part of the contract?

- No use of AI, even to create our deliverables
- No use of AI w/o disclosure
- Same as the above limited to ML or gen-AI?
- No use of inputs or performance data to train (other than for customer use)
- No use of open source datasets to train
- Warranties re rights to training data
- AI won't degrade other system features
- Etc.

What AI-related disclosures might customers really need?

AI used to create other systems: *Customer needs nothing*

- IP concerns already covered by typical IP indemnity and warranty?
- Privacy concerns already covered by DPA?

AI in the system: *maybe*

- ✓ Disclosure of AI's role
- ✓ Everything else required when AI is the system

AI is the system: *maybe ...*

- ✓ Sources of training data (for ML)
- ✓ Use of customer inputs to train (obviously)
- ✓ History w/ hallucination, defamation, etc.?
- ✓ IP, privacy, likeness rights, and other issues?
- ✓ Record-keeping and audit terms?
- ✓ Anything else specifically required by regs

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Lesson 7



SOWS AND OTHER PROJECT DESCRIPTIONS: The Basics

Whose job is this anyway?

Statement of work components

The SoW

- A. *Intro: goals, recitals/background, etc. – inoperative*
- B. *Definitions*
- C. *Scope of work: pure work description – subset of SoW*
- D. *Timeline, Deliverables, and Milestones*
- E. *Commercial/payment terms*
- F. *Assumptions and customer responsibilities*
- G. *Governance (including change orders)*

Not included

- Master agreement: MSA, Ts&Cs, etc. (attached)
- Amendments
- Your proposal

Your proposal, pitch,
bid, etc. makes a
terrible SoW (or specs)

- You were persuasive rather than precise
- You promised without reservation
- You offered to do just about anything ...
- You're the sole author so ambiguity will be construed against you

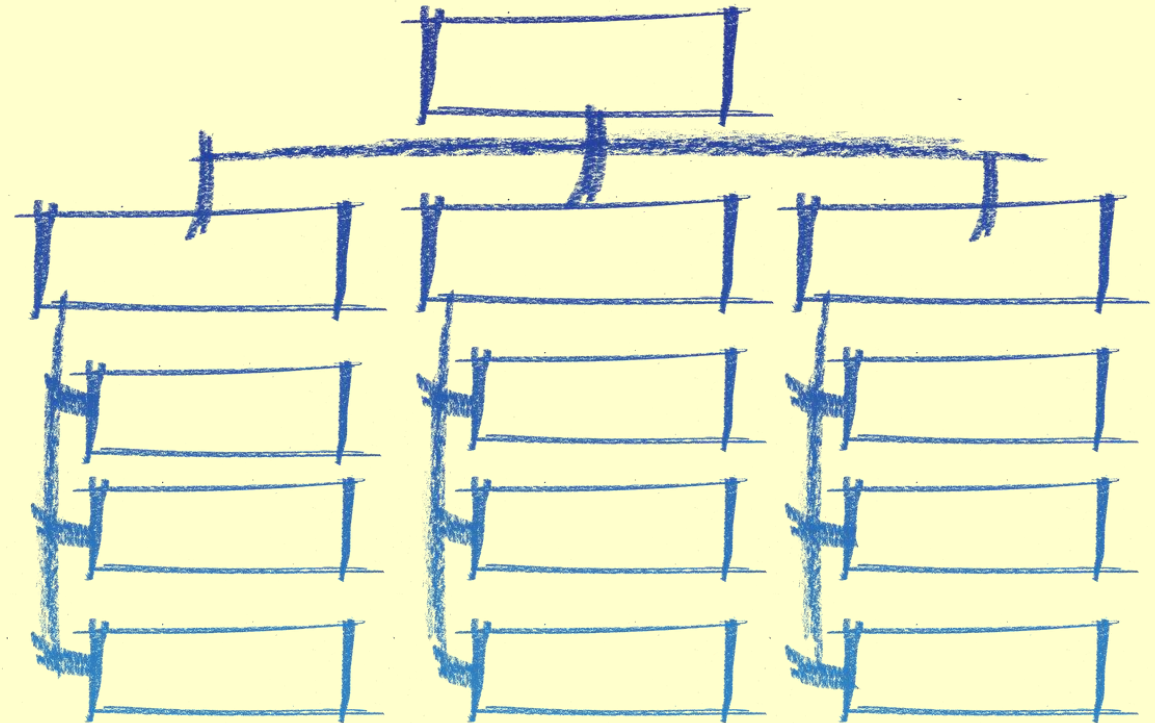


Keeping The SoW Process Moving



Narrowing the scope of negotiation delay

- Switch all to active language
- Write up a list of deliverables
- Write up an out-of-scope list
- Ask if this should be task-driven or outcome-driven – and call for edits according to that



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Lesson 8



Special Terms: AGILE AND OTHER “TBD DELIVERABLES” PROJECTS

Hint: the cat is agile



Maximizing flexibility while gaining certainty

No, you don't need to sell a whole second SoW – or do w/o specs. Options:

1. High level functional specs (instead of technical): gives customer some certainty; gives provider lower risk of rejection
2. Specs *as* deliverables: Deliverable #1 = specs for Deliverable #2 ...



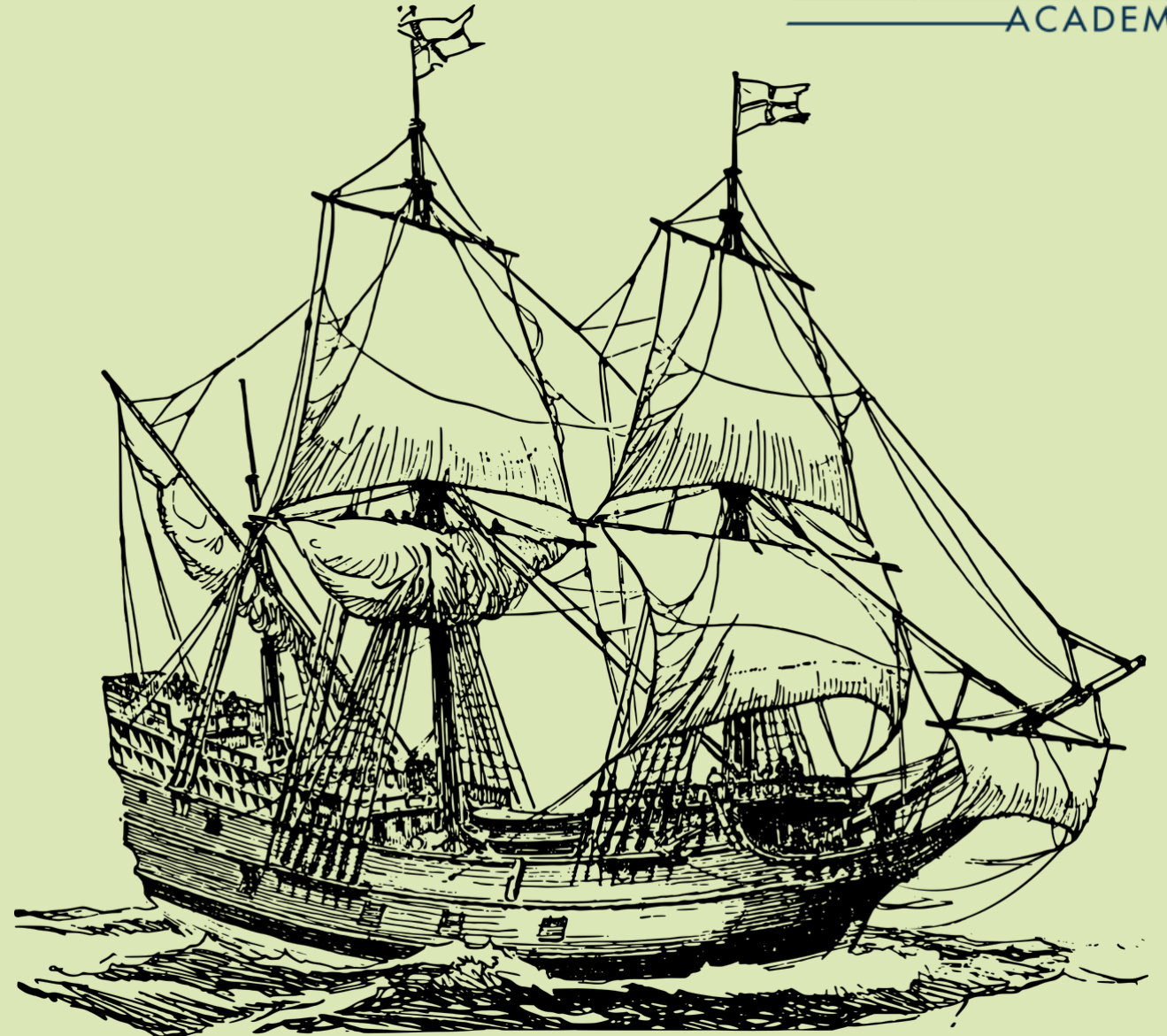
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Lesson 9



NAVIGATING SPECIAL REVENUE ISSUES

- Rev-rec
- Separating payment streams
- Payment timing



Rev-rec for software (ASC 606)



Revenue is
recognized
when earned,
not paid

(good and bad: maybe
recognize before payment but
maybe long after)

- On-premise license granted and software provided: recognize now
- Hardware title transferred: recognize now
- Promise of SaaS, prof. services, or anything else to be delivered: recognize when delivered

Money back
and credits
in warranties
& SLAs?

- Assurance warranty: warrant of functionality, IP, etc. – does not block rev-rec now
- Service warranty: extended warranty, maintenance plan, etc. – recognize over time

Separate Payment Streams – even w/o separate payments



“For the On-Premise Software, Professional Services, and SaaS, Customer shall pay \$600,000 per calendar month.”



“The payment referenced in the preceding sentence constitutes:

- (a) \$100,000 for the On-Premise Software;
- (b) \$10,000 for the Professional Services;
- (c) \$400,000 for Type A SaaS; and
- (d) \$90,000 for Type B SaaS.”

Payment Timing

If maintenance services start after a year of implementation, why do maintenance fees start on Day 1?

If SaaS starts after a year of customization, why do SaaS fees start on Day 1?

The straight dope may be ... software price are artificially low and would have to come up if we lost 1 year of service fees

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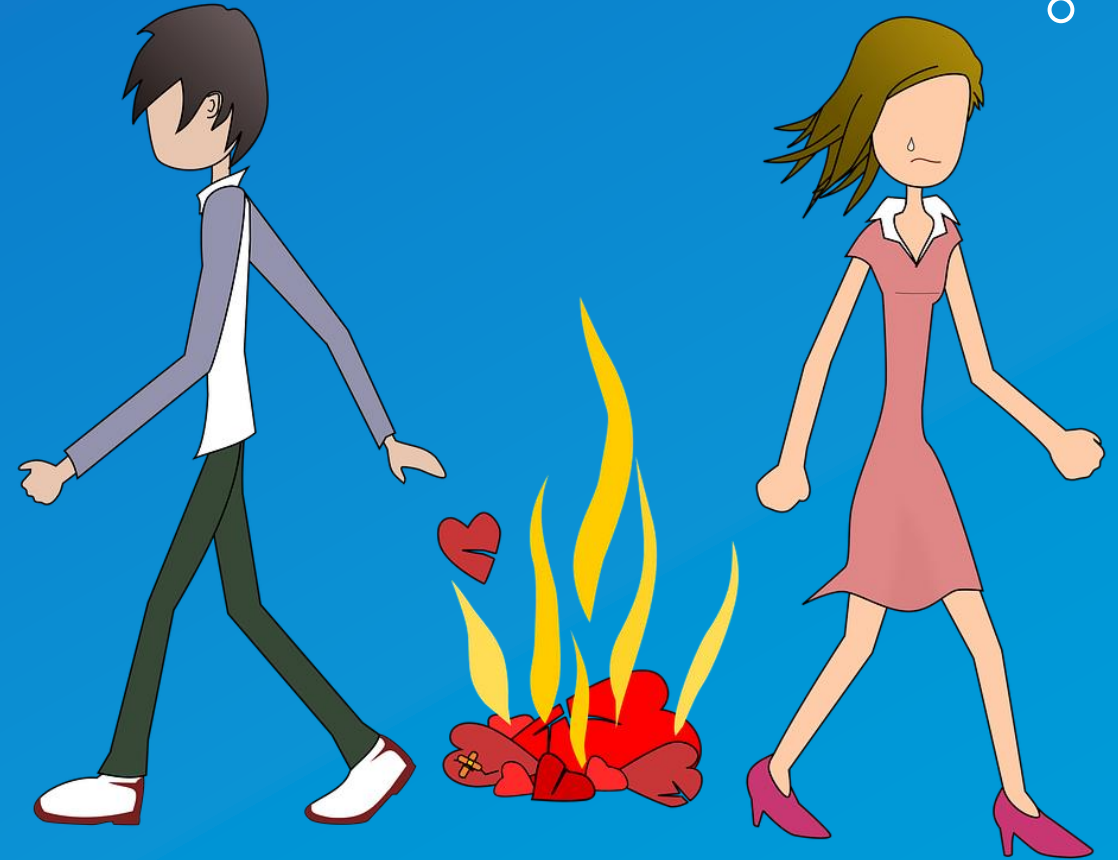
Lesson 10





TERM AND TERMINATION

*(a.k.a How to Discuss
Breaking Up)*



Term vs. Termination

- **Term** = natural end of relationship
- **Termination** cuts relationship short (unnatural end)
- **Non-renewal** \neq termination



Termination for Breach w/ Notice & Cure

“Either party may terminate this Agreement for the other’s material breach by written notice, effective in 30 days unless the other party first cures such breach.”

- ◆ **“Material”** doesn’t need a definition, but your side might want to narrow it
- ◆ *Notice & cure* usually protects **your side**

Termination for convenience (mostly by customer)

Termination “for any reason or no reason”

Pretty reasonable *with* early termination fees to protect provider’s investment (but could create rev-rec issue)

Long notice period? *Do you need any notice if you get enough early termination fees?*



Other termination w/o breach

A relationship **safety-valve** ... for each party

- Key staff departure (“key man” termination)
- Loss of security certificate
- Reduction of SLA rights
- Acquisition by competitor
- Etc.

Again, check on rev-rec



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C. Key Liability Terms (a.k.a. Deal-Blockers)

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- A. Selling Your Contract: The Basics
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Section C

11. Selling Your Limit of Liability
12. A Few Minutes on the Nature of Warranties
13. The Most Typical Warranties: Function and IP
14. Why indemnities jam up deals and what to do
15. Typical Indemnities
16. Contentious Indemnities

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Lesson 11





SELLING YOUR LIMIT OF LIABILITY

If courts are fair, why not leave liability to them?

Doesn't LoL mean you could breach w/o compensating us for part of the loss?

Don't you stand behind your product?

- Leverage: software creates opportunities and risks many times its value – so unlimited liability would make business impractical
- Industry: LoL is 100% standard in tech
- *And we're not sure courts are fair*

The dollar cap (or €, ¥, £, ₹ ...)

“Provider’s liability arising out of or related to this Agreement will not exceed ...”

- Defined (arbitrary) amount
- 1 year’s fees: standard?
- *You can go higher w/o defeating the purpose!*



Consequential and other indirect damages

So complex that few lawyers understand ...
but almost universally accepted anyway

Shaky thumbnail definitions

- Direct damages: normal and predictable
- Consequential, indirect, special damages: unusual and situational
- Lost profits: could go either way, contrary to common belief
- Punitive damages: not generally available anyway



Exceptions

No problem

- Breach of nondisclosure
- Indemnity
- Intentional injury

Dubious

- Gross negligence

Mutual LoL

- Strays from LoL's purpose but hard to say "no"
- Need extra exceptions: payment and IP infringement



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Lesson 12

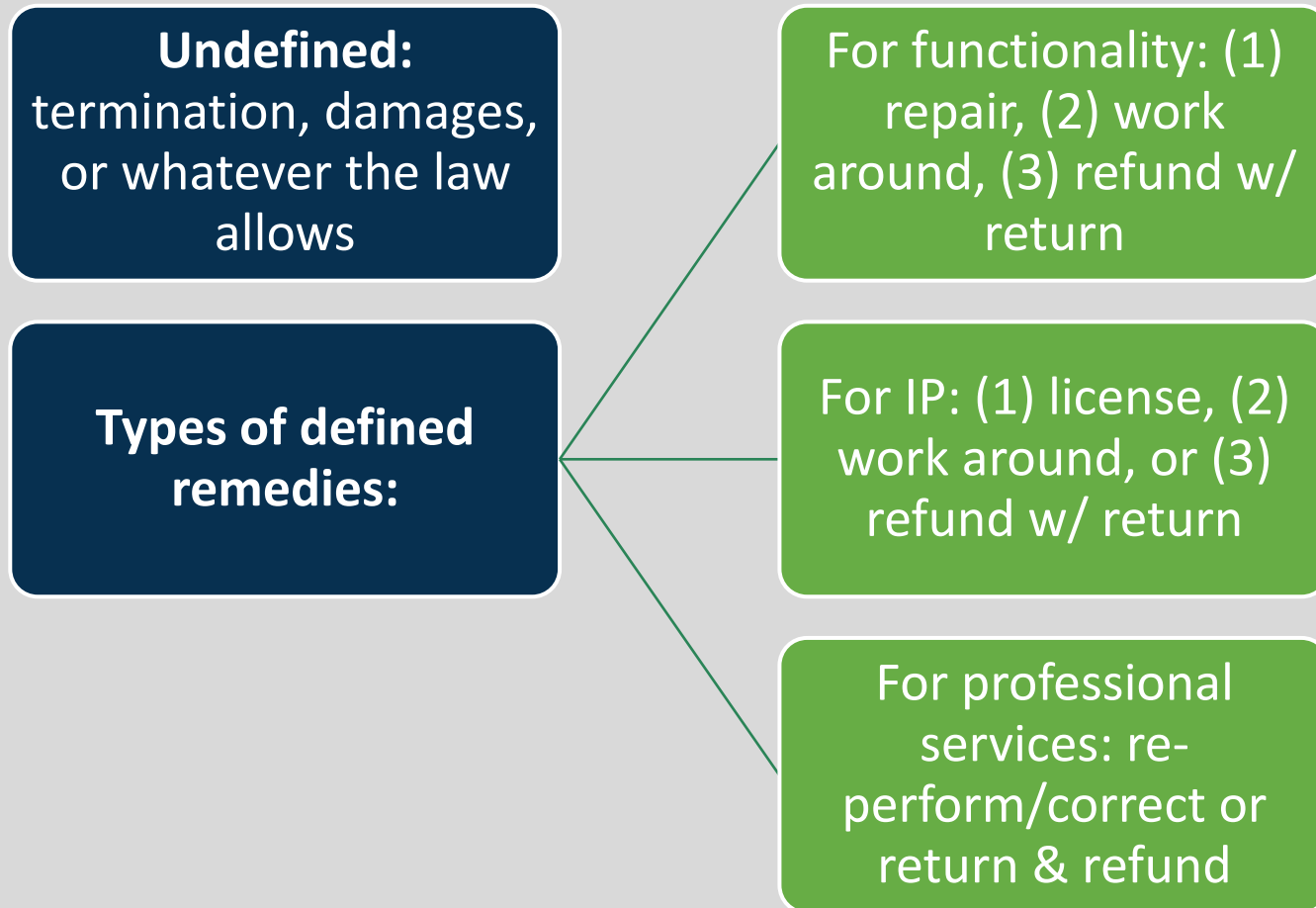


A FEW MINUTES ON THE NATURE OF WARRANTIES

- Terms about facts, not performance
- Shifts risk: doesn't guarantee
- Strict liability
- Don't say "represents," only "warrants" – but that's probably legal's battle



Warranty Remedies



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Lesson 13



THE MOST TYPICAL WARRANTIES: FUNCTION AND IP

Warranty of Function

“Provider warrants that the System will function materially according to the Specifications during the Warranty Period.”

- ✓ Time limit: 30 days, 180 days, etc.
- ✓ Broader than SLA





IP Warranty

“Provider warrants that it has and will maintain all intellectual property rights necessary to grant Customer the rights in Section ___ (*License & Subscription*).”

- Or just no *known* infringement
- Does this have value in the cloud? *Yes*.
- Does this retain value if we have an IP indemnity? *Yes*.

No IP or functionality warranty for gen-AI?

Outputs are unpredictable by nature, so what's our **functionality or IP warranty**?

Typical solutions ...

- None
- Warrant all but outputs

Unlikely solutions ...

- Warrant outputs, except issues arising out of prompts and other customer inputs? – *How would we know the source?*
- Warrant outputs but exclude IP and defamation, discrimination, privacy, etc.
- Other twists and turns ...?



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Lesson 14



WHY INDEMNITIES JAM UP DEALS AND WHAT TO DO

Third party indemnity:

If someone sues the indemnified party for _____ (an “Indemnified Claim”), the indemnitor will ...

- Hire lawyers to defend the case
- Pay any settlements
- Pay any judgments



Deal-blockers – because ...

- “Rights” of a 3rd party in a 2-party deal: **confusing** (even for lawyers)
- Sounds like a punishment/remedy but isn't
- Strict liability: no fault necessary
- Unlimited “liability,” usually
- Uninsured?
- High cost/risk topics: IP, data, etc.





Reducing the temperature (for both sides)

1. *Point out the real problem: 3rd party lawsuit, not either contracting party's bad behavior*
2. *Describe the terms: system for cooperation vs. 3rd party plaintiff*
3. *Describe the solution: give it to party whose business generates these suits*
4. *Look at brass tacks: simple question of cost*
5. *Consider compromises: limit on indemnity spending, etc.*
6. *Wait it out*

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Lesson 15



TYPICAL INDEMNITIES





IP indemnity

Problematic Qualifications

No indemnity for ...

- IP in effect after the Effective Date
- IP outside U.S. [or other country]





IP indemnities re gen-AI & other ML outputs

No one knows whether or to what extent the ML training infringes copyright

- Some providers: no indemnity
- Microsoft, OpenAI, AWS, Adobe, Shutterstock, etc.: copyright indemnities in B2B
- Small model providers: probably
- *Why IP indemnity and no IP warranty?*

Personal Injury & property Indemnity



“... arising out of, related to, or alleging personal injury or property damage resulting from Indemnitor’s act or omission or that of its employee or contractor”

- Dangerous workspaces
- Sexual harassment
- AI defamation, etc.?
- Etc.

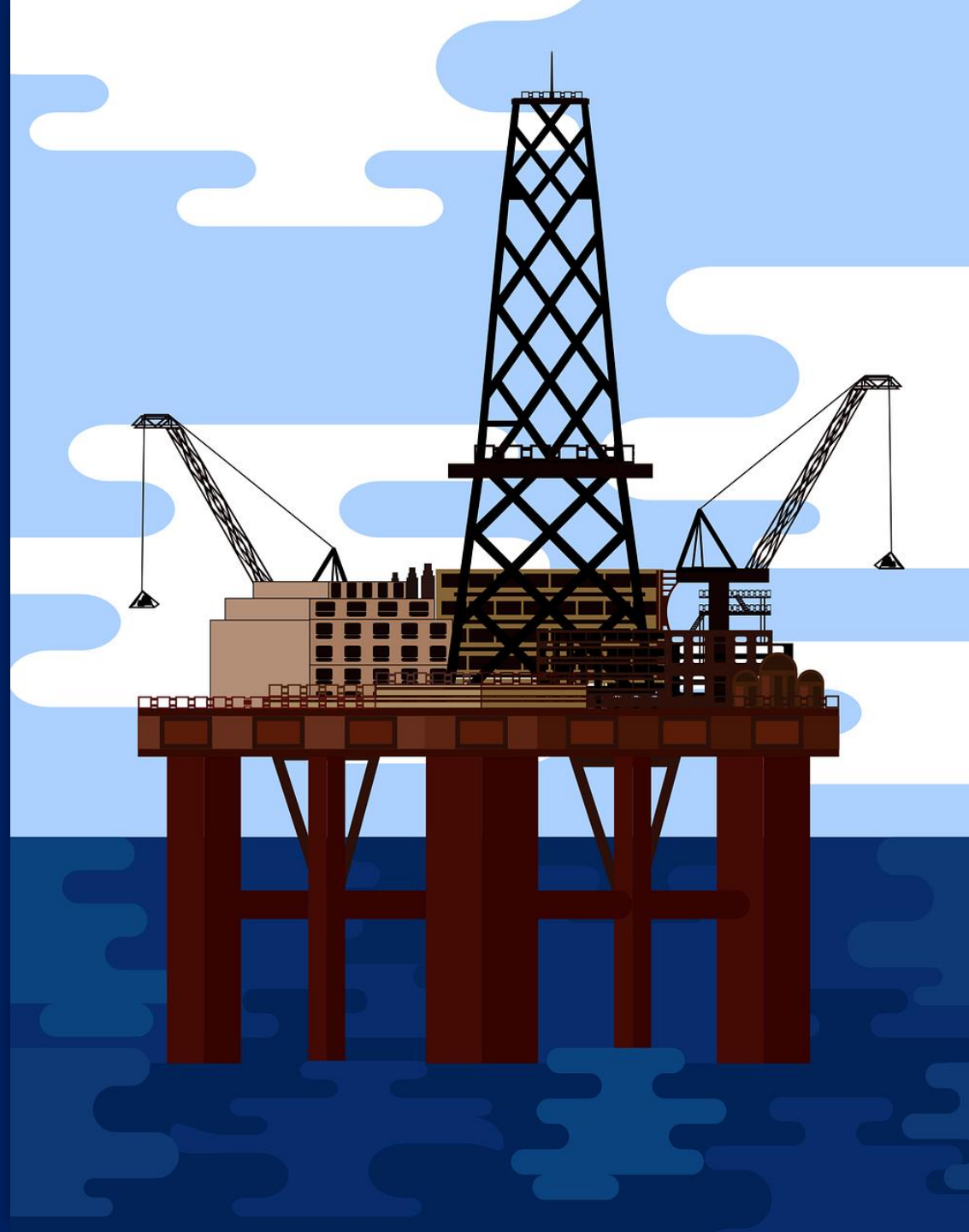


Employee & Contractor Compensation Indemnity

“... arising out of or related to Provider’s employee’s or contractor’s actual or alleged compensation or benefits”

Indemnity by Customer

- Risky Industry: PI indemnity for customers that haul dynamite, run nuclear power plants, ship oil in tankers, etc. – customer covers claims, regardless of fault
- Customer Content: IP and privacy indemnity for customer content on cloud provider's servers



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Lesson 16



THE MOST CONTENTIOUS INDEMNITIES



Data Incident Indemnity

“... a Data Incident (as defined below) caused by Provider or any of its agents or employees.”

- Just say “no”?
- Limit the spending?
- Make it “mutual”?
- From the customer only?



Other notably unpleasant indemnities

- Nuclear indemnity: “... arising out of or related to Indemnitor’s breach of this Agreement, negligence, or other wrongdoing”
- Indemnity for all acts of subcontractors
- Etc.



Comparing insurance ...

Unlike most contracting parties, insurers ...

- Get access to risk profile information
- Know how to assess risk w/ great expertise
- Can require risk-mitigation
- Are litigation experts
- Are bonded and rated
- Have lots of money



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