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# Caveat Emptor: Seven Terms to Avoid in Technology Contracts

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# Presentation Overview

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- ❑ Disclaimer
- ❑ Session Objectives
- ❑ Seven Contract Terms to Avoid
- ❑ Conclusion
- ❑ Questions

# Disclaimer

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# Disclaimer

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The ideas and legal interpretations presented in this paper are solely the author's professional views and do not represent the views of his company or their affiliates. The following information should be considered general advice and not specific legal advice to follow in your specific legal situation. You should always consult with a competent legal professional regarding your specific legal issues.

The author makes no claims, promises or guarantees about the accuracy, completeness, or adequacy of the information contained in this paper. The law changes very rapidly and, accordingly, the author does not guarantee that any information in this paper is accurate and up to date. Additionally, the law differs from jurisdiction to jurisdiction, and is subject to interpretation of courts located in each country, state, province or local jurisdiction and therefore your jurisdiction may not follow these general legal principles.

## Session Objectives

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- ❑ Review the seven contract terms that buyers should avoid.
- ❑ Learn about the pitfalls and why these seven contract terms are potentially dangerous to your organization.
- ❑ Learn how to reduce your organization's risk by eliminating or negotiating more favorable contract terms.

# Evergreen Clause

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- ❑ Automatically renews (usually annually).
- ❑ Obligates the buyer to decline to renew in writing.
- ❑ Buyer's often overlook deadlines.
- ❑ License to print money for the seller.



## Evergreen Clause – A Better Approach

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- ❑ Eliminate Evergreen clause from contract.
- ❑ Replace with one year contract renewal that must be acknowledged by the buyer each year.
- ❑ Require Seller to send invoice to renew contract.
- ❑ Seller's invoice should be sent at least 60 days prior to contract expiration
- ❑ Buyer can proactively decide on renewal.

## Limitations of Liability Clause

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- ❑ Limits amount of damages that buyer can be awarded for breach of contract.
- ❑ Usually protects only the seller.
- ❑ Limits all liability even intentional torts.
- ❑ U.S. Courts have generally limitation clauses to be valid if:
  - Negotiated between equal parties
  - Clearly conspicuous (bold type)
  - Not against public policy

## Limitations of Liability Clause – A Better Approach

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- ❑ Draft to make clause apply to both seller and buyer.
- ❑ Exclude limits for intentional torts (e.g., theft, injury)
- ❑ Exclude limits for gross negligence.
- ❑ Ensure clause doesn't limit seller's indemnification responsibilities.
- ❑ Ensure clause doesn't void seller's warranties

# Annual Fee Increases

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- Contracts often silent on annual fee increases.
- Seller reserves right to change fee unilaterally.
- Seller reserves right to switch you to another maintenance plan.
- No cap on fee increases.

## Annual Fee Increases – A Better Approach

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- ❑ No fee increase first two – three years.
- ❑ Negotiate an “objective” measure for each increase (U.S. Consumer Price Index)
- ❑ Negotiate a hard cap (3%).
- ❑ Base on “Actual” Price Paid not “List” Price.
- ❑ Negotiate percentage down from original percentage.

# Disaster Recovery/Test Systems

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- ❑ Contracts are often silent on a buyer's rights.
- ❑ Buyer's do NOT automatically obtain the legal right to install development, test and disaster recovery software.
- ❑ Not having this right could cost a buyer substantial amounts of additional fees.



## Disaster Recovery/Test Systems – A Better Approach

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- ❑ Specify that development, test and disaster recovery environments are allowed without additional charges or fees.
- ❑ Ensure that software license is not limited to a specific hardware platform.
- ❑ Ensure that the software license is not limited to a specific operating system.



# Contract Termination Terms

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- ❑ Early termination of the procurement process
  - mutual agreement
  - default of one party
  - buyer's convenience (PMBOK, 2009)



- ❑ Contracts often have vague contract termination provisions.
- ❑ Many contracts don't allow termination at buyer's convenience.

## Contract Termination Terms – A Better Approach

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- ❑ Ensure contract contains termination clause that allows for:
  - mutual agreement
  - default of one party
  - buyer's convenience.
  
- ❑ Buyer should continue to have the right to use software without support or updates
  
- ❑ Buyer may have to pay for termination for convenience

# Indemnification

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- ❑ “Indemnification is a provision in a contract under which one party or both parties commit to compensate the other for any harm, liability, or loss arising out of the contract” (Gartner, 2009).
- ❑ The formula to compute the amount of compensation is usually included in the contract.
- ❑ Indemnification has become more important with multi-million dollar patent infringement settlements.



## Indemnification – A Better Approach

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- Buyer should be specifically protected for seller's patent infringements
- Seller should bear costs of defending suits.
- Buyer should support seller's defense.

## Seller Web based Terms

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- ❑ Seller reserves the right to “unilaterally” change contract terms in the “future” on a website
- ❑ Contracts indicate that buyer is bound by these unseen terms as if part of the original contract
- ❑ Courts have generally held “clickwrap”/”Shrinkwrap” agreements to be enforceable (ProCD, Inc. v. Zeldenberg, 1996)



## Seller Web based Terms – A Better Approach

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- ❑ Buyer should NEVER agree to this contract clause.
- ❑ Backup plan is to include an “Order of Precedence” clause where the original contract overrides web based terms.
- ❑ Several jurisdictions have found these clauses to be invalid due to either “procedural unconscionable” or as “illusory” contract terms. (Douglas v. Blockbuster, 495 F.3d 1062 (2010))

## Conclusion

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- ❑ READ the contract to understand how it applies to your organization!
- ❑ Buyer needs to review these seven contract terms carefully.
- ❑ Use the Better Approach clauses to avoid these seven contract terms.
- ❑ Buyer needs to avoid, mitigate or transfer risks where appropriate to the seller.
- ❑ Obtain legal representation to ensure your rights are protected.