

HOMBURGER

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Negotiating Software and IT Contracts – A Primer for Non-IT Lawyers



Getting Started

- What we are talking about
 - Software license and maintenance agreements
 - Software development agreements
 - Outsourcing agreements

- Legal qualification
 - In most cases: Work contracts, mandates and mixed contracts dominate
 - Regularly: License contracts
 - Rarely: Employment contracts, purchase contracts, lease agreements, simple partnerships

- Go for Swiss law – it is reasonable and will cost you less time and money

Why bother?

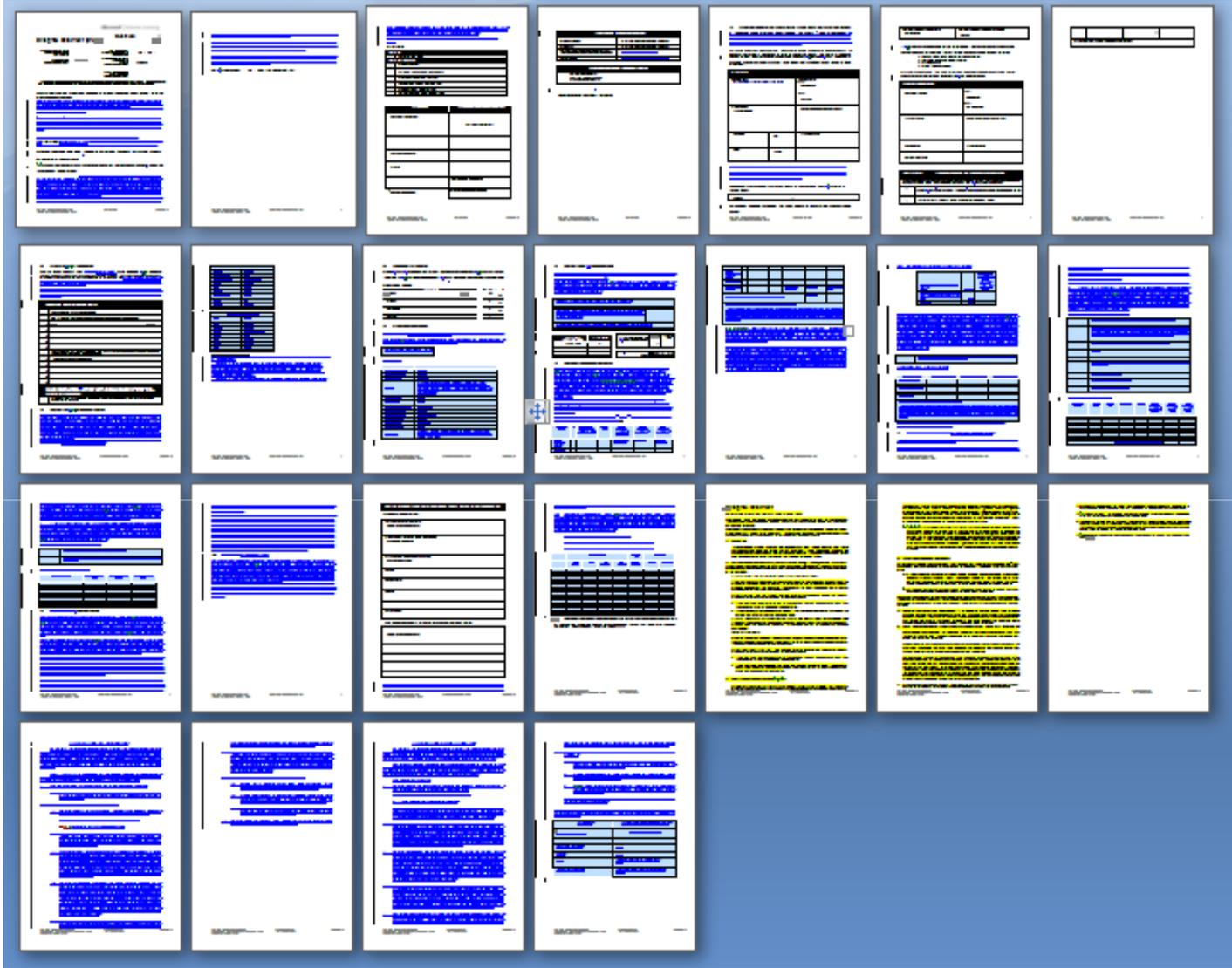
- Benefits of a well-negotiated IT contract for customers
 - You can better understand the provider and its capabilities
 - You can avoid (some) surprises later on
 - You can avoid (some) dependencies
 - You can save money
 - You can ensure priority treatment in case of problems
 - You can secure bargaining power
 - But you will hardly ever fight in court

- Providers know the pitfalls much better than their customers

General points to consider

- Bridge the gap
 - Many pitfalls in IT contracts relate to technical and procedural issues, not the law
 - IT specialists are usually not precise when drafting or reviewing contracts
 - You cannot seriously review and negotiate an IT contract without understanding the key issues and risks from your IT colleagues (they can tell you!)

- Get the full picture
 - Contractual relationships are often governed by a multitude of contracts (frame agreements, license agreements, statements of work, service descriptions, service level agreements, escrow agreements, maintenance agreements, etc.)
 - Providers usually want to use their templates, but are often ready to amend them



Negotiating IT contracts

- Homework for your colleagues in IT
 - Precisely define what is needed and expected to be provided
 - Consider future changes (re technology, company structure, business, needs, etc.)
 - Understand the provider's business model (how does it make money?)
 - Know the market (rates, service levels, etc.)

- Only three rules for you
 - Expect poor performance
 - Prepare for your own weaknesses
 - Avoid dependencies

Rule 1: Expect poor performance

- Typical issues
 - Late deliveries, untested software, poor quality
 - Implied expectations are not fulfilled (or cost more)
 - Lack or loss of skilled and competent personnel
- Ways how to address them
 - Precisely define not only what you expect, but also how it should be fulfilled
 - Broad warranties and duties of care to cover for the rest
 - Keep control over key personnel; be careful when defining skill-based hourly rates
 - Provide for provisions that will hurt the provider in case of poor performance (strict deadlines, substitute performance, damages, penalties, full or partial termination) and use ordinary Swiss law as a fall-back

Rule 2: Prepare for your own weaknesses

- Typical issues
 - Duty to cooperate and other customer "obligations"
 - User requirements and expectations change throughout a project
 - Poor testing of deliveries on the customer's part; late notices of defects
- Ways how to address them
 - Avoid back doors; require the provider to issue warnings
 - Define a change request procedure that avoids surprises
 - Limit the effects of acceptance on what has been tested by you; productive use or payment should not trigger acceptance
 - Provide for realistic time periods to complain about defects

Rule 3: Avoid dependencies

- Typical issues
 - Exorbitant costs for supplemental licenses
 - Single source for maintaining a particular software
 - Early termination difficult and costly
- Ways how to address them
 - Define your licensed rights broadly and carefully (including defined terms)
 - Agree on future formation of prices and secure maintenance early on
 - Flexible termination rights, including defined exit and post-exit support
 - Retain your flexibility to undertake corporate restructurings & carve-outs

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Thank you
for your attention.

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