When a deal is ready for one side to take a crack at writing the first draft of a technology contract, the lawyer doing the drafting should try to do essentially two things. Most important, she should write a contract that accurately tells the story. When I say, “tells the story,” I mean that the contract must tell a reader what the business folks have decided to do. And it really is a story, albeit a boring one, when written in legalistic contract language.

Now, whenever a lawyer attempts that first draft, it’s quickly apparent that the business folks
never addressed numerous issues that should be addressed in the contract. Her job is to identify
those issues and then address them in a way that has a tilt toward her client.

Typically, the business folks discuss high-level concerns like price, quantity, delivery date, and
basic functionality. They leave it to the lawyers to worry about things like limitations of liability,
the details of the warranty, performance standards, and acceptance testing procedures.

It's naive to think that the best practice is to write the contract without a tilt toward your side.
The norm is that this first draft will be the basis for negotiations and will never see the light of
day as a signed agreement.

If the lawyer doing the drafting attempts to do the King Solomon thing, the result will be a
contract tilted toward the other side. That's because the other side is expecting a contract that has
a bias toward the drafter. You can deny that you've drafted it that way all you want. Nobody will
proceed any differently. They'll still perceive the contract as a first draft for negotiation purposes
and carry on accordingly.

Inevitably, a contract is dragged toward the middle with the first draft defining one outside
boundary. If one side is naive enough to set that boundary in the "middle," then it'll simply be
pulled toward a new middle, which will be well over to the other side's position.

So, now I've defined the job of the attorney doing the drafting. Again, it's telling the story and
filling in the unspoken parts with a tilt toward your side.

In the world of technology-related contracts, though, this isn't what I typically see. Most first
drafts don't tell the story and aren't so much tilted or one-sided, as just incompetently written.

One-sided would be a big improvement. I can deal with that. At least the contract told the story.
Now, I just have to go through the story, as told, and negotiate toward the middle ground.

Incompetently written is a tougher one, however. It makes the negotiation time-consuming and
frustrating.

There are many reasons for this. For one, when the lawyer on the other side presents a poor
document, it often means that he's inexperienced with technology contracting or that some of his
bulbs don't light up, or both. Trust me when I say that not every law school graduate is bright.

The best-case scenario, although not the usual one, is that they're experienced and bright, but
weren't given sufficient time to write a good agreement.

A Lawyer's Lament

What I'm bemoaning is how much I hate working with poor documents and incompetent
lawyers. Whether they're incompetent due to inexperience or are just incompetent, it's the same
frustration.
I started my legal career almost 18 years ago by doing sophisticated corporate transactions. Whether it was a merger and acquisition, private placement, or documenting a large commercial transaction, the contracting process was mature and the lawyers involved generally understood it.

We had templates that were time-tested and laid out the basic format for the deal documentation. The lawyers involved had typically been here and done this before. The same could have been said for the parties who were usually sophisticated and experienced in business.

This isn’t the way it is in my world of technology deals. I’ve had deals with even large and well-known companies, where they produced the first draft, and I’ve been blown away by the sheer incompetence of what I saw.

It only gets worse when it’s a technology start-up on the other side. They may do good tech work, and they may do sophisticated deals with venture capitalists. Still, when it comes to the bread and butter of documenting what for them should be an ordinary course of business deal, they fall flat on their face.

It just boggles my mind that a company in the business of developing sophisticated custom software can’t come up with a decent contract for custom-developing software. It would be like shaking hands with your banker on a large commercial loan and then having him say, “I don’t know how we write up this deal. We don’t have lawyers who know how to document commercial loans.” It’s insane.

Business people complain that litigation is too expensive. They’re right, it is. Therefore, it should follow that they should and would do whatever it takes to minimize the risk of ending up in a courtroom with a business dispute. They don’t.

In the tech world, all too often, they reduce costs by not allocating enough money to have competent and experienced counsel negotiate and document their deals. It’s a shortsighted way to do business.

To appreciate this point, you need to understand that most business litigation isn’t about liars, cheats, and thieves. It’s about honest people honestly disagreeing about enough money that they feel the need to go to war over it. (In our society, we call legalized and ritualized warfare “civil litigation.” Some speculate that it’s an improvement over dueling. Sometimes I wonder.)

The contracting process isn’t the place to cut corners and save money. While it’s true that even the best contract—one that’s been thoroughly negotiated by extremely competent counsel on both sides—can land in a courtroom it’s just not as likely. That’s because people don’t usually end up at war over clarity. One side may not like the answer that “clarity” provides, but if there’s a clear answer, litigation is usually avoided.

Here’s the bottom line from the business decision perspective. While it may cost you $10,000, $20,000, $30,000 or more in legal fees to document a sophisticated technology transaction, it will cost you many multiples of these numbers to litigate it.
Furthermore, when you litigate you may not win or may not win completely. And even if you win, you might never collect what you win. If this sounds ugly, that's because it is.

Proposed Answers

If you're in the tech business, whether you develop e-commerce sites, custom-write software, set up computer networks, or whatever, you should invest in an experienced technology attorney to develop some forms that you can use as the starting point for your routine transactions. While it's tempting to "borrow" the form your competitor uses, you really don't know that it's any good. The odds are that it isn't. In fact, the odds are that your competitor "borrowed" it as well.

If you buy technology services, and the other side gives you garbage where a contract should be, you should propose that your lawyer write the contract from scratch. While this may seem like an expensive fix, it may not be. If the other side doesn't like this idea, tell them that it's a board requirement and then have your board require it.

Often it takes more time and, accordingly, more money to try to work within the bounds of a garbage contract than to just simply rewrite it from scratch. In addition, I find that no matter how hard I work to "fix" a bad document, it still has more holes than Swiss cheese.

It's like building a building. If the foundation is poor, you'll probably never succeed in shoring up the structure.

If you're a lawyer who doesn't have experience with tech contracting, then work with somebody who does until you have the experience to fly on your own. Seminars are good, but the formula for success is seminars plus a mentor. Anything less, and you do your client a disservice.

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