

The Ins and Outs of Negotiating Software Licenses and Cloud Computing Agreements: Strategies for Managing Risk

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The background is a solid blue color. Overlaid on this are several dark blue silhouettes of people in business attire. Some are standing and talking, while others are shaking hands. A white dotted line graph with a small peak is visible across the lower half of the image. A solid yellow horizontal line is positioned above the text.

Software Licenses and and Cloud Computing Agreements

Software Licenses and Cloud Computing Agreements

Software Licenses

- **More Traditional Arrangement**
- **Software is installed locally on Licensee's machine**

Cloud Computing

- **Software is located remotely on the "cloud" and accessed by a user**
- **Subscription based**
- **Types of Services: Software as Service, Platform as a Service, Infrastructure as a Service**

The background of the slide features a blue-tinted image of several business professionals in silhouette, engaged in a meeting. A white line graph with circular markers is overlaid on the scene, showing an upward trend. The title text is positioned on the left side, preceded by a short yellow horizontal line.

Minimization of Risk Using Contract Provisions

Minimization of Risk Using Contract Provisions

Types of Risk

- **Risk the software or services will not work**
- **Third Party IP Infringement Claims**
- **Data Security**
- **Ability to Terminate**
- **Licensor Instability**

Minimization of Risk Using Contract Provisions

Representations, Warranties, and Covenants

- **What are the statements and promises the parties are relying on as they enter into the agreement?**
 - Ownership of intellectual property
 - Support and uptime requirements
 - Data Security
 - Warranties related to services and/or goods
- **What is disclaimed?**

Minimization of Risk Using Contract Provisions

Indemnification

- **How do the parties want to allocate the risks associated with certain claims?**
 - Intellectual Property Infringement
 - Data Breach
 - Gross Negligence and Willful Misconduct

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Limitation of Liability

- **What kind of damages can the parties recover in the event of a breach, and how much damages can a party recover?**
 - Is there a damages limitation or liability cap?
 - Are there or should there be exclusions from the limitation of liability provisions?

Minimization of Risk Using Contract Provisions

Breach

- **What happens when a party breaches the agreement?**
 - What constitutes a breach?
 - Who can breach the agreement?
 - What are the remedies available in the event of a breach?
 - Termination
 - Sue for damages
 - Replacement of infringing IP with non-infringing IP
 - Trigger of source code escrow
 - Can you recover?
 - Insurance

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Term and Termination

- **How long with Agreement last and what happens with the Agreement expires or is terminated?**
 - Does the agreement automatically renew?
 - Is there a trial period?
 - Is termination for convenience appropriate?
 - Is the Licensor obligated to provide transition services

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Source Code Escrow

- **The underlying source code for the software will be stored in escrow, and released upon the occurrence of a certain event, such as bankruptcy.**
- **Useful for:**
 - Ongoing maintenance and support if Licensor is unable or unwilling;
 - Transition services; or
 - Upgrading obsolete technology if Licensor is no longer making updates

The background is a solid blue color. Overlaid on this are several dark blue silhouettes of people in business attire. Some are standing, some are shaking hands, and others are holding documents. A white line graph with circular markers starts from the left and trends upwards towards the right. A dotted white line graph starts from the bottom left and trends upwards towards the right. In the bottom right corner, the number '13' is followed by a white chevron symbol pointing to the right.

Discussion

Discussion

**How do you translate the risks associated
with cloud computing agreements to
business clients?**

Discussion

What strategies do you use when the other side seems to have all of the negotiating leverage? How do you deal with a bad deal?

Discussion

What strategies do you use when the party on the other side of the contract seems financially unstable?

Discussion

**How do you deal with terms in
agreements that can change without
notice?**