



Procurement and contracts

Covers basic concepts, guidance and more...

A Reference for the Rest of Us!

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Powerful. Smart. HR Software.



From last time...

A recap

In our previous sessions we have taken you through 'step-by-step' the first 7 essential stages of selecting People Tech, that is right for **YOUR** business.

We have provided guidance on how to structure your journey, with overview packs and downloadable documents that **YOU** can populate with **YOUR** company information

“So what’s next?”

Justify the Business Case

Build the business case for your HR needs. What does success look like? Define measurable outcomes on time saved and cost benefits across your organisation.

Supplier Beauty Parade

Create a long-list of possible suppliers. Don't get bogged down or swept away with sales. Make sure you objectively compare solutions side-by-side.

Supplier Shortlist

Create a shortlist and request more in-depth information from suppliers. Use a simple weighted scoring framework for assessment and compare critical features across suppliers.

Negotiation

Avoid pitfalls in negotiation, and balance pricing with partnership. Make sure you're clear on delivery approach and ongoing support as well as the raw tech.

Desk Research and Exploration

Work out where to start, when to make a change, how to save time. Identify your needs, and move forward. Seems daunting but heatmaps and structured questionnaires can help.

Organisational Structure

Get ahead by flushing out any changes to jobs, structures or processes, along with working out how you will measure organisation performance. It will help reduce risks later.

HR Data

Don't underestimate the time it will take to check, and clean up your data. Data Protection is an increasingly hot topic, so make sure you're in control.

Procurement and Contract

Navigate procurement and contract with care and pragmatism. Don't forget the importance of data protection but try not to lose the essence of the partnership agreement.

Initiating and mobilising your project

Get your tech implemented painlessly. Mobilise your team, and set yourself up for success by using the best project management and tracking techniques.



Procurement & Contracts

Successfully navigating the procurement, IT and legal minefields

After selecting your chosen vendor and negotiated the high level principles of the deal with them, you'll need to create a legally binding contract that provides the legal basis of the partnership. **Always ensure contracts are reviewed by a legal professional.**

Lawyers are VERY EXPENSIVE, and it's a good idea to try and get as much agreed with your selected vendor prior to engaging them. This will save everyone time and money (and sanity) which is a good thing.

Legal negotiation is an art but it can feel like a minefield. It's easy to get bamboozled by lawyers and bogged down. The trick is to get the balance of pragmatism vs knowing enough about the key legal terms that are actually important to your project and organisation.

Key considerations we will go through today:

- 1 Give yourself enough time
- 2 Don't lose your head patience in the process
- 3 Be pragmatic about what is most important to you
- 4 Enjoy the "Black Art"
- 5 Legal jargon buster
- 6 Key DOs and DON'Ts



A typical simple contract framework is made up of an overall agreement and a statement of work:



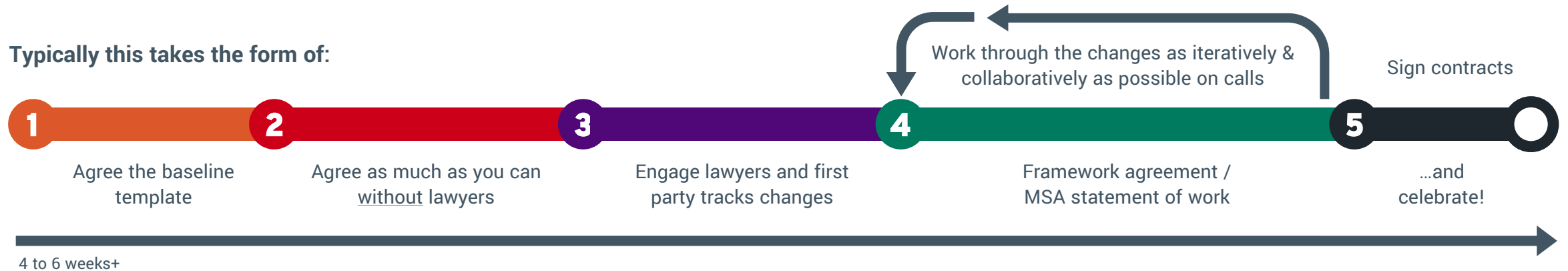


1 Give yourself enough time

It could take a while...

Agreeing a contract with your vendor can be time consuming – so make sure you give yourself enough time to go through the process. It depends on size of your project and also the flexibility of your vendor, but typically contracts take a minimum of 4-6 weeks to review and close.

Typically this takes the form of:



You can help yourself by asking yourself the following questions before engaging with your lawyers:

- 1 Have you cleared up as many of the deal principles as you can with your vendor?
- 2 Are you going to use in-house or external lawyers?
- 3 Whose contract template will you be using as a baseline – i) yours? ii) your vendor's iii) external template from 3rd party lawyer?
- 4 Do you have a clear “brief” for your lawyers? How much input and time are you expecting from them? What are the red flags?

Don't expect the legal process to happen fast. There are important decisions and commitments to be made, and it's important to spend time to make the right decisions. Equally it's important to brief your lawyers exercise an appropriate amount of time that does not unnecessarily delay the project but ensures your commercial and legal risks are minimised



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Don't lose your head patience in the process

Things to consider...

Intellectual Property

Insurances

Data Protection

Reasonable vs best endeavours

Mutuality

Confidentiality

Force Majeure

Inflation

Payment terms

Indemnities

Levels of liability

Milestone payments

Penalties for late delivery

Specification

Term & Termination

Time is of the essence





3

Be pragmatic about what is important to you

It could take a while...

Despite all your best intentions, and the warmth of relationship with your vendor to agree key principles, you can be sure that there will be some tensions that arise during the contract discussions with your lawyers.

Remember that deliberately checking the edge cases and in some cases causing tension is what lawyers are paid to do!

Whilst everything is important there may be some things that are more important to you than others.

Here are some of the key contract provisions to focus on depending upon your main areas of concern:

Things to consider



Time

- “Time is of the essence”- obligates vendor to achieve a date
- “Longstop Date” – can be used to penalise late delivery or get out
- Consider when SaaS and Professional Services are paid



Cost

- Basis of milestone payments
- “True up” / “True down” of Active users
- Inflationary uplifts – you can try to “fix” these for the contract term
- Lock in of pricing discounts



Risk/ Compliance

- Indemnities (though it’s unlikely these will be accepted) & Limits of liability
- Right to termination if the system is not meeting contractually agreed standards
- Service Level Agreements and penalties for not achieving them
- Data Protection & external certification (e.g. ISO 27001)

...but be aware that

- It’s difficult to prove delays are solely due to vendor and can lead to mutual obligations and tensions around provision of info, staff & sign off
- Withholding payments can work both ways – as both a positive and negative motivator of behaviours
- Vendor may apply baseline cost to cover infrastructure
- Holding inflationary payments may have unwanted consequences as vendor has to cover wage inflationary pressures
- Indemnities are usually overkill and the risks can be usually dealt with in more pragmatic ways and via limits of liability
- Whether the vendor has external certifications is usually a good way of understanding their maturity – make sure you see the certificates and that they haven’t expired!



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An aside: enjoying the “Black Art”

Becoming a “Legal Ninja”

- Whilst legal review can seem very turgid and boring – with the right mindset you can learn a lot.
- “A little knowledge is a dangerous thing” – but in the world of legal negotiation, it’s also very helpful.
- There are certain phrases that you will start to use in wider contexts: For the avoidance of doubt...

In our experience, most HR systems SaaS contract negotiations “boil down” to the following key points:

Intellectual Property Rights (IPR):

Historically IT systems were “hand crafted” for specific customer needs, and the customer therefore had the right to anything they had built as their own intellectual property. In the cloud computing / SaaS world this is not the same since the vendor clearly has their own IPR and usually any bespoke build would be reliant upon this IPR. The customer clearly has company know how and documents that must be protected along with rights and obligations over their own data. BUT this can sometimes be erroneously interpreted as a right to software not just data / project docs.

Indemnities:

Lawyers seem to get very excited about the need to include indemnities as they are a legal “magic wand” to cover the customer from any / unlimited costs, and they can claim for indirect / consequential losses and not have any obligation to mitigate losses

Liabilities:

Liabilities are probably the most important / sensitive part of the contract to discuss and get right. In the event of something going wrong, these are the levels to which either party (but usually these are loaded against the vendor) can be liable/sued for damages and costs. There are usually 3 levels of liability finally agreed.

Typical / pragmatic legal outcomes

- Vendor retains the IPR for their own software (obviously) but also for anything built on their platform*
- Customer has IPR for everything non-software created (documents, knowhow) along with rights over their data

*For something truly bespoke that confers a specific customer advantage it may be possible to negotiate a period of time for which the vendor exclusively provides the software / service for you

- It’s highly unlikely the vendor will accept indemnities since voluntarily accepted indemnities (other than those required by law) will tend to nullify professional indemnity insurance
- An indemnity for IPR or Data Breach may be accepted subject to cap (see liabilities) and obligation on customer to mitigate losses

- The usual “final” position agreed between vendors and customers is 3 levels of liability: 1) Unlimited liability on things that cannot be excluded by law 2) A “Super cap” on liability that usually applies to IPR and Data Breach claims 3) A cap for all other liabilities that is often up to 150% of contract value in a single year



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Legal jargon buster

The “Black Art” of legal terminology

“Notwithstanding the aforementioned undertaking to procure a vessel to fill with coffee therein, the ongoing obligation to furnish Mr Fielder with a cookie is limited to the extent as expressly required by law”

OR

“I’m buying Paul a coffee but not a cookie”



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Legal jargon buster

The “Black Art” of legal terminology

“Time is of the essence”

– sounds so innocuous but contractually obliges the vendor to deliver on time otherwise they are in breach of contract and the customer can claim for damages.

“Reasonable Endeavours” vs “Best Endeavours”

– again sounds so innocuous, but “Best Endeavours” is more legally onerous than a “reasonable” endeavours and requires the vendor to take all measures (including potentially bankrupting themselves) to complete an undertaking. Reasonable endeavours is usually more reasonable!

NB. There is also something in between – “All Reasonable Endeavours” but it is rarely used

Mutuality

– is a term often used when discussing contract terms, in relation to fairness and balance, and means that a principle should apply both ways. *E.g. if you expect your vendor to create a document within X days from a workshop, be prepared for the vendor to insist on Y days for you to sign it off.* Making contract provisions as mutual as possible is no bad thing and can encourage partnership behaviours.

Termination for convenience

– is often requested by customers so that they can exit a contract without “lock in”. However the reality is that the vendor may be stuck with stranded costs (such as hosting costs that they have committed to) that make it very difficult for them to accept. If the termination is for service performance reasons, it’s more reasonable to look for ways to define breach of contract conditions that directly refer to this – e.g. failure to hit longstop date, system failing UAT repeatedly, repeated system non-availability.

Agreement to agree

– this is usually bad from a legal perspective since it leaves a provision ambiguous or dependent upon something that is not yet created. The most typical examples of this are usually in relation to dates for milestone payments in project plans where the plan is not yet created. Best to tag the milestone payment to e.g. “End of Design”, “End Of Build” if a planned date is not yet known.

Ambiguity is a killer of contracts and projects in general, so it is good practice to include as many “knowns” as possible into contract schedules (e.g. estimated project plan, specifications, Data Protection Agreements etc)



6 Key DOs and DON'Ts

DO

- Make sure you're clear about the contract template start point – check with IT, procurement, lawyers and vendor to 100% confirm this
- Be realistic about the time it could take to go through the process – this could be 4-6 weeks minimum
- Create a brief for your lawyers to understand and make sure they're clear on what is most important to you – cost vs time vs risk
- Understand your lawyer's cost model and if necessary put a cap on their costs
- Make sure your vendor has sufficient insurance cover that aligns with your agreed liability limits
- Engage your IT department for any data protection related clauses or Data Protection Impact Assessments they wish to add – these can add weeks
- Try and make clauses “mutual” where possible – it makes you think differently and definitely helps establish partnership principles
- Enjoy the ride – you will become a “legal ninja” in no time

DON'T

- Engage lawyers until you've got to a good understanding of the key deal principles with your vendor – it will save untold time, money and sanity
- Insist on indemnities not required by law unless you have a very good reason to do so. Voluntarily accepted indemnities can nullify PI insurance
- Think that belligerent insistence on onerous liability and indemnity clauses for your vendor will help you.
- Think that insurance is not your problem – it is. If you claim damages from a vendor that can't be covered by insurance. It's your problem as well
- Sign a contract without a featureset, project plan and acceptance criteria that are broadly agreed in contract with the vendor
- Leave anything ambiguous in the contract
- Don't let your lawyers kill your partnership unless there is good reason