IAITAM ACE 2025
ITAM - Another Brick In The Wall

Technology Contracts

Best Practices and Common Pitfalls

BY: HASSAN ESSAILI

SPEAKER BIO

Hassan has been practicing law for almost 10 years. He is an experienced transactional attorney with a robust background in negotiating complex agreements such as Enterprise SaaS agreements, license agreements, implementation agreements, open source licenses, AI licensing terms, and Data Privacy Agreements.

He is married with two kids (ages 2 and 4) and has a dog named Nola.

ITAM - ANOTHER BRICK IN THE WALL

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April 22-24, 2025 | The M Resort Spa Casino | Las Vegas, NV

Disclaimer

This presentation is for informational purposes only and does not constitute legal advice. Any statements or opinions are my own and do not represent my employer or the IAITAM organization. Please consult with a qualified attorney regarding any legal questions or issues related to the topics discussed today.

Overview of Today's Presentation

- List of Common Tech Contracts
- General Terms and Conditions
- Open Source Software
- Data Processing Agreement
- Consulting / Professional Services
- Questions

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Common Tech Contracts

- SaaS Agreements
- EULA's
- Licensing Agreements
- NDA's
- Open Source Software

- Order Forms
- Data Processing Agreement
- Consulting / Professional Services Agreement
- Scopes of Work (SOW's)

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General Terms

General Terms and Conditions will generally include:

Overview

- Term and termination

- Payment terms

- Confidentiality Clause

- Indemnification

- Liability Cap

- Governing Law and Jurisdiction

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General Terms

Always Read Your Agreements

Celebration Clause

The parties agree that the Effective Date of this MSA shall be celebrated annually as "Celebration Day". Minimum requirements for celebrations are a cake and a at least 2 balloons….

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General Terms
Term and Termination

You can have a perpetual agreement (no end date) or a fixed term agreement.

Sample Perpetual Term Clause:

This Agreement begins on the effective date and continues until terminated by either Party.

Termination for convenience

Either party may terminate this agreement effective upon 30 days notice to the other party.

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General Terms
Term and Termination

<u>Sample Fixed Term</u>

This Agreement will commence on the effective date and continue for 2 years unless terminated earlier as provided herein.

<u>Renewals</u>
Auto Renewals
Fixed Term
<u>Early Termination Rights</u>
→ Material Breach of the agreement.
→ Your reps/warranties are implied as material to a contract.
→ Breach of obligations or applicable law.
→ For SOW's, failure to hit certain milestones.

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General Terms

Payment

Customer will pay the fees for the Services **set forth on the applicable Order Form**. Following execution of the Order Form, Vendor will submit an invoice to Customer for the Services, and payment of the **undisputed** fees in the invoice will be **due within 60 days** of the **date Customer received the invoice**. Vendor shall have the **right to terminate** this agreement if Customer fails to pay the **undisputed** fees within 30 days of the due date.

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General Terms
Confidentiality

The term "Confidential Information" shall mean all information one Party hereto acquires from the other Party hereto relating to the Services, whether developed by the disclosing Party or by others including, without limitation, trade secrets, unpublished patent applications, designs, processes, disaster recovery plans, audit reports, information technology structure and hardware, studies and notes containing or reflecting such information, business plans and strategies, financial information, pricing information, specifications, devices, and all information one Party hereto acquires or observes in connection with the Services, regardless of whether such information is designated as Confidential Information at the time of its disclosure.

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General Terms
Confidentiality

<u>Exclusions to the definition of Confidentiality:</u>
The confidentiality and non-disclosure obligations set forth herein shall not apply with respect to any confidential information that (a) was in Receiving Party's possession or **was known to it prior** receiving it from the Disclosing Party, (b) is independently developed by Receiving Party without *access to* **or use** of the Disclosing Party's Confidential Information, (c) is or **becomes public** knowledge, lawfully, without fault of Receiving Party; or (d) is or **becomes available** on an unrestricted basis to Receiving Party from a source other than Disclosing Party, and that party is not under any obligation to keep such information confidential.

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General Terms
Indemnification

Vendor shall fully defend, indemnify, and hold Company and its directors, officers, employees, agents, stockholders, and their affiliates harmless from and against any and all claims, demands, causes of action, damages, liabilities, losses, settlements, judgments, costs, and expenses (including reasonable attorneys' fees and costs) arising out of or related to any one or more of the following: (1) any allegation that the Services infringe or misappropriate any third party copyright, trade secret, trademark, or patent, or any other intellectual property right; (2) Vendor's breach of this Agreement; (3) Vendor's breach of any law, rule or regulation; or (4) Vendor's negligence, gross negligence, or willful misconduct.

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Vendor shall fully **indemnify, defend, and hold harmless** Company and its directors, officers, employees, agents, stockholders, and their affiliates from and against any and all claims, demands, causes of action, damages, liabilities, losses, settlements, judgments, costs, and expenses (including reasonable attorneys' fees and costs) arising out of or related to any one or more of the following: (1) any allegation that the Services infringe or misappropriate any third party copyright, trade secret, trademark, or patent, or any other intellectual property right; (2) Vendor's breach of this Agreement; (3) Vendor's breach of any law, rule or regulation; or (4) Vendor's negligence, gross negligence, or willful misconduct.

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General Terms
Always Read Your Agreements
Part 2

<u>Amazon Zombie Clause</u>
This restriction will not apply in the event of the occurrence (certified by the US Centers for Disease Control) of a widespread viral infection transmitted via bites or contact with bodily fluids that causes corpses to reincarnate…

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General Terms
Limitation of Liability

LIMITATIONS OF LIABILITY. NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INCIDENTAL, INDIRECT, CONSEQUENTIAL, PUNITIVE OR SPECIAL DAMAGES (INCLUDING BUT NOT LIMITED TO DAMAGES TO BUSINESS REPUTATION, LOST BUSINESS, LOST ANTICIPATED PROFITS, OR LOST ANTICIPATED SAVINGS), WHETHER FORESEEABLE OR NOT AND HOWEVER CAUSED, EVEN IF SUCH PARTY IS ADVISED OF THE POSSIBILITY THAT SUCH DAMAGES MIGHT ARISE. NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, THE LIABILITY OF EACH PARTY TO THE OTHER FOR ANY OR ALL LOSSES OR INJURIES FROM ANY ACTS OR OMISSIONS UNDER THIS AGREEMENT, REGARDLESS OF THE NATURE OF THE LEGAL OR EQUITABLE RIGHT CLAIMED TO HAVE BEEN VIOLATED, SHALL NOT EXCEED THE AMOUNT PAID BY CUSTOMER TO PAYCOM UNDER THIS AGREEMENT FOR THE SERVICE COMPONENT WHICH IS THE SUBJECT OF THE ALLEGED BREACH DURING THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE ALLEGED BREACH.

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General Terms

Limitation of Liability

<u>Consequential Damages Disclaimer</u>

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY **INCIDENTAL, INDIRECT, CONSEQUENTIAL, PUNITIVE OR SPECIAL DAMAGES** (INCLUDING BUT NOT LIMITED TO DAMAGES TO BUSINESS REPUTATION, LOST BUSINESS, LOST ANTICIPATED PROFITS, OR LOST ANTICIPATED SAVINGS), WHETHER FORESEEABLE OR NOT AND HOWEVER CAUSED, EVEN IF SUCH PARTY IS ADVISED OF THE POSSIBILITY THAT SUCH DAMAGES MIGHT ARISE.

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General Terms
Limitation of Liability

<u>Direct Damages Disclaimer</u>

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, THE LIABILITY OF EACH PARTY TO THE OTHER **FOR ANY OR ALL LOSSES OR INJURIES** FROM ANY ACTS OR OMISSIONS UNDER THIS AGREEMENT, **REGARDLESS OF THE NATURE** OF THE LEGAL OR EQUITABLE RIGHT CLAIMED TO HAVE BEEN VIOLATED, ***SHALL NOT EXCEED* THE AMOUNT PAID OR PAYABLE** BY CUSTOMER TO PAYCOM UNDER THIS AGREEMENT **FOR THE SERVICE COMPONENT** WHICH IS THE SUBJECT OF THE ALLEGED BREACH **DURING THE TWELVE MONTH PERIOD** IMMEDIATELY PRECEDING THE ALLEGED BREACH.

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General Terms
Limitation of Liability

Exclusions to the Liability Cap:

- Indemnity (especially third-party IP infringement claims);
- Breach of confidentiality;
- Gross negligence / willful misconduct (typically you are prohibited from capping this anyway in most jurisdictions);
- Breach of applicable law, rule, or regulations.

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General Terms

Governing Law and Jurisdiction

This Agreement shall be governed by and construed and enforced in accordance **with the laws of the State** of Oklahoma, without reference to the conflict of laws or principles thereof. Each Party also irrevocably submits to **the exclusive jurisdiction and venue of the courts** of the **state courts** located in Oklahoma City, Oklahoma, or **the United States District Court**, located in Oklahoma County, Oklahoma.

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General Terms

Governing Law and Jurisdiction

<u>Alternative Dispute Resolution Options:</u>

In the event of an issue arising under the Agreement, the parties shall meet to settle the dispute, claim, question, or disagreement prior to filing litigation or arbitration. Both parties shall have decision makers who have a title of Vice President or above attend the meeting, and they shall consult and negotiate with each other in good faith. If after 60 days the parties are unable to reach a resolution, then the dispute shall be finally settled through binding Arbitration under the rules of the American Arbitration Association, and judgment of the decision issued by the arbitrator(s) may be entered into any court having jurisdiction thereof.

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General Terms

Governing Law and Jurisdiction

<u>Informal Settlement Conference:</u>

In the event of an issue arising under the Agreement, the parties shall **first meet in good faith to settle** the dispute, claim, question, or disagreement **prior to filing litigation or arbitration**. Both parties shall have **decision makers** who have a title of Vice President or above attend the meeting(s), and they shall consult and negotiate with each other in good faith.

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General Terms

Governing Law and Jurisdiction

Arbitration after ISC:

If after **60 days** the parties are unable to reach a resolution, then the dispute shall be **finally settled through binding** Arbitration under the rules of the **American Arbitration Association**, with **1** arbitrator. Any **judgment or decision** issued by the arbitrator may be **entered into any court** having jurisdiction thereof. The parties will **split the cost** of arbitration equally.

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Open Source Software

- AKA OSS.
- Free software governed by a commonly utilized set of legal terms;
- Typically downloaded from github.
- Two types: Permissive and Copyleft (non permissive)

Open Source Software

Permissive example's are your MIT, Apache, and BSD's.
- No restrictions on your ownership or use, including if you make improvements to your app

Copyleft OSS examples are your GPL, LGPL, AGPL, etc.
- Restrictions on your use. Some require you to disclose your code!
- GPL and LGPL – these limitations are if you distribute a physical copy of the software.
    - Vizio case
- AGPL – this applies to SaaS software.

Open Source Software

Takeaway?

- Need a process to review these requests and lock down what OSS can be released in your final products.
- If it's a copyleft license, you need to explore if your use case will require you to publicly disclose all or a portion of your source code.
- You need to ensure there is a process to update OSS code regularly to reduce the risk of vulnerabilities.
- If you are acquiring a company, you need to scan their software prior to finalizing and have them remediate any copyleft OSS licenses that might be problematic.

Data Processing Addendum

When do you need a DPA?

- Anytime you share personal information with a third party.

DPA Should include:

- Define who the controller and processor are of the information

- Controller has the right to provide the information

- Processor has the necessary physical and technical security to protect the information

- What can the processor use the information for

- Process for requesting return or deletion of the information

Consulting / Professional Services

Summary:

- Covers work done by a third party;

- Work made for hire clause;

- Independent Contractor Statement;

- Reps/warranties;

- Payment – limit to acceptance of the work;

- SOW should follow specifying work to be done;
    - If not listed in the SOW they are not required to do it.

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Connect with Me!

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