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Electronic Contracting, Part 2 – Adapting to Link-and-Layer Methods

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This is the 2nd of 2 installments on **electronic contracting** best practices and tips for businesses and their attorneys.

Live links to web pages in form agreements have become ubiquitous, creating both challenges and opportunities for electronic contracting. Linked pages house contractually binding additional documents and terms, most of which may change over time.

For the side receiving this type of form agreement, at best, it cuts down on the initial appearance of the volume of pages to review before signing – but, at worst, key terms are missed and future changes are unchecked.

We call these “link-and-layer” methods of contracting – and there are easy-to-implement best practices and tips for adapting to them. The below alternatives are primarily for recipients of these forms, but preparers should also be attentive to them and anticipate them.

Scenarios

In this overview, “Vendor” includes suppliers, sellers, licensors, and other types of providers of goods and services; “Customer” includes buyers, licensees, and the like.

Initial Links-and-Layers: As a potential Customer, you receive the Vendor’s one-page ordering document as a PDF or go to the Vendor’s web portal to see that same one-page order, ready for your e-signing. Products and services are briefly listed, along with corresponding fees, payment frequency, and length of term.

Where are the legal terms and conditions? Tucked near the bottom, often in small print, may be something similar to:

“This Order Form, including the products and services provided hereunder, is governed by the terms and conditions of Vendor’s Master Agreement, as posted at <LINK>, which is hereby incorporated into this Order Form (collectively, the “Agreement”).

By signing below, Customer agrees to be bound by such terms and conditions as of the date of signing.”

The Customer could sign the one-page Order Form or click “I Agree” and be done, skipping over the 10-page Master Agreement that 20 years ago would have been provided in paper format.

Additional Links-and-Layers: Resisting the impulse to review just the one-page Order Form and sign, and instead read and negotiate the linked Master Agreement, is not, however, the only step. That Master Agreement itself often has further links to web pages containing more – added descriptions of products and services, support policies and documentation, security procedures, and third-party terms and conditions, to name just some possibilities.

For example, a Cloud-services Vendor may include a link in a key defined term:

“Security and Data Processing Terms’ means the then-current terms and conditions describing security and data processing obligations with respect to Customer’s data, as described at <LINK>.”

Or that same Vendor may include, in a section on support:

“Vendor’s then-current support policies, located at <LINK>, shall apply and are incorporated into this Master Agreement.”

When the Customer asks her attorney about what “the” agreement is, the unsettling answer is “everything.”

Printing and Attaching

A common initial reaction of a party faced with these electronic contracting methods is to request that all links be excised and all linked documents be printed out and physically appended as exhibits or schedules.

If the form provider has more negotiation leverage, it may simply refuse. It may also maintain that across-the-board printing-out and attaching does not make sense for less legal, supplemental linked information.

Returning to the above scenarios, yes, to the extent there are going to be negotiated changes to the Master Agreement, it should be printed out (and references in an Order Form to how the then-current Master Agreement is available by link should be removed). And the same applies to linked documents referenced within the Master Agreement itself.

But static descriptions, policies, and procedures do not align with the evolution that certain products and services will naturally undergo. For example, the form-provider Vendor will point out that its particular support policies apply to all of its customers – for reasons of staffing, consistency, and emerging business or technological changes (many of which, the Vendor will point out, will actually be beneficial to the Customer).

One easy step to take for any linked document that does not get attached, and knowing what is at the link itself could change: cut and paste its contents into a dated Word document, and retain that in your files for future reference or for use with one of the below alternatives.

Prior Notice

Requiring prior notice of changes to linked terms is another alternative. Short of formal written notice, variants are the Vendor posting information about changes at its portal or informing a Customer designee of changes by email. For example, a form sentence could be expanded to add a new portion (as underlined):

“Customer shall follow Vendor’s Acceptable Use Policy, the current version of which is at <LINK>; however, Vendor shall provide Customer with at least 30 days’ prior written notice of any changes to the Acceptable Use Policy.”

Amending Specific Provisions

If only finite negotiated changes are pursued, one alternative is to add amending language near the linked terms. For example, a Customer wanting a termination remedy in addition to service level credits might start with the form’s sentence and add to that:

“Vendor’s current service levels and service level credits for Service Level Failures are described in the Service Level Attachment, the current version of which is at <LINK>; additionally, Customer may also elect to terminate the Agreement if there are two months of Service Level Failures in any three-month period.”

Setting Parameters

Putting parameters on changes to linked documents is another alternative. For example, a Customer entering a Master Agreement, pursuant to which various subscription products and services may be obtained, may want to stipulate longer periods for some:

“Vendor shall make available, and Customer may obtain for subscription periods of 12 months each (with elective 12-month renewals), any of the Services described in the Services Catalog, at <LINK>. Vendor will notify Customer at least 18 months before discontinuing any particular Service; provided, however, for Key X-type Service and Key Y-type Service, Vendor will notify Customer at least 36 months before discontinuance.”

Neutralizing Layered Provisions on Risk Allocation and Liability

Key risk and liability provisions are, logically, in the main body of the Master Agreement (to use the above scenario), and business parties and their attorneys know to review these carefully and negotiate. While linked supplemental descriptions, terms, and policies tend to be mostly amplifications about the products and services being provided, they too often also contain alternative provisions that are disclaimers, exclusions of damages, limitations of liability, and indemnities.

These alternative, often competing provisions create uncertainty as to liability and risk allocation. A party who successfully negotiates these provisions in the Master Agreement fumbles away some of its gains by ignoring similar provisions appearing in linked documents.

While beyond the scope of this overview, the form provider may have created these less conspicuous, overlapping layers purposefully for its advantage, but the more likely reasons this occurs are the form provider's generalized goals of limiting exposure and being protected in every document, even if those provisions do not fit together hand in glove, and being prepared at different times by different authors.

For example, a common negotiated provision in a Master Agreement's limitations of liability provision is an indemnification exception. To narrow that exception, add the underlined qualification:

"either party has an obligation to indemnify, defend, or hold harmless, as expressly provided in Section # above (and, for clarification, no indemnification provisions that may be in linked documents incorporated into the Agreement shall apply as an exception)."

Another way to rein in unwanted coverage by linked terms is to add a sentence:

"To the extent contained in linked documents to this Master Agreement, no such provisions regarding exclusions of damages, limitations of liability, or exceptions to either shall apply, it being the intent of the parties that the above Section # shall govern with respect to such commitments."

Order of Precedence

The importance of order of precedence provisions undergirds all of the alternative approaches to the link-and-layer methods – and in particular neutralizing provisions located in linked documents regarding risk allocation and liability. Typically located near the top or bottom of a Master Agreement, a form provider would more often want linked documents to prevail, but the form recipient, who has focused its negotiations on the Master Agreement and mindful of how linked documents could change in the future, would more likely ask for:

"In the event of an unavoidable conflict, the terms and conditions in this Master Agreement shall prevail over those in incorporated linked documents."

Stipulating No Material Changes

A final, more sweeping approach is to declare that changes will not materially alter quality or benefits, as compared to when the contracting period began.

For example, a Vendor may include a linked reference to its then-current support policy, but would likely be amenable to adding the underlined portion:

"Support policies, available at <LINK>, are subject to change at Vendor's discretion; however, such changes will not result in a material reduction in the level of support provided during the period for which fees for support have been paid."

Another materiality variation is to prescribe a remedy:

"Documentation describing the features and functionalities of the services (located at <LINK>) is subject to change at Vendor's discretion; provided that Customer may terminate applicable Orders upon notice to Vendor if such changes are materially detrimental to then-existing services being"

provided.”

Compared to other alternatives, this “no material changes” alternative is the most ambiguous as to interpretative outcome.

Conclusion

Link-and-layer methods of electronic contacting are pervasive, and these alternatives can help parties manage expectations, risks, and future changes to their agreements.

Previously – Electronic Contracting, Part 1 – Practical Tips for E-Signing Transactional Documents