

Unlocking AI Success: Essential Contract Provisions and Negotiation Considerations

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and Lawyers: Uses, Misuses and Ethics

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Critical AI Contracting Considerations

- ✓ Introduction and General Observations
- ✓ Some Initial Transaction Questions
- ✓ Do your due diligence!
- ✓ Use Rights/Licensing/Data Ownership
- ✓ Privacy/Cybersecurity
- ✓ Representations/Warranties/ Disclaimers
- ✓ Indemnification
- ✓ Termination Considerations
- ✓ AI Risk Mitigation Strategies/Conclusion

General Observations - Structuring Challenges for AI Agreements/Procurements

- AI solutions involve a complex contracting framework, each with its own concerns.
- The Services are subject to constant modification and change (and so are the AI Contracts).
- Given the speed of AI evolution (i) does building AI products/services to hard-coded specifications still make sense? (ii) how do you measure success?
- AI Vendors rely on data, tool and talent providers under a series of contracts that the Client cannot negotiate.
- Parallels to early cloud contracts-most AI Contracts are very **one-sided, shift/allocate all the risks to Client**, including limitations of liability and indemnities.

General Observations - AI Contracts

- AI Contracts mostly silent re critical AI performance considerations
 - **Model Maintenance.** Does the AI Vendor have an obligation to maintain or improve models used to develop or operate the AI Product?
 - Does the AI Vendor make information about model changes available?
 - Does the AI Contract require AI Vendors to continuously monitor or maintain their model?
 - Consider Client risks of AI Vendors using out of date training data.
- Heavy emphasis on the quality of Client prompts/inputs-it's up to the Client.
- Absence of any discussion re training data, AI Service/Product components.
- Audit may be very challenging - difficult or impossible.
- Contracts often silent on critical/well-known AI Vendor risks, i.e., risks to Client confidential information, cyberthreats, no mention of breach notification (maybe buried in a Privacy Policy/Data Processing Addendum, maybe not).
- Considerable disclaimers re reliability, accuracy of outputs.

Some Initial Questions/Transaction Questions

- What kind of AI system are you acquiring?
 - COTS arrangement involving the supply of a trained AI system with no bespoke customization for the Client? (pro-Vendor)
 - A more bespoke arrangement where the Vendor trains and customizes an AI system for a particular customer (pro-Client)
- What Services will the AI system provide?
- Who will train what tool with which data?
- Will the same AI system be used internally or externally?
- Will the AI solution make or affect regulated decisions?
- Which local/global laws apply to the AI Services/Products?
- Will the AI solution process personally identifiable information/personal information?
- What control will Clients or Users have over how the AI system/Product works, if any?

Background homework: Do Your Due Diligence!

➤ **Know your AI Vendor**

- Is the AI Vendor a relatively mature company or a start-up?
- Has it been the subject of any publicly available complaints, such as regulatory investigations (i.e., the FTC, Privacy Regulators) or lawsuits? (OpenAI claims).
- What is the origin of the AI Product/Service? Understand the scope of its source data—was it captured “in-house” or scraped from “publicly available” sources?
- Was the Product/solution created for government agencies?
- Some AI Products/Services may not be appropriate for lawyers - do your homework.

➤ **Know the use case**

- Before diving into the black and white contract terms, you must fully understand (i) the nature of the intended AI application; and (ii) how the AI Product/Service will be used.
- Will the AI Product/Service make or affect decisions that are subject to specific laws?

➤ **Understand the AI Contract framework**

- The “AI Contract” may reference a myriad of hyperlinked, ever-changing documents, including:
 - Order form, Service agreement, separate Terms of Use/Terms of Service, Website Terms, Privacy Policy, Additional Legal Terms, hyperlinked License Agreement—all of these must be reviewed.
 - Many AI Vendors state that they will not provide any notification of changes to these AI Contract terms.

Use Rights/Licensing/Data Ownership

- Review the AI Contract to ensure that Client has the necessary rights to use the AI Service/Product as contemplated.
 - Does the Client have the right to license and create derivative works from, transfer, sell or otherwise use information, products, software or services obtained from the Services?
- Critical to drill down in the prospective AI Contract to determine what the AI Vendor says about (i) the ownership of its own intellectual property (AI models, tools) including any licensed 3rd party content/software; and (ii) who owns the content/output generated by the AI Product/Service, as applicable (i.e., the AI Vendor or the Client?).
 - Review the license grant language carefully: *non-exclusive, non-transferable, non-sublicensable license vs. perpetual, irrevocable, royalty-free, worldwide license...*
 - You may have rights to use certain elements of the Services differently, i.e., third party elements that cannot be used for any promotional, advertorial, endorsement, advertising, or merchandising purposes.
 - There may also be geographic limitations regarding use of the Service.
- Many AI systems are built on data sets that have been scraped from other publicly available third-party content, which opens these vendors up to prospective litigation.
 - Track source, jurisdiction, type, and restrictions in data used in analytics or stored in the data lake.
 - Look for language in the AI Vendor Contract to ensure that: (i) all rights that make up the AI system have been listed and protected and that the AI Vendor has the right to license the AI technology for its intended uses (and any restrictions should be carefully noted); and (ii) ownership of the various component parts (Client materials/inputs, AI System outputs/adapted software, etc.) is clearly defined.

Use Rights/Ownership- Vendor Rights

- Most AI Vendors will want a right to use, copy and otherwise utilize Client Materials as required to develop, train, fine-tune and improve their algorithms and models and to exercise or perform the AI Vendor's rights, remedies and obligations under the Agreement.
- Is the AI Vendor being granted an ongoing license to use, copy and utilize Client materials with other existing and future customers?
 - **Raises serious concerns for lawyers around data protection, ownership and control.**
- Can AI Vendors use Client Materials if they are anonymized, made non-identifiable and reduced to mathematical constructs?
- AI Vendor will also want to use any feedback and suggestions for improvement relating to the AI System, or the Services provided by the Supplier ('Feedback') without charge or limitation.

Privacy/Cybersecurity- Critical for Lawyers

- What does the AI Vendor say about its own privacy/cybersecurity practices? Has the AI Vendor incorporated privacy/security by design in the development of its AI system?
 - Review the AI Vendor's privacy policy, Service terms, terms of use (these may be different).
- Amend the AI Vendor contract to address existing and prospective privacy law requirements. Insist upon mandatory data breach notification language in the AI Contract.
- Review the AI Vendor's terms to see how it will use Client's content, including any personal information and whether/how such PI will be aggregated/deidentified before use.
- Review the AI Vendor's data retention policies and whether they are acceptable.
- Understand the AI Vendor's measures to protect Client inputs (e.g., segregation, anonymization, deletion).
- Ensure that subprocessors/subcontractors will not train any AI models for general use with Client inputs/outputs or Customer Data.

Privacy/Cybersecurity- Reverse Requirements

- Be aware of reverse privacy/security requirements. Neutralize as necessary.
 - *Security. You must implement reasonable and appropriate measures designed to help secure your access to and use of the Services. If you discover any vulnerabilities or breaches related to your use of the Services, you must promptly contact OpenAI and provide details of the vulnerability or breach.*
 - *Processing of Personal Data. If you use the Services to process personal data, you must provide legally adequate privacy notices and obtain necessary consents for the processing of such data, and you represent to us that you are processing such data in accordance with applicable law. If you will be using the OpenAI API for the processing of “personal data” as defined in the GDPR or “Personal Information” as defined in CCPA, please fill out this form to request to execute our Data Processing Addendum.*
 - *Where processing is based on consent and to the extent permitted by law, by agreeing to these Terms, you consent to Microsoft’s collection, use and disclosure of your Content and data as described in the Privacy Statement.*

Representations/Warranties/Disclaimers

- Typically, AI Products/Services are provided on an “**as is, as available, with all faults**” basis (‘as far as the law allows’).
- No representations/warranties/covenants/guarantees, *maybe* direct damages only, very limited liability.
- No liability for errors, mistakes, defects or inaccuracies of the Content, Website or Services.
 - *THE SERVICES ARE PROVIDED “AS IS.” EXCEPT TO THE EXTENT PROHIBITED BY LAW, WE AND OUR AFFILIATES AND LICENSORS **MAKE NO WARRANTIES** (EXPRESS, IMPLIED, STATUTORY OR OTHERWISE) WITH RESPECT TO THE SERVICES, AND DISCLAIM ALL WARRANTIES INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, SATISFACTORY QUALITY, NON-INFRINGEMENT, AND QUIET ENJOYMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING OR TRADE USAGE. WE DO NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED, ACCURATE OR ERROR FREE, OR THAT ANY CONTENT WILL BE SECURE OR NOT LOST OR ALTERED.*

Reverse Representations and Warranties

- **Rights to Materials.** *Our Services may allow you to submit text, documents, or other materials to the Services for processing (“Prompts”). Our Services may generate responses based on your Prompts (“Outputs”). Outputs and Prompts collectively are “Materials.” You represent and warrant that you have all rights, and have provided any notices and obtained any consents, that are necessary for us to process any Prompts you submit to the Services in accordance with our Terms. You also represent and warrant that your submission of Prompts to us will not violate our Terms, our [Acceptable Use Policy](#), or any laws applicable to those Prompts—including intellectual property laws and any privacy or data protection laws governing personal information contained in your Prompts. Except as expressly provided in our Terms, you retain all right, title, and interest—including any intellectual property rights—that you have in and to your Prompts. Subject to this Section 6(a) and without limiting Section 12, we authorize you to use the Outputs for the Permitted Use.*

Representations and Warranties

- Seek to add legal representations/warranties regarding the following:
 - Ownership/has all necessary rights, power and authority to grant/maintain the licenses and make the AI Service/Product available & perform its obligations under the Agreement;
 - Fit for purpose, is of satisfactory quality, free from [material defects], developed by the AI Vendor with reasonable care and skill;
 - Will conform to the specifications/performance criteria;
 - No past or present IP infringement, including no infringement when the AI Service/Product is used by Client as intended;
 - Compliance with laws, including applicable privacy/data protection laws (specify as required);
 - No contravention of Open Source software licensing terms and conditions;
 - Has obtained and will continue to obtain all necessary consents, licenses and permissions for use of the AI Vendor's training data for all purposes described under the Agreement;
 - No viruses, malware, spyware, worms, etc. that would damage Client's systems or cause loss or damages to Client's data, records, hardware, etc.; and
 - No pending third-party claims.

Representations and Warranties

- If applicable, Vendor has trained and tested the AI system in accordance with the requirements set out the applicable Schedule and good industry practice.
- Don't forget to seek representations/warranties regarding any Documentation/User Manuals
 - Must allow Client to provide useful information about the logic involved in the AI Product/Service to satisfy legal transparency requirements.
 - Must comply with the requirements set out in the agreed-upon Schedule, provide Client with adequate instructions to enable effective installation, use and maintenance of the AI system.
- The AI system is transparent and interpretable such that its output can be traced back to input data and can satisfy applicable transparency provisions under applicable legislation.
- **Bias:** AI Vendor has taken reasonable steps to mitigate the risk of causing [material discrimination] against a class of individuals on the basis of protected grounds/or the AI System will not provide any output or Services which cause unlawful discrimination or otherwise violate applicable laws...

Disclaimers/Limitation of Liability

➤ Extensive and very low liabilities.

- *Limitations of Liability. NEITHER WE NOR ANY OF OUR AFFILIATES OR LICENSORS WILL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES, INCLUDING DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, OR DATA OR OTHER LOSSES, EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. OUR AGGREGATE LIABILITY UNDER THESE TERMS SHALL NOT EXCEED THE GREATER OF THE AMOUNT YOU PAID FOR THE SERVICE THAT GAVE RISE TO THE CLAIM DURING THE 12 MONTHS BEFORE THE LIABILITY AROSE OR ONE HUNDRED DOLLARS (\$100). THE LIMITATIONS IN THIS SECTION APPLY ONLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW.*
- *TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW, THE ANTHROPIC PARTIES' TOTAL AGGREGATE LIABILITY TO YOU FOR ALL DAMAGES, LOSSES AND CAUSES OF ACTION ARISING OUT OF OR IN ANY WAY RELATED TO THE SERVICES, THE MATERIALS, OR THESE TERMS, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, WILL NOT EXCEED THE GREATER OF THE AMOUNT YOU PAID TO US FOR ACCESS TO OR USE OF THE SERVICES (IF ANY) IN THE SIX MONTHS PRECEDING THE DATE SUCH DAMAGES, LOSSES, AND CAUSES OF ACTION FIRST AROSE, AND \$100. THE FOREGOING LIMITATIONS ARE ESSENTIAL TO THESE TERMS, AND WE WOULD NOT OFFER THE SERVICES TO YOU UNDER THESE TERMS WITHOUT THESE LIMITATIONS.*

Limitation of Liability

- Individual liability caps may be product-specific. Check the Agreement (and Schedules, as applicable) carefully.
- Negotiate reasonable liability caps, including 'super-caps' if possible.
- Negotiate carve-outs/super-caps for indemnities, confidentiality breaches, compliance with applicable laws, data losses, fraud, gross misconduct/negligence, wilful misconduct.
- May want to have a separate super-cap for costs associated with breaches of applicable privacy/data protection laws, security breaches, notification and reporting requirements, etc. as well as IP infringement.
 - **Greater of \$X or a multiplier** [3x fees paid, etc.]
 - Very fact specific depending on the nature of the AI Product/Service.

Indemnification

- AI Vendors typically do not give indemnities and in fact generally seek **reverse indemnities from the Client.**
 - *You will defend, indemnify, and hold harmless us, our affiliates, and our personnel, from and against any claims, losses, and expenses (including attorneys' fees) arising from or relating to your use of the Services, including your Content, Products or Services you develop or offer in connection with the Services, and your breach of these Terms or violation of applicable law.*
 - *YOU AGREE TO INDEMNIFY AND HOLD HARMLESS THE ABC PARTIES FROM AND AGAINST ANY AND ALL LIABILITIES, CLAIMS, DAMAGES, EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES AND COSTS), AND OTHER LOSSES ARISING OUT OF OR RELATED TO YOUR BREACH OR ALLEGED BREACH OF THESE TERMS; YOUR ACCESS TO, USE OF, OR ALLEGED USE OF THE SERVICES OR THE MATERIALS; YOUR FEEDBACK; ANY PRODUCTS OR SERVICES THAT YOU DEVELOP, OFFER, OR OTHERWISE MAKE AVAILABLE USING OR OTHERWISE IN CONNECTION WITH THE SERVICES; YOUR VIOLATION OF APPLICABLE LAW OR ANY THIRD-PARTY RIGHT; AND ANY ACTUAL OR ALLEGED FRAUD, INTENTIONAL MISCONDUCT, GROSS NEGLIGENCE, OR CRIMINAL ACTS COMMITTED BY YOU OR YOUR EMPLOYEES OR AGENTS. WE RESERVE THE RIGHT TO ENGAGE SEPARATE COUNSEL AND PARTICIPATE IN OR ASSUME THE EXCLUSIVE DEFENSE AND CONTROL OF ANY MATTER OTHERWISE SUBJECT TO INDEMNIFICATION BY YOU HEREUNDER, IN WHICH CASE YOU AGREE TO COOPERATE WITH US AND SUCH SEPARATE COUNSEL AS WE REASONABLY REQUEST.*
- Clients are required to indemnify the AI Vendor for any infringement or misusing any persons rights, including intellectual property rights (global) in relation to the Services/Website or Content, from any deliberate or unlawful act that they commit or a failure to act.

Indemnification

- Look at what the AI Vendor is offering and focus on obtaining critical indemnities.
 - Limited to just **representations and warranties? Anything else?**
- Key indemnities from the AI Vendor can include (see also list of representations/warranties above):
 - Breaches of laws, fraud, negligence/gross negligence, wilful misconduct;
 - IP infringement – especially patent and copyright;
 - Confidentiality/data breaches/cyber breaches; and
 - Personal injury/death (depending on the Product/Service).
- Microsoft IP commitment for paid versions of Microsoft commercial Copilot services (including Windows Copilot when signed in with a work ID) and Bing Chat Enterprise.
- Google – embedded Duet AI across its products- *“If you are challenged on copyright grounds, we will assume responsibility for the potential legal risks involved”.*
- Beginning of an industry thaw?
- Consider seeking super-caps.
 - Greater of \$X or a multiplier [3x fees paid, etc.].
- The scope of the indemnity should include affiliates, contractors, third party licensors as applicable.
- Mitigate **cross-indemnities.** Look for language that limits the AI Vendor’s obligation to indemnify, i.e., *“Provided that you have not breached the terms and conditions of this Agreement, ABC agrees to defend, indemnify and hold You harmless up to the Liability Cap under the respective licenses as purchased by You...”*

Termination Considerations

- What happens following AI Contract termination?
 - Client must **immediately stop using the Services/Website and must promptly return or destroy AI Vendor's Confidential Information**
 - Does this include outputs? What is captured?
 - Does the Client have ongoing usage rights regarding outputs (Content)?
 - Consider Client needs to migrate data out of the AI system or move to an alternative supplier.
 - Consider post-termination support/maintenance services.
 - Will the **AI Vendor have a continued right to use any ingested Client Content, PII?**
 - If yes, consider necessary protections/restrictions against ongoing use of sensitive stakeholder data.
 - AI Contract may explicitly state that it retains Client feedback (provided through the Services or otherwise).

AI Contract Risk Mitigation Strategies/Conclusion

- While there are many benefits to the use of AI, lawyers must assess the risks and potential downsides and deploy appropriate mitigation strategies including negotiating strong contracts.
- Recognize the risks and don't be afraid to seek changes to standard AI Contracts - every AI Contract is different, and some AI Vendors are better than others.
- Seek and require contractual transparency (i.e., plain language nontechnical documentation).
- Vendors are beginning to offer IP indemnities (Microsoft, Google, Adobe – with limitations).
- COTs Agreements may not be appropriate for some lawyers.
- It's early days for AI Contracts and they will evolve in the face of market pressure.

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