OLIVIA WHITCROFT

"If terms are far removed from reality, then this defeats the purpose of having a written agreement at all"

As new technology inspires creative services, customers and suppliers also need to be creative with the terms of the contracts between them

Picture the scene: it's 1993 and the forward-thinking telecommunications manager at Big Industry Ltd has decided that this new-fangled email communication will be good for business. He clears it with the operations director and before long they've decided upon a provider.

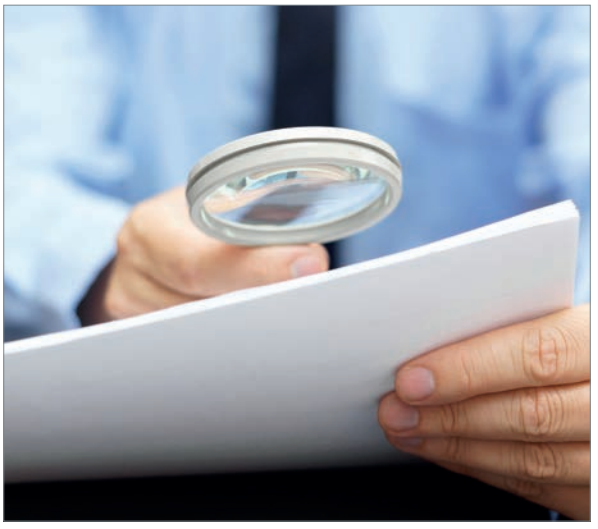
Initially, email will be set up on one PC for one user, but if all goes well, the intention is to roll it out across other company computers. Practicalities such as phone lines and modems are discussed, fees and setup dates agreed, and then the small matter of a contract is raised. The company requires all providers to sign up to its standard terms, and it's explained to the provider that a few additional provisions are required for these types of services, including responsibilities for the BT line and so on. The contract is drawn up and sent (by post) to the provider for review.

Casting his eye over the document, the provider soon realises that he's been presented with a contract for fax-machine maintenance, complete with response times for fixing hardware faults, paper and ink-cartridge replacement. He raises these concerns with Big Industry and is told that it will accept a few tweaks, but there's no time for lengthy negotiations or for a new contract to be drawn up. The provider signs the contract and the parties move forth into the unknown territory of providing email within a framework of fixing fax machines.

This isn't a true story, but it represents the frequent disconnect between the terms of technology contracts and the services that are being provided. This is emphasised by the rapid development of technology, presenting new environments for delivering services and new opportunities for business collaborations. Insufficient time and resources are allocated to producing a bespoke contract, so providers are presented with "standard" terms. These are generally used for more established methods of service delivery, but are felt most appropriate to match the context. They range from something slightly inappropriate to complete nonsense: as in my example above, it really can be the difference between provision of email services and fax-machine maintenance.

Olivia Whitcroft is principal of the law firm OBEP, which specialises in technology contracts, IP and data protection
@ObepOlivia

More up-to-date examples include contracts for face-to-face or web delivery of services, where in reality they're being provided over a mobile app; or end-user agreements for technology services, where in practice the services are being resold. Software development agreements often don't reflect intended use of source code or copyright. Contracts involving use of customer data are frequently unsuitable: terms requiring a party only to process data upon instruction, when it's clearly taking action under its own steam; promises to keep data on a fixed server in the UK, when it's actually being entrusted to a subcontracted cloud provider.



BELOW Check those Ts&Cs carefully before you sign a cloud contract, because who knows where your data will be stored?

If terms are far removed from reality, then this defeats the purpose of having a written agreement at all. The point is to document how the relationship is intended to work, which may act as a guide to the parties' actions (such as delivery of services and payment), protect certain assets (such as copyright and know-how) and give a clear basis for legal recourse in the event that something goes wrong. Inappropriate terms may fail to achieve any of these. The most they may do is meet internal administrative requirements.

So what?

Of course, the parties may carry on their relationship in harmony regardless of the written terms. So, all may be well. However, sooner or later, one party may want something to be done or may dislike something that the other party has done, and will refer to the agreement. At this point they'll discover that the terms say something different, haven't covered the issue, or don't really make sense.

Both parties could then agree to amend the contract to fix the problem, or find a practical way forward, and this may resolve matters. However, if they remain in disagreement, they'll want to rely on the existing terms to protect or defend their position. Unfortunately, the legal position with those terms may be extremely hazy!

Taking one extreme, the agreement may be enforceable as it stands; in other words, the parties will need to comply with the terms as written, even though they both had something else in mind. This may happen where the contract is disadvantageous for a party, but isn't too far from the core intention. At the other extreme, the agreement may be ineffective due to a mistake or lack of certainty. This is generally unhelpful for both parties, but may result in one side being put at a greater disadvantage.

Where possible, a court will try to construe the wording of a contract in a way the parties intended, or may infer terms to give effect to that intention. Or, if a party can show there's been a mistake, a court could order the contract to be rectified. This could help, for example, if the word "fax" was used instead of "email" and it's clear the parties meant "email". However, giving new meaning to the terms is unlikely if the terms can reasonably be given their ordinary meaning, or if they're far removed from reality; a party is unlikely to provide evidence of completely different terms having been agreed.

Unsuitable terms can also cause compliance problems or have knock-on effects on other relationships. For example, it can be a breach of data protection law not to impose security obligations on a service provider, and ineffective assignments of copyright may mean intended onward licences to others are ineffective.

As can be seen, resolving the consequences of inappropriate terms can be time-consuming and costly, and even then may not achieve the desired result for either party. It's much better to get the terms right from the start.

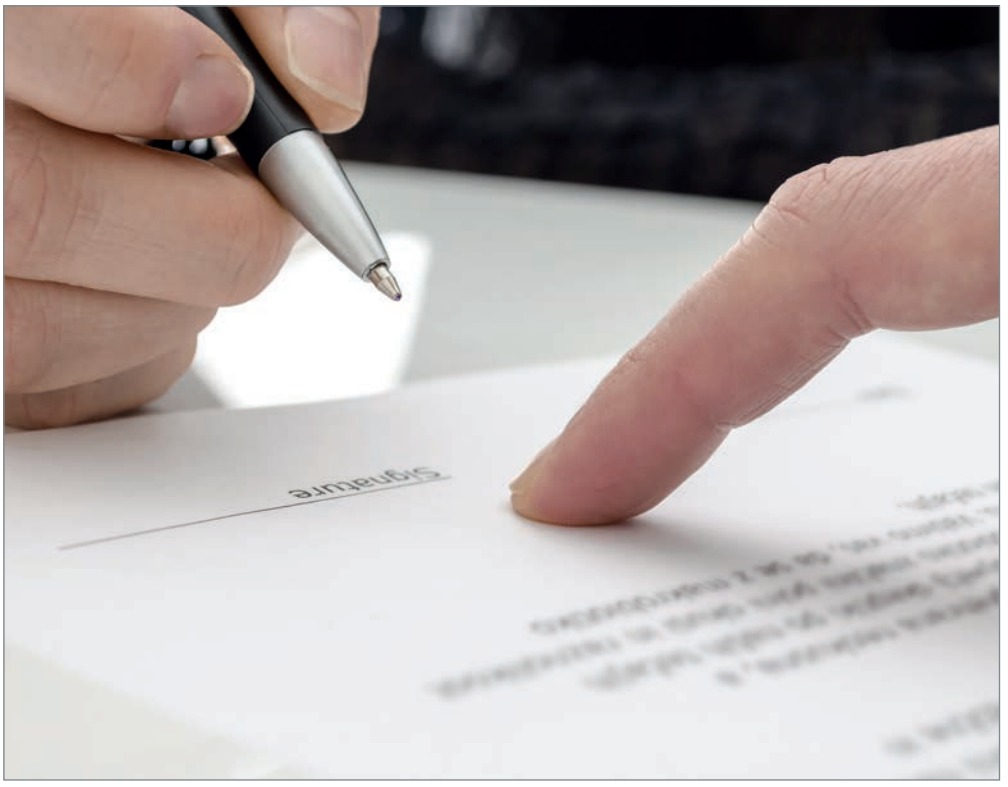
What can be done about it?

The overall message isn't new: a contract needs to be tailored to the context of the intended relationship. As new technology inspires creative services and methods of service delivery, customers and suppliers also need to be creative with the terms governing their relationships. Standard terms can be useful for the basics, but bashing out terms to apply unamended to all technological scenarios is unlikely to be achievable.

The argument against this approach also isn't new. Getting external lawyers involved can be costly; getting in-house lawyers involved for each project can be time-consuming. Standard terms and procedures help to keep control of legal risks within the available resources and budget. Each new relationship may not justify the time and costs involved in producing a "perfect" contract.

However, this doesn't mean that a middle ground can't be reached, showing some flexibility in approach. If time and resources are limited, a shorter agreement may be an option, with a clear description of the intended relationship, but without addressing every scenario. This is likely to be better than a mesh of terms that sound good legally but are potentially useless in practice. A more all-encompassing agreement could then be produced at a later date if things go well.

If terms are added to address a new technological issue, remember also to adapt the terms that are already in there. The repeated addition of new layers of terms often results in overly complex contracts. For example, new terms may be added relating to online delivery of digital content without removing terms about physical delivery. The intentions may be good but, before long, the simplest route forward may be to rip up the contract and find a blank piece of paper to start again.



Effective communication can also reduce the time involved in getting the terms right. This includes input from those who understand the technology, and appropriate lawyer-to-lawyer discussions. It may sound crazy, but contracts aren't just for the lawyers – the terms should ideally be read and understood by commercial and technical teams as well.

What happened next

Let's pick up our story from where we left it in the early 1990s, with Big Industry starting to use email. There soon followed business networks and websites, and into the late 1990s e-commerce became the big thing. Search engines became sophisticated, websites started to interact with customers, and digital content became an alternative to physical equivalents. Employees were becoming more mobile; laptops replaced desktops, mobile phones were standard issue, and they could dial up to the work network from home. Psions and PalmPilots went into pockets or handbags. The "tele" was slashed from the telecommunications manager's job title.

In the noughties, dial-up was soon replaced by broadband, and PDAs by BlackBerrys to access email on the move. Pretty soon competitors had arrived on the scene offering smartphones and tablets. Moving into the current decade: VoIP, webinars and social media became established business tools; apps started to challenge websites and other traditional methods of service delivery.

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Alongside all this, IT services and licensing models were changing. Software downloads were superseding floppy disks and CD-ROMs, and open source was added to the mix in development projects. Alternatives to traditional IT outsourcing were evolving, moving through application service providers and reaching cloud computing in the 2010s. Infrastructure-, platform- and software-as-a-service started being provided using intricate partnership and subcontracting models.

Just over 20 years down the line from introducing email, Big Industry is now looking into BYOD, Big Data, the Internet of Things, 3D printing and augmented reality. Big Industry's relationships with its providers and partners continue to evolve to capture these new opportunities. All it has to do is ensure that its contracts with these parties continue to evolve as well.

If all you have is standard terms, everything looks like a fax machine.

olivia.whitcroft@obep.co.uk