

## **Guest Column: Negotiating Tech Deals With American Companies**

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The information technology (“IT”) industry has some rather firmly established deal norms that apply worldwide. It’s important to know those so you don’t push where pushing is not likely to garner meaningful concessions. Knowing the norms allows you to effectively focus on the areas where you can have impact while choreographing your concessions around areas where you’re not likely to win the battle anyway. You simply cannot negotiate these deals effectively unless you understand the norms. This article is a primer on understanding what are workable and fair agreements when contracting with American companies.

### **What are the Goals?**

It is especially important that you define the goals for the negotiation of your deal when dealing with an American company in order to avoid problems relating to social and business differences between cultures. Fortunately the English language is a valuable tool in accurately putting the deal down on paper.

Your tech contracts with American companies don’t need to define every complex tech concept in such a way that a hypothetical Indian or American employee could interpret it. Rather, the assumption is that interpretation would be by a team capable of understanding a technical contract.

For example, let’s imagine that everyone sitting at the negotiating table (or the conference call) is not available to interpret the agreement when a question arises years later. The written document has to be good enough to stand on its own. It must explain the deal sufficiently such that a substitute team with the same training as the original negotiating team can understand the intention of the parties.

Another goal is simply to use the contracting process to ensure communication between the parties. This is even more important when negotiating international agreements. Parties often have few overlapping ideas on what the contract is about. Then, when they do agree, the contract does not state the deal in plain English. Use the contracting process to make sure the business leads in both countries understand the deal and the contract accurately states the deal.

Lastly, another goal should be to pull those one sided vendor terms back to the middle. I would comment that most first drafts from tech vendors (including brand-name vendors) are atrociously written. They arrive on thoughtlessly used templates modified by the incompetent. They are not so much one-sided in favor of the vendor as simply not an expression of the deal.

### **Who Takes the Loss?**

When things go wrong in the world of IT, they can have far-reaching consequences. So your contract needs to clearly state who pays for these losses.

In IT, the norm is that the customer usually bears these risks. We can argue about how fair it is. But as the customer, you must build mission critical systems with enough redundancy and over capacity to prevent catastrophic mishaps. It's up to the purchaser of IT services to create enough redundancy to protect against unacceptable losses.

The vendor's answer to legitimately broken or poorly performing IT products is we'll improve our "response time" in dealing with the issue, but we will never, ever, **ever**, write you a check for your losses. You must largely accept this fundamental norm. Yes, there are exceptions. I have seen and negotiated contracts with real teeth against vendors, but they are the exceptions.

So, as a buyer of IT goods and services, focus on what you can get. You should always negotiate for better response time guarantees than are first being offered. Follow this up by requesting specific escalation provisions, which helps to insure that if level one support can't get the job done in a reasonable amount of time, it will move up through the vendor's chain of command quickly. Good response time and escalation provisions can be worth their weight in gold when you're in crisis.

### **Limitations of Liability**

One of the things you should always focus on is damage limitations. Be leery of clauses like, "Vendor's liability for any loss, damage or expense of any kind, resulting from the products or services, negligence, or any other cause whatsoever, regardless of the form of action, whether in tort or in contract, shall be limited to the selling price of the products or services." Variations on this type of clause may limit you to six months of service charges or some predetermined, and usually low, dollar figure.

Limitations of liability are negotiable and since a one sided damage limitation could emasculate much of what you gained in other aspects of your negotiation, I would suggest that you must focus on damage limits.

### **Final Tips from the Trenches**

In negotiating your agreements with American companies, you must avoid that natural tendency to see the deal's starting point as being the vendor's form. You should first see the deal from your one-sided perspective. What do you want and need?

In a negotiation, you're not likely to get everything you want either, but you must work to pull contracts back to the middle, i.e., back to what's fair. You shouldn't ask for changes in a vendor's form only after asking yourself whether the change is significant. If it's one sided in favor of the vendor, ask that the provision be made neutral.

Just remember, what's good for them is good for you. That's fairness. Don't walk into a deal thinking about the size of an American company. They want your business or they wouldn't be talking to you. Sure, the Microsofts of the world budge less than the local vendor down the road, but they all bend. The only way to find out how far is to push back.



### **About The Grossman Law Group**

The Grossman Law Group is a law firm that focuses on complex information technology, licensing, outsourcing, and telecommunications transactions. The Firm's attorneys have over thirty years of experience, expertise, and IT industry knowledge in handling these types of deals. Clients include Fortune 500, middle market, and emerging companies. The Firm has offices in New York City and South Florida.