



# CONTRACT NEGOTIATION STRATEGY & RECENT TRENDS

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## Roadmap

- Negotiation Tactics, Pitfalls & Leverage
- Recent FinTech Trends
- Recent Dispute Trends
- Top Legalese for Negotiating Disputes



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## NEGOTIATION TACTICS, PITFALLS & LEVERAGE



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## Negotiation Pitfalls & Sales Tactics

- Timing Constraints
  - Artificial Discount Deadlines
  - Locking in Implementation Date
  - Internal Timing Constraints
    - Due Diligence Timing vs. Negotiation Timing
- Vendor Hardball
  - “We do not entertain changes”
  - “### of credit unions have signed this exact version”
  - Third party has “blessed” this as a customer favorable contract
- International Companies
  - Counsel can be very different!



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## Your Leverage

- Find your leverage!
  - Large institution
  - Large merely as compared to other customers of the vendor
  - Early Adopter
  - Use their timing constraints against them (quarter end sales quotas)
  - Don't put the decision-makers on the phone
- Just say no!
  - They want/need to sell to you!
- Industry Experience
  - Consultants
  - Outside Counsel



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## Consultants

- When to use them?
  - Pricing
  - Operational – Boots on the Ground
- Value
- Who?
  - Specialization
  - Consolidation
    - NextStep/Cornerstone – Sievewright/SRM
  - Experts / Insider Info
    - Top Vendor Executives switching teams!



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## RECENT FINTECH TRENDS



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## Recent FinTech Trends... The Big Ones!



- Cores
  - Migration to Hosted
  - Is novel better than tried and true?
- OLB/MB
  - Alkami
  - Q2
  - Lumin
  - Fiserv (Architect)
- Cards
  - PSCU
  - Co-op

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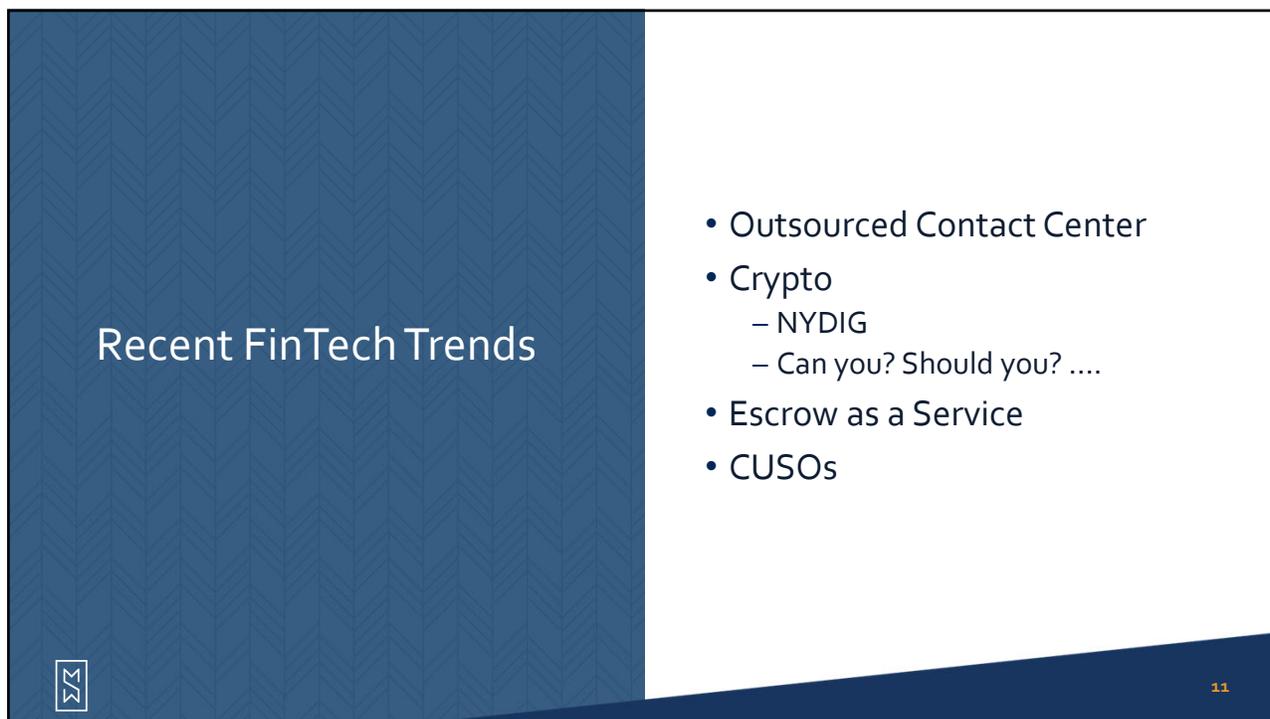
## Recent FinTech Trends



- Marketplace Lending
  - Upstart
  - Upgrade
- ChatBots / Virtual Assistants
- Zelle
  - Network Rules!

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Recent FinTech Trends

- Outsourced Contact Center
- Crypto
  - NYDIG
  - Can you? Should you? ....
- Escrow as a Service
- CUSOs

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RECENT DISPUTE TRENDS

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## Recent Dispute Trends

- RESOURCE SCARCITY!!
  - Remote Workers / Offshore Resources
  - Implementation Team
- Delayed Implementation
  - But fees already due!!
  - Third party implementation
- Holding Data Hostage
  - Negotiate deconversion
  - In-House software still problematic
  - Imaging Software
- SLAs



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## Does your vendor have a parent company with multiple subsidiaries?

- Liability
- Sharing of Data
- Are they treated as a subcontractor?
- Responsibility for implementation



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# TOP LEGALESE FOR NEGOTIATING DISPUTES



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## Top Legalese for Negotiating Disputes

- The legalese can drive business decisions & strategy
- Provisions work together (not in isolation)!
- Provisions
  - Billing Terms
  - Limitation of Liability
  - Indemnification
  - Venue
  - Governing Law
  - Attorneys' Fees
  - Early Termination Fees/Liquidated Damages
  - Performance Requirements



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## Top Legalese – Billing Terms

- Payment Schedule
  - Payment tied to performance (not specific date)
- Good Faith Dispute
  - Penalties only for undisputed amounts
- Side Note: Fee Increases
  - When?
  - How much? Absolute cap?



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## Top Legalese – Billing Terms

"Invoices are due and payable **upon the invoice date**. All amounts shall be paid **by ACH**. If any **[undisputed]** invoiced amounts remain unpaid 30 days after the date of invoice, Client shall pay a monthly late charge based on the unpaid amounts equal to the lesser of 1.5% or the highest amount allowed by law until such invoice amount is paid in full. **Client shall neither make nor assert any right of deduction or set-off from amounts invoiced.**"



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## Top Legalese – Limitation of Liability

- Indirect Damages
- Direct Damages
- Carve-Outs
  - Gross Negligence & Willful Misconduct
  - Indemnification
  - Security Breaches
- Types of Carve-Outs
  - Unlimited Caps
  - Higher Caps



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## Top Legalese – Limitation of Liability

"IN NO EVENT SHALL **VENDOR** BE LIABLE FOR LOSS OF GOODWILL, PROFIT, REPUTATION, OR BUSINESS, OR FOR SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, EXEMPLARY, OR TORT DAMAGES (COLLECTIVELY, "INDIRECT DAMAGES"), ARISING OUT OF OR RELATING TO THIS AGREEMENT, REGARDLESS OF WHETHER SUCH CLAIM ARISES IN TORT, CONTRACT, OR OTHERWISE. VENDOR'S AGGREGATE LIABILITY TO CLIENT AND ANY THIRD PARTY FOR ANY AND ALL CLAIMS AND OBLIGATIONS RELATING TO THIS AGREEMENT SHALL BE LIMITED TO THE TOTAL FEES **PAID BY** CLIENT TO VENDOR UNDER THE SCHEDULE RESULTING IN SUCH LIABILITY IN THE **2 MONTH PERIOD PRECEDING THE DATE THE LAST CLAIM ACCRUED.**"



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## Top Legalese – Indemnification

- What is it?
  - A promise to defend and protect the other party from claims and reimburse for any judgments and/or settlements.
- Third Party v. First Party
- General Indemnification
  - Material Breach
  - Breaches of Confidentiality
- IP Infringement



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## Top Legalese – Venue, Governing Law & Attorneys' Fees

- Defined:
  - Governing Law: The law that will govern the interpretation of the contract
  - Venue: The court (location) where a dispute will be heard
- Options
  - Your state
  - New York
  - Delaware (but...)
- Venue
  - Travel Clause?
- Attorneys' Fees
  - Fees awarded to prevailing party
  - Cuts both ways
- Dispute Resolution Requirements



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## Top Legalese – Early Termination Fees/Liquidated Damages

- State Laws Limit Liquidated Damages
  - Reasonableness at time of breach
  - Reasonableness at time of contract execution
- Shouldn't be 100%
  - Lost Profits vs. Lost Revenue
  - If not 100%, then what?
  - Stepped amounts to account for vendor up-front costs?



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## Top Legalese – Early Termination Fees/Liquidated Damages

“Upon termination of the Agreement, **all remaining Fees** through the end of the then current term shall be accelerated, and Client **shall pay all such accelerated fees** to Vendor **prior to the return of information**. The parties agree that Vendor losses incurred as a result of early termination would be difficult or impossible to calculate as of the effective date. Accordingly, the amounts set forth in this Section represent a **reasonable pre-estimate of losses** and are not a penalty.”



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## Top Legalese – Performance Requirements

- SLAs
  - Commercially reasonable efforts
  - Penalties
- Milestones
  - Live Date
  - Penalty/Termination Right for Missed Live Date
  - Mutual?
  - Meaningful?
- Specific Key Functionality
  - What was promised during sales/RFP?



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## Top Legalese – Data Security & Privacy

- The obvious – make sure it is addressed!
  - How specific are the security provisions?
  - Data breach notification? Timeframe?
  - Assistance with remediation? Reimbursement?
- How is a security breach affected by limitation of liability?
- How does limitation of liability relate to the actual cost of a breach (as opposed to the value of the contract)?
- CCPA / CPRA



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## Another Trend – Sponsorship Agreements



- Types
  - Professional Teams (Major League, Minor League)
  - Schools
  - Stadium Naming Rights
- Are you getting full value compared to other companies?
  - IPG 360
- NIL Agreements
  - Student Athlete Deals – Now More Common
  - Be careful...very specific legal requirements!

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## Contracts in Mergers



- Due Diligence!
  - Legal analysis
  - Review actual contract (don't rely on summaries)
- Which contract is going to survive?
- Cost to Exit/Early Termination Fee

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# QUESTIONS?

**IN-PERSON ATTENDEES:**  
Please raise your hand if you have a question;  
We will pass a microphone to you.

**VIRTUAL ATTENDEES:**  
Please click the Q&A button on the bottom of your Zoom window to open the Q&A window;  
Enter your question into the Q&A box, then click Send.



The screenshot shows the Zoom meeting control bar. From left to right, it includes: 'Audio Settings' with an upward arrow, 'Chat' with a speech bubble icon, 'Raise Hand' with a hand icon, 'Q&A' with a speech bubble icon and a red dot, and 'Leave Meeting' in red text. The 'Q&A' button is circled in orange.



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# THANK YOU!

-  550 N. Brand Blvd., Ste. #550  
Glendale, CA 91203
-  Steve.Balian@swmlp.com  
Haley.Rebel@swmlp.com
-  (818) 241-0103
-  <https://swmlp.com>



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