Termination and Step In Rights

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Overview

- What is meant by termination and step in rights?
- When the rights can be used?
- The process for exercising the rights
- Tips and tricks
Rights to terminate:

- Contract
  - default
  - "neutral" causes
  - convenience
- By agreement
- Common law
- Whole or part
Termination - Fault

- Immediate exercise
  - failure to provide any services
  - loss of licence or authorisation
  - repeated breach of a single critical obligation
  - exhausted the financial security or liability cap

- Notice and opportunity to remedy the default
  - failure to provide a particular service
  - failure to comply with a law or policy
  - failure to meet a particular service level

- Make it relevant
Tips and tricks

- Process is important
  - repudiation
  - loss of right to terminate

- Requirements on termination
  - reservation of rights accrued prior
  - deliver up confidential documents
  - transition out plans
Step in rights enable customer (or its nominee) to take over the provision of the services in specified circumstances

**Key Features**

- Trigger Events – customer's reasonable determination
- Use of service provider's personnel, equipment, facilities and IP
- Cooperation and assistance
- Payment by service provider of customer's additional costs
- Suspension of service provider's obligations to provide services
- Reservation of other rights which arise
- Exit
**Trigger Events - Example**

*If, in the reasonable opinion of the Customer:*

- **there has been a substantial breach or non-performance of the Contract by the Service Provider which substantially prevents, hinders, degrades or delays the performance of any:**
  - critical aspect of the Services; or
  - critical function of the Customer,
  for more than 48 consecutive hours;

- **the Service Provider purports to terminate the Contract other than in accordance with its legal rights, or otherwise repudiates or abandons the Contract; or**

- **an Insolvency Event occurs in respect of the Service Provider…**
Circumstances of exercise
- Material breach of contract
- Termination not appropriate
- Business critical services
- Confident the service provider will be able to resume

Process is important
- Contract sets out process to be followed
- Consultation
Advantages and Disadvantages

Advantages
- Self-help
- Avoids termination
- May remedy the defective performance

Disadvantages
- Risk to Customer
- Blame sharing
- Areas of responsibility
- May not remedy defective performance
Step in rights – tips and tricks

Consider including in contracts when:

- Major outsourcing and business critical
- Not off-the-shelf solutions
- It will provide an incentive to the provider

Prior to exercising – conduct a risk assessment

- After trigger event resolved, service provider will perform
- Customer or substitute able to perform
- IP rights and other rights are in place
- Budget for required management effort
Questions?