



Termination of technology contracts

At a glance:



Consider whether termination is the best option: Termination can be high risk. There may be other commercial and legal options available to you to realise your aims. For instance, negotiation and variation of existing terms, service credits, step-in rights or contractual escalations.



Carefully consider the contract: Consider whether termination rights exist, or whether a common law termination right has been excluded. Consider whether anything must take place before termination (such as ADR), whether there are any termination notice requirements, and whether there is a governing law or jurisdiction provision.



Investigate the facts: A contractual termination right will need to be supported by a factual pattern. This will include consideration of whether there has merely been a material breach of contract, or a breach so serious that there has been a repudiatory breach. If the latter, this may provide a common law right of termination.



Consequences of termination: Consider whether any payments are due on termination, whether limitations of liability still apply, whether TUPE rights are applicable and, whether exit assistance is required. Bear in mind that different types of damages may be recoverable depending on the method of termination.



If you have decided to terminate, consider our top tips: It is vital when serving a notice of termination that you get this right. Keep our “top tips” below in mind.

In uncertain and turbulent times both technology suppliers and their customers are considering whether their existing contracts continue to be commercially beneficial. In particular, they may be giving thought as to (i) whether they still require the services; (ii) whether they can still fulfil the contract; or (iii) what their options are in the face of counterparties who are having financial difficulties.

These considerations may lead to a decision to terminate existing contracts, but this decision should not be taken lightly. Get it wrong and you may inadvertently provide the other party with an opportunity to terminate for a repudiatory breach of contract and claim damages for their loss of bargain.

Below, we set out key points to consider when deciding whether or not to terminate, along with methods to reduce the risk of adverse consequences if you do terminate.

Step 1: Is termination the best option?

When things are going wrong on a technology project it can be tempting to try and exit the agreement by whatever means necessary.

Proceeding directly to termination carries significant commercial, legal and technical risks. Even before looking at the contract for any termination provisions, alternative options should be carefully considered to enable continuity of the project and to safeguard your investment.

Alternative solutions may include:

- Informal or formal negotiations (i.e. mediation);
- Agreement to vary the contract terms;
- Engaging the assistance of technical personnel to determine whether all technical solutions have been exhausted; and
- Consideration of commercial leverage – is there scope for a creative resolution? (i.e. exclusive rights to collaboration in future, swapping of personnel, etc.)

Step 2: Carefully consider the contract

If it is not possible to resolve the issue via non-contractual means, the terms of the contract should be carefully considered to determine:

- Whether the contract contains a termination right;
- Whether any common law termination rights (i.e. for repudiatory breach of contract) are excluded;
- Whether there is a requirement to engage in a dispute resolution procedure prior to termination;
- Whether there are any specific termination notice requirements that must be adhered to; and
- Whether there is a governing law and jurisdiction provision.

Caution should be exercised in respect of any actions taken once aware of the right to terminate. This is because continuing to perform under the contract, or delaying its termination, may affirm the contract and thereby nullify the right to terminate for a common law repudiatory breach of contract. It may therefore be prudent to expressly reserve the right to terminate to prevent this from happening.

Termination cannot be undone once a party has given notice.

Step 3: Consider the factual pattern

The common law right to terminate only arises when there has been a repudiatory breach, being a breach so serious that it deprives a party of substantially all the benefit of a contract.

This differs from a material breach, which is usually not as serious as a repudiatory breach and therefore does not give rise to a common law right to terminate. If a contract provides for termination in the instance of a material breach, it will be important to note whether and how 'material' is defined in the contract.

Whether a breach is material or repudiatory is very fact dependant and context driven. It is important to consider where the breach sits within all obligations in the contract. Is the breach so severe that a substantial contractual obligation cannot be met? Is substantially all of the benefit deprived? Consider the impact on your business and the losses suffered.

It is also important to consider whether the breaching party has made any effort to rectify their breach, and whether the contract requires that they be given time to do so before termination can occur.

Step 4: The consequences of termination

Terminating the contract will have varying consequences depending on the nature of the contract and contractual termination provisions.

Consider whether:

- Any employees are affected and the applicability of TUPE rights. Line up legal assistance to help navigate these rights;
- There are any ongoing caps on liability surviving post-termination;
- Any payments are due on termination;
- Any other obligations will survive post termination (such as confidentiality or non-compete obligations); and
- New suppliers need to be arranged.

Termination may give a right to damages for losses suffered, including loss of profit or reputation, costs of investigating any issues and subsequent correction. Ensure that all documents evidencing the breach and loss are preserved by relevant employees for any potential claims that may arise. Note however that termination via a contractual method may limit damages to those incurred up to the date of termination, whereas "loss of bargain" damages may be recoverable in the event of a repudiatory breach.

Termination top tips:

- Check the notice provisions in the contract.
- State whether you are terminating under the contract, and if so the provision on which you rely, or (for those jurisdictions where this could be relevant) state that the breach is repudiatory, entitling you to terminate, or (if applicable) both.
- State when termination is effective from. This can be immediate, or state the notice period required in the contract.
- Set out comprehensive details of the alleged breach by the defaulting party. Be as specific as possible, including dates of key incidents and correspondence. In undertaking work to locate and identify the comprehensive details, take steps to maintain privilege to limit the potential for any unhelpful documents being disclosable at a later date.
- Be as specific as you can be in relation to details of the monies claimed or loss suffered.
- Include provision for claiming interest and costs.
- If the defaulting party has indicated that it will not comply with future obligations, your notice should also:
 - include references to this indication, and
 - state that you wish to terminate the agreement as a result of this confirmation (in some jurisdictions, this could amount to an anticipatory repudiatory breach).

Specific requirements may apply depending on the applicable law and each agreement should be assessed and reviewed on the basis of the background law applying to the agreement. Please do also contact the DLA Piper Tech Disputes Team for further advice.



Richard Norman

Partner

richard.norman@dlapiper.com



Daniel Jones

Legal Director

daniel.j.jones@dlapiper.com