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Reducing the Risk of Healthcare IT Purchases: Avoiding and Resolving Disputes

transforming healthcare through IT™

Welcome and Introductions

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Conflict of Interest Disclosure

- Joseph E. Addiego III:
 - Has no real or apparent conflicts of interest to report.
- Andrew K. Fletcher
 - Has no real or apparent conflicts of interest to report.
- Marilyn Lamar
 - Has no real or apparent conflicts of interest to report.
- Sharon R. Klein
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Goal Today

Practical Understanding of Two Points

1. What are the procedures available to resolve contract disputes?
2. How does the contract negotiation and drafting process impact my ability to resolve disputes?

Structure

1. Overview of dispute resolution methods
2. Overview of contract negotiation/drafting issues
3. Three specific business scenarios
 - Contract drafting issues
 - How this impacts dispute resolution options and efficacy

1. Dispute Resolution Procedures

- What is ADR?
 - Alternative Dispute Resolution
- Alternatives to what?
 - Litigation
- What are the alternatives?
 - Arbitration
 - Mediation

What is Litigation?

- Case in state or federal court
- Randomly selected judge
 - Hears a variety of cases
 - Not specialized in any industry
- Jury Trial
- Right of appeal
 - Review of legal decisions by court
 - Limited review of factual determinations

Litigation Procedure

- Rigid process (sometimes tortured)
- Rules of evidence
- Discovery
 - Electronic discovery
 - Depositions
- Motions
- Formal trial

What is Arbitration?

- Binding contract-based dispute resolution procedure
- Types of arbitration panels
 - One arbitrator
 - Three arbitrators
 - Party-appointed arbitrators
- Types of arbitration
 - Traditional
 - High/low
 - Baseball

Arbitration procedure

- Parties select arbitrator(s)
 - Experienced and knowledgeable arbitrator is critical
- Discovery based on agreement or arbitrators' order
 - Some document exchange
 - Some deposition discovery
- Hearings (“trial”?) conducted before arbitrator(s)
 - Witnesses testify under oath
- Schedule
 - Generally compressed
 - Can be spread-out over many months
- Decision is final

Litigation Features (May Be Pros, May be Cons)

- Formal discovery
- Stricter rules of procedure, relevance, evidence
- Motion practice
- Jury trial
- Forum (court) selection
- Appeal rights

Litigation “Cons”

- Electronic discovery
- Court is not a subject-matter expert
- Court will not give case the same attention as arbitrator(s)
- Deep-pocket opponent can make process long and very expensive

Arbitration Features (May Be Pros, May Be Cons)

- Select the “trier of fact”
- Flexible process
- Designed to be less expensive than litigation
- Arbitration decision is final – no appeals
- “Final” decision faster than litigation

Arbitration Cons

- Parties pay arbitrators
- No court power:
 - No injunctions
 - No subpoenas
- No right of appeal
- Hearings can drag out
- Still need court action for enforcement

Mediation

- Informal
- Voluntary
- Can agree to mediate any time
- Experienced and knowledgeable mediator is critical
- Facilitative, evaluative, or transformative?
- Can be a contractual prerequisite to arbitration

2. Contract Drafting

The Contract Life Cycle

- Meet
 - RFI responses
 - RFP process
- Courtship
 - Sales presentation
 - Letter of intent
 - Contract negotiations (pre-nuptial)


Contract Life Cycle (cont.)

- Marriage
 - Day to day operations
 - New projects (children)
- Death/divorce
 - Exit strategies
 - Transition
 - Parting amicably ... or mediation, arbitration or litigation

Negotiation Fundamentals

- Leverage changes during process – for example, when front runner announced
- Negotiating with two vendors - possible but resource intensive for customer
- For the vendor – negotiating a familiar document with known parameters
- For the customer – more challenging
 - Vendor document is unusual and complicated
 - May be unclear who at customer has authority to accept risk or compromise

Negotiation Fundamentals (cont.)

- Establish authority to negotiate within clear parameters
 - Senior executives for escalation only - must not allow vendor to bypass primary negotiation team
 - Complex operational, financial, risk and legal issues require a multi-discipline approach
 - Continuous communication
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Compromise

- The art of balancing customer and vendor expectations and challenges
- No right answers for all situations
- Negotiation process should help the parties avoid misunderstandings that lead to disputes



Common Vendor Arguments

- Vendor's standard form is usually signed without negotiation
- Price is based on use of standard contract
- Difficult issues will be addressed after contract is signed
 - Developing SLAs
 - Credits

Most Common Problems

- System does not include features, functions or performance levels expected -- but fees due
- Lack of detailed implementation plan led to delays and cost overruns
- Interface and response time issues
- System requires work flow changes

Most Common Problems (cont.)

- Unexpected and expensive change orders
- Must migrate to next version or new product because support term not long enough or vendor was acquired
- Vendor not required to transition data or services at end – delay in receiving data and premium rate charged for services

3. Practical Scenarios

- Review of Scenarios 1-3
- Discussion of drafting considerations
- Analysis of ADR options
- Application of an ADR option


Scenario 1 – Implementation and Performance Problems

- Clinical system license and support agreement
- Payment(s) for license due on the earlier of [date] or implementation [event]
- Implementation plan not attached to agreement (time and materials payment)
- No acceptance criteria for implementation
- Resources of Vendor did not calculate necessary resource commitment of Hospital
- No provision for regulatory change

Scenario 1 – Disputes

- The software doesn't transfer data securely or seamlessly to the main HIS
- The implementation has now cost 2 times what was estimated
- The Hospital already paid for half of the license fees even though the system is not implemented
- The software does not appear to be compliant with HITECH requirements

Scenario 1 Drafting Focus: Ensuring Performance After Contract Execution

- Acceptance and implementation criteria
 - Support/maintenance
 - Change orders
 - Service level agreements
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Planning for Change

- Change order provisions - consider
 - Who can initiate change
 - Time to respond
 - Negotiate rates for extra work in advance
- Negotiate that no extra charge if necessary to:
 - Comply with changes in law or regulations
 - Achieve “meaningful use” under HITECH

SLAs and Performance Credits

- Why use service levels (SLAs) and performance credits (penalties)?
- Customer wants to assure performance levels – availability, response time, etc.
- Monetary performance credits address difficult to prove damages – eg., how does a customer *prove* the cost of low service levels?

SLAs and Performance Credits

- Often difficult to develop what will later appear to be the critical SLAs
 - Proper measurements
 - Monetary amounts
- Must make this a priority
 - assign sufficient resources and allow enough time to develop



SLAs and Performance Credits

- Negotiate protective terms (outs) commonly proposed in vendor SLAs
- “Reasonable efforts” standard
- Measurement over long periods
- Forgiveness if later exceed the standard
- No liability if any failure by customer to satisfy its obligations
- Unrealistic assumptions

Scenario 1 ADR Focus: Advantages of Arbitration

- What are the practical issues?
 - Poorly designed implementation criteria
- What are the (non-contract) legal issues?
 - Regulatory changes
- Whose problem is this?
 - Burdens and risks
 - Subject matter expertise

Is Arbitration Advantageous?

- Technology subject matter experts
 - Technology and implementation issues
- Legal subject matter experts
 - Impact of regulations
- Focus on your dispute
 - Attention of the arbitrator(s) vs. a court
- Why does this matter?
 - Discussion
- How does this impact dispute resolution?
 - Discussion

Scenario 2: Damages for Non-Performance

- Financial system – license and agreement for maintenance and support
- Limitation of Liability – one year's license fees (\$100,000) (no carve outs)
- Exclusion of consequential damages
- Disclaimer of loss of data
- Purchase based on marketing information and demo (no RFP)

Scenario 2 – Disputes

- System's loss of data caused business downturn at Hospital due to significant delay in claims and remittances
- Damages exceed \$1.5 million
- System did not conform to marketing material or demo

Scenario 2 Drafting Focus: Damages After Contract Termination

- Direct vs consequential damages
- Monetary cap
- Exclusions
- “Entire agreement” clause

Limitation on Liability

- Caps on actual direct damages
- All fees paid and payable
- No cap on indemnification, gross negligence, breach of PHI

Scenario 2 Dispute Resolution Focus: Advantages of Litigation

- Enforcement of limitation provisions
- What are the risks the parties face?
 - Enforcement or non-enforcement of limitations provision
- How is litigation an advantage?
 - Higher likelihood of enforcement of the provision?
 - Early motion practice?
 - Discovery?
 - Trial/hearing? (Expense and exposure)
- How does right of appeal factor in?
 - Negotiation leverage?
 - Impact on aggressive plaintiffs?

Scenario 3 – Bankrupt Vendor

- ASP license and maintenance and support agreement for full HIS
- No source code escrow
- No provision for transition services
- Termination for bankruptcy
- Standard confidentiality provision without any extension to Hospital subcontractors

Scenario 3 – Disputes

- Hospital withheld payment for non-performance
- Vendor goes into bankruptcy and refuses to allow access to Hospital data
- Bankruptcy court allows Hospital to keep license but no support upgrades
- To support and update the software, Hospital needs source code
- Competitor of Vendor can host the license, but doing so would reveal Vendor's source code and trade secrets

Scenario 3 – Drafting Focus: Post-Termination Transition

- Support during transition
- Source code escrow
- Assistance of third party outsourcers

Anticipating Change

- Coordination with strategic planning
- Acquisitions, divestitures, and joint ventures
- Change of control (of vendor or customer)
- Changes in technology
- Regulatory changes
- Opportunity for incentives (P4P, meaningful use, PQRI, pilot programs, etc.)
- Offshore services

Dealing with Change

- Financial condition of vendor
 - Need due diligence if privately held
 - Ongoing covenants and periodic financials to provide early warning of problems
- Termination for bankruptcy
 - May not be enforceable
 - Try to address with right to terminate if financial standards not met
 - Use source code escrow with release conditions including failure to support

Scenario 3 – ADR Focus: Advantages of Mediation

- What are the limitations of litigation/arbitration?
 - Blunt instrument
 - Focuses on one winner/one loser
- Is there a collaborative approach?
 - Work with debtor?
 - Work with competitor?

Mediation Possibilities

- Work with competitor?
- License payments to vendor?
- How do you protect debtor/vendors' trade secret rights?
 - Limited access to source code
- How can you use the bankruptcy court to your advantage?
 - Court monitoring of limited access agreements
 - Continued jurisdiction

Concluding Thoughts -- The Value of Early Evaluation

- Implementation and operation issues
- Potential damages
- Impact of change
- Contract provisions and business considerations
- Executive support

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