



Termination and Step In Rights

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- 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



- 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

- 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



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?

