

The Assignment Clause: Why It Matters

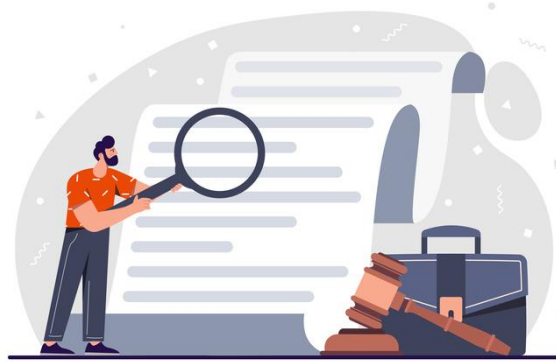
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Introduction

This research is focused on mergers, acquisitions, and divestitures to help educate IT contract reviewers on the importance of the assignment clause and its role in business operations. Armed with this knowledge, the reviewer can educate their leadership on potential issues related to assignments that may occur if not negotiated properly. It would behoove executives to be familiar with the concepts included here to develop organizational strategies.

IT contract reviewers often ignore assignment in favor of spending more time on other operational concerns. Instead, they should consider the potential acquisition of their vendors as a risk and plan to mitigate that risk.



Unfortunately, the threat of vendors being acquired or merging with entities unacceptable to your organization is persistent in the current market. Adding this potential risk to the due diligence phase of vendor risk assessments will help prepare organizations for future issues. As a means of shoring up your due diligence, establish ongoing monitoring of both the vendor market and the vendor's potential for a merger or acquisition so you can adequately prepare for any future issues before they become a problem for your organization.

In addition to ongoing monitoring, IT must be aware of and in alignment with any organizational strategies or needs that may arise from a purchase or divestiture. Preparing assignment rights in IT agreements for potential organizational changes via acquisition, merger, or simply restructuring will save the organization time and resources and eliminate potential risks to future negotiations.

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The Educational Part

What is an assignment clause?

[In simple terms](#), “The assignment clause sets how and when a party may transfer its rights and obligations to another party.” How you and your vendors can use and view it is less straightforward, and we will discuss a few examples below. If you wish to have a more detailed conversation, please feel free to reach out to us and set up a call.

The generally upheld interpretation for lack of assignment language tends to favor the vendor if no assignment clause is in the agreement.

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How is assignment used?

Though the assignment clause can come into play in many ways, this article will focus on a few common variables we often see in IT contracts.

- **Example 1:** Customer may not assign or transfer this Agreement or any of Customer's rights or duties hereunder without VENDOR's express prior written consent. VENDOR may freely assign this Agreement and its rights and/or obligations hereunder, in whole or part.

The most common language we see around assignment is a vendor's one-sided boilerplate language prohibiting assignment rights to the customer without the vendor's consent while allowing the vendor to assign freely (see Example 1). This language primarily accommodates the options for the vendor should they be acquired or merge with another entity. If this happens with an entity unacceptable to your organization, you will have little recourse to sever the relationship unless other precautions are in place.

For more information on preparing your agreements, please reach out to an Info-Tech Advisor!

Altering the above language to grant your organization the ability to assign without the vendor's permission while withholding the vendor's ability to assign without your written permission would better position you for an organizational change (e.g. divestiture, merger, or restructuring). This language change potentially allows you to continue to leverage favorably negotiated agreements for your company.

- **Example 2:** This Agreement and all rights and obligations hereunder may not be assigned without the written consent of the other party.

Assignment language that is straightforward and often used as a compromise in negotiations allows both parties to assign with the written permission of the other. As a

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result, if your organization needs to make changes, most vendors won't typically withhold their approval unreasonably. In addition, making permission mutual grants protection for your organization in case an unfavorable entity acquires one of your vendors. Often the acquiring vendors denigrate services, retire the acquired vendor's products in favor of their own (sparking the need for new agreements), or have unacceptable practices to your organization (creating a regulatory or reputational risk).

- **Example 3:** Neither party may assign this Agreement without the prior written approval of the other, which approval will not be unreasonably withheld or delayed, provided that VENDOR may assign any of its rights and/or obligations herein to any of its Affiliates or to any entity that acquires all or substantially all of its assets.

Another typical example of language we see is that in Example 3. This language prohibits unreasonable denial of Assignment from both parties but allows the vendor to invoke Assignment in the case of an acquisition. The language lacks the protections of the language in Example 2 to protect your organization from entering into an unwanted relationship. This lack of protection could damage your organization. In today's world, vendor acquisitions are quite common and not consistently favorable to the customers caught in the sudden changeover. Note the language allows the agreement to move to their affiliate, which may not be in your best interest, depending on the importance of the relationship with the parent company.

How assignment works with the termination clause

It is also relevant to note that if either party refuses an assignment, it potentially moves the agreement into termination as the relationship severs. [Therefore, ensure you review and understand the termination terms thoroughly \(along with your operational needs.\)](#)

Mergers, acquisitions, and divestitures

Suppose your organization is considering restructuring through a merger, acquisition, or divestiture at any point. In that case, you should ensure you have clearly defined assignment rights that will allow you to keep negotiated terms favorably.

Organizations often consolidate IT agreements. Usually, this means renegotiating a new contract for the parent organization to consolidate the assets from multiple affiliate entities. For example, suppose one of the child entities has particularly beneficial negotiated terms. In that case, it is arguably in the best interest of the parent company to bring all its affiliates under that agreement. Therefore, reviewing your assignment language to allow a favorable agreement to move up to a parent organization will significantly

enhance your negotiation position on the terms of the agreement. However, other variables, such as tiered pricing or volume metrics, may still be arguable.

Bankruptcy

Despite the assignment language, it is important to note that bankruptcy triggers its own terms and affects the rights of both parties. For a good explanation of how bankruptcy affects IT agreements, please see [Bankruptcy as a Trigger for Contract Termination – Separating Myth From Reality and How to Protect Your Organization Better](#).

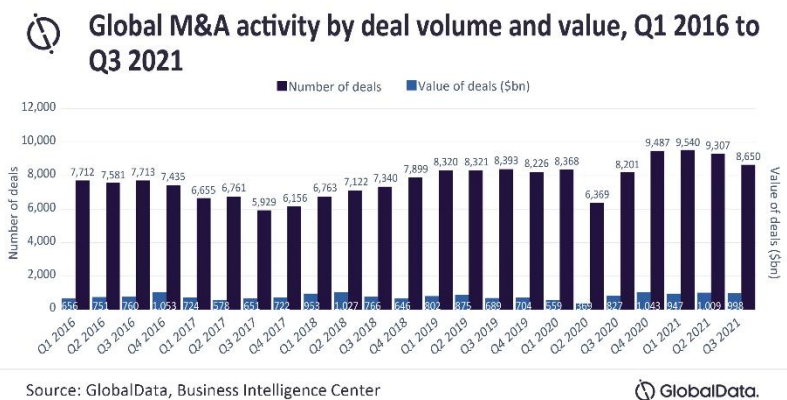
The Practical Advice

It is no secret that [mergers](#) and [acquisitions](#) are highly prevalent in today's IT and cybersecurity markets. Still, it is likely not foremost in people's thoughts when reviewing a new agreement. Simply put, an unexpected merger or acquisition of one of your current vendors could create an unacceptable risk to your organization.

Unacceptable acquisition example

Fictional VENDOR A has worked with your organization for some time, but fictional MEGA-VENDOR B recently acquired them. If you are fortunate, someone will notify your organization of this new relationship before your next renewal invoice hits. In that case,

you should immediately check your assignment clause in the agreement with VENDOR A. Suppose you have no right of refusal or termination. You are now in a potentially unwanted relationship with MEGA-VENDOR B. You may have little recourse to sever the relationship if MEGA-VENDOR B is known for unacceptable practices or violates your policies or standards of conduct. In hindsight, a fair assignment clause would have mitigated this risk.



Example of license "switching"

One of the more common issues we see in vendor acquisitions happens around licensing. For instance, MEGA-VENDOR B purchases VENDOR A, who owns a critical application for you, to add to their portfolio. Seeing an opportunity to impose a license model of their choice, MEGA-VENDOR B decides that the application will now be "end of life" and discontinues the maintenance. Often, MEGA-VENDOR B will allow you to continue to use the old product – at a substantial maintenance rate – until you can get on one of its preferred products. Suppose your assignment language did not allow you to authorize the new relationship. In that case, you may not have the recourse to terminate. You may face the remainder of the relationship term either overpaying for your existing product's maintenance or implementing and paying more for a new product that may or may not meet your needs.



Another example of organizational restructuring



Take, for example, a growing fictional healthcare organization HEALTHCARE 1. For many years it was small and generally operated through its few affiliate hospitals. Recently it decided to adopt a consolidation strategy and move all its IT expense into a shared services model governed by the parent organization. Its current plans include acquisitions of clinics, other hospitals, and healthcare systems to expand its reach.

Looking through its IT portfolio, it has many choices regarding which agreements to renegotiate or move under the parent. If it has a standard assignment language, this exercise will be much easier, but typically that will not be the case. To ensure future restructuring through mergers and acquisitions, HEALTHCARE 1 should incorporate language into its new assignment clauses that allow for a smooth agreement transition.

To help prevent adverse outcomes, consider incorporating a few practices into your vendor lifecycle management.

Focus on [due diligence vendor risk assessments](#) before signing any agreement. Make sure to include appropriate assignment language that accommodates your organizational needs in your contract review checklist (or put one in place if you have not already done so). When assessing new vendors, research their position in the market, financial stability, and potential for acquisition or merger.

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Enact ongoing monitoring to avoid potential adverse outcomes from vendor acquisitions. Create organizational practices that regularly evaluate critical vendors' position in the market to avoid being caught unawares.

Inform IT of your organization's strategic plan. Understandably, many senior executives will not broadcast the specifics of mergers and acquisitions. Still, IT should be aware of their potential to negotiate agreements effectively on behalf of the organization.

Don't underestimate IT's role in negotiations. When the discussion comes up, IT professionals are in a perfect position to explain their concerns to the other departments involved in reviewing the agreement (Business, Operations, Legal, Risk, Compliance, Security, etc.). Unfortunately, many of these departmental experts are not current on the challenges facing IT vendors in the current market, the frequency of acquisitions, and the risk impact your organization could face.



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Summation

Have a plan for assignment language in your IT contract reviews.

Be forward-thinking in protecting your organization from future risks by checking your agreements for proper assignment language as a regular practice.

Ensure that if one of your vendors is acquired by another, you maintain adequate rights to continue or sever the relationship as you deem appropriate. While this can be a tricky endeavor with the major vendors in the market, you can certainly employ mechanisms to better your position if you take the time to prepare your agreements properly.

If your organization restructures, make sure favorably negotiated terms are kept intact.

Finally, a great way to ensure the proper activities around assignments are happening is to incorporate a review of assignment into your contract lifecycle management strategy through your vendor management initiatives. Set an appropriate cadence for reviewing the terms of your agreements that align with corporate strategy and market research. Establish ongoing monitoring practices around the vendor's financial health, in addition to the initial due diligence, to give you time to prepare if a critical vendor's market acquisition position changes.



For more information on preparing your agreements, please reach out to an Info-Tech Advisor.

Info-Tech References

- [Bankruptcy as a Trigger for Contract Termination – Separating Myth From Reality and How to Protect Your Organization Better](#)
- [Jump Start Your Vendor Management Initiative](#)
- [Looking at Risk in a New Light: The 6 Pillars of Vendor Risk Management](#)
- [Prepare Your Organization for a Successful CLM Project](#)
- [Design and Build an Effective Contract Lifecycle Management Process](#)
- [Don't Allow Software Licensing to Derail Your M&A](#)
- [Understand Common IT Contract Provisions to Negotiate More Effectively](#)
- [Contract Term & Termination – It's more than the start and end date of any agreement](#)
- [Vendor Contract & Cost Optimization](#)

Bibliography

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- [Top cybersecurity M&A deals for 2022 | CSO Online](#)
- [Noteworthy tech acquisitions 2022 | Computerworld](#)
- [Assignment Sample Clauses: 330k Samples | Law Insider](#)
- [§ 2-210. Delegation of Performance; Assignment of Rights. | Uniform Commercial Code | US Law | LII / Legal Information Institute | Cornell Law School](#)



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