

THE BASIC ANATOMY OF AN ENGLISH LANGUAGE

CONTRACT

(Student Outline)

While perhaps not as entertaining as Torts, or as interesting as Criminal law, Contract Law is an essential element of legal training. As a non-native English speaking lawyer in a “globalized” world, it is important that you have a basic knowledge of how to read and understand English language contracts. In order to understand the content of the contract, you must first gain an understanding of how English language contracts are structured and worded. We will therefore spend the lecture looking at the structure, essential elements, and wording of English language contracts. It is hope that this will increase your knowledge, and thus comfortableness, in dealing with English language contracts.

I have also attached a contract that we will use in class as a reference when discussing this topic during the lecture. You should bring both the outline and the sample contract to the lecture.

THE “FRONT” OF THE CONTRACT – RECITALS AND DEFINITIONS

1. RECITALS:

Lawyers often begin a contract by giving some background information. This ‘introductory paragraph,’ known as a _____ or the *recitals* in English, also may help make clear the parties’ intentions or to resolve problems of interpretation. Recitals may also be used to secure a remedy by informing the court of the importance of a term. When a judge decides a contract dispute, the central issue in his or her mind is “what was the intent of the parties?” The parties can express that intent in the recitals. An explanation of the purpose of the transaction may assist the court in construing the contract or in determining damages.

The parties often express the reasons behind why they entered into the contract. Such an explanation of the purpose of the transaction may assist the court in construing the contract or in determining damages.

For Example: In a Seller/Buyer contract for the sale of an antique book, the attorney for the Buyer might include in the recitals that Buyer needs this particular book to complete a collection of books that will be worth considerably more with the addition than without it.

If the recital contains this information, it could be used to establish Buyer’s damages in case of breach or even provide the grounds for _____ (equitable relief = not money damages, but the book itself).

2. **DEFINITIONS:** Following the recitals section, one often finds a definitions section.

Some things to remember about contract definitions:

- i) Use the definition section to define:
 1. Special “trade” terms (used only in that business)
 2. Complicated ideas (rather than having to write them out each time in the contract)
- ii) Be sure to use the word defined consistently throughout the contract. This rule applies to ALL words you use in the contract! When learning to write, most of us were instructed to consult a thesaurus so that we would use a variety of words. In the writing of contracts the opposite is true. It is a contract, not a novel, remember?! When reviewing contracts NEVER forget the following rule of drafting:

THE GOLDEN RULE OF DRAFTING!:

This rule should be followed by the drafter, and caught be by careful reader if it has not been followed in the document!!!

For example:

An agreement states that “the parties shall use *reasonable efforts* to timely perform this contract”. A later provision in the same contract states that “the seller shall use *best efforts*.”

This change in language may suggest that the parties intended the meaning of *best effort* to be something different than *reasonable efforts*, leading to confusion and ambiguity!

THE ‘MIDDLE’ OF THE CONTRACT: OPERATIVE LANGUAGE AND BOILERPLATE

“OPERATIVE LANGUAGE” AND “BOILERPLATE” -

When we read a contract, we must always be clear as to what is the “standard” language found in all contracts (**Boilerplate**), from the “new” language that dictates the relation between the parties in this specific contractual relationship (**Operative Language**).

A responsible contract reader must know:

1. The difference between Operative Language and Boilerplate
2. What each type of Boilerplate looks like and how to identify it.
3. Why the Boilerplate language is in the contract in the first place.

Lets first look at Boilerplate, as it is found in every contract and often makes up a great proportion of the actual written contract.

I. BOILERPLATE

The term “Boilerplate” is often used to describe the all-purpose language that is found in every contract, often under the heading _____. Boilerplate terms are statements by the parties that clarify what general law that will govern the contract. Many people who work regularly with contracts tend to just dismiss it as ‘just boilerplate’, but you should not assume that you know what the term means without reading it, and you should never underestimate its importance!

Standard Boilerplate terms include all of the following:

1. _____: Most parties do not want a entire contract to become void (no longer legally binding) because a single clause is not enforceable under the law. In order to avoid this problem, a clause is normally placed in a contract that allows the void clause (or clauses) to be “cut out” of the contract, so that the rest of the contract is still valid.

Example:

The invalidity, in whole or in part, of any term of this agreement does not affect the validity of the remainder of the agreement

2. _____: Many times contracts involve lot of discussion, and thus lots of paper (or at least e-mails) flying around! In order for the parties to make it clear to a reader of a contract that this contract represents THE agreement between the parties, a merger clause is often included.

Example:

This agreement signed by both parties and so initialed by both parties in the margin opposite this paragraph constitutes a final written expression of all the terms of this agreement and is a complete and exclusive statement of those terms

3. _____: Also known as an “Act of God” clause, it protects both parties from being found in breach of contract due to factors beyond the parties personal control.

Example:

Force majeure. Deliveries may be suspended by either party in case of acts of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent.

4. _____: – The parties are always free to modify the contract at a later date, but often times this causes major problems. This is particularly true when a contract is modified orally. If later problems arise between the parties, such oral modification can be both difficult to prove or disprove. In order to avoid this problem, most contract contain this clause.

Example:

All Modifications to be in Writing. This contract may be modified or rescinded only by writing signed by both of the parties

5. _____: The Common Law assumes that a party can give (assign) his responsibilities under a contract to a 3rd party. If the parties do not want this to happen, they have to be sure to put a clause in the contract forbidding it!

Examples:

Either Seller or Buyer may assign its rights under this agreement in whole or in part

No right or interest in this contract shall be assigned by either Buyer or Seller without the written permission of the other party, and no delegation or any obligation owed by either Buyer or Seller shall be made without the written permission of the other party. Any attempted assignment or delegation shall be wholly void and totally ineffective for all purposes

6. _____: In international contracts, it is extremely important to determine whose legal systems is going to govern the contract! In order to make this clear, the parties normally include a such a clause.

Example: In a contract between a California Company and a Canadian Company, where the parties want California law to govern:

The validity, interpretation, and performances of this Agreement shall be controlled by and construed under the laws of the State of California, as if performed wholly within the state and without giving effect to the principles of conflict of law. The parties specifically disclaim the UN Convention on Contracts for the International Sale of Goods.

7. _____: This clause dictates not what law will be used, but what court will here the case. This is know as “jurisdiction”. In international contracts, or any contract where there is large physical distance between the parties, this clause can be important.

Example:

Any legal suit, action or proceeding arising out of or relating to this Agreement shall be commenced in a federal court in the state of Colorado, and each party hereto irrevocably submits to the non-exclusive jurisdiction and venue of any such court in any such suit, action or proceeding.

II OPERATIVE LANGAUGE – refers to the language that affects the legal relationships. The drafter must choose language with care.

In giving you guidance in this area, unlike other areas, I am afraid it is not possible to say, “it is done this way, it is done that way” (Sorry!). Contracts are for the parties to make and the first rule of interpretation is to carry out the parties’ intentions. Therefore, in order to understand the **Operative Language** of a contract, we must explore the language used in creating the “core” of the contract.

Creating Legal Consequences – The whole point of a contract is to create legal consequences. What a party is to do under a contract, what the other party has a right to receive, and what other options both parties may exercise under the contract are all dictated by specific words and phrases.

As mentioned earlier, these words might already be familiar to you, but “at law” they mean very different things than you learned from your Elementary School English teacher! Even more importantly, these often small, seemingly unimportant words have HUGE legal consequences on the parties. Such words as *shall, may, must, if, when*, etc. are the key words on which the legal relationship between the parties to a contract depend! It is thus important to explore the meaning of these words in the context of English language contracts, and what legal affect these words have on the relationship of the parties entering into a contract.

DUTIES

A contract duty is something that, if not performed by the party, will be considered a breach. The following words are most commonly used to create duties and rights in contracts. Whatever word is used to express this in the contract, it should always be possible to replace the word with the phrase _____.

Contract **DUTIES** can be created by using either **will, shall, or must**:

1. The problem with **will** is :
 - a. It sounds weak
 - b. Might simply be referring to the future (duty or just future event ???)
 - c. Confusing, since contracts are normally written in the present tense. The contract “is always speaking”

2. I prefer the word **shall** because it is a term of *command*. The weakness with the word **shall** is that it is very often used in two different ways in a single document.

d. As a term of command: “The buyer shall...”. This is the correct usage = “The buyer *has an obligation to*” = Duty

b. Unfortunately, **shall** is often “incorrectly” used as a substitute for *is, should, must, required*: “The computer shall...”, “The products shall...”, “The contract shall...”. “Shall” sounds very lawyer-like so attorneys like to throw it around!

3. Because *shall* is often misused and *will* does not sound very obligatory, some drafters use the word **must** and **must not**. While **must** can be used, it tends to be a bit “strong” and causes most people to have flashbacks of their childhood (“You must eat your Spinach!”).

Therefore **must** is better used to create conditions (see below), so I do not use it for creating a Duty.

4. Regardless, whichever language is used – **MAKE SURE IT IS USE IT THE SAME WAY THROUGH THE WHOLE CONTRACT!!!**

5. Duties to *not act* are created by the words **shall not** or **is not required to**, as follows:

Seller shall deliver the goods by no later than 10 days after the date of this contract. Seller is not required to provide notice of the exact day of delivery.

RIGHTS

A contract right is simply the other side of a duty. If Seller has a **duty** to do X, then Buyer has a **right** that Seller do X.

6. Rights are usually created by using the words: _____.
For example:

*If Buyer is late in making payments on three consecutive shipments, Seller is **entitled to** impose a surcharge of 5% on the amount due for the fourth and all subsequent shipments.*

7. The negative form is: _____. For example:

*Employee is entitled to speak publicly about any matters, without fear of recrimination from the Company, but Employee is **not entitled to** publicly disparage the Company, its practices, its policies, or its products. [Both denying the right and making it a duty not to].*

PRIVILEGES –

A privilege differs from a right only in the sense that it does not have a direct duty-corollary. The corollary, rather, is a ‘no-right’. To say that Seller has a privilege of doing X, means that Buyer does not have a right that Seller do or not do X.

1. The word _____ is used to create privileges.
2. Two Forms, each with a slightly different legal consequence:
- a. The first gives the privilege-holder an option to choose between several alternatives, as in selecting how the duty of delivery will be satisfied. For example:

Seller _____ deliver by truck, rail, or air.

- b. The second, gives the privilege holder the power to unilaterally create legal consequences. For example:

Seller _____ terminate this contract on 10 days notice to Buyer.

OTHER LEGAL CONSEQUENCES –

Some other words used to create legal consequences are: **is, is not**, or some other verb.

For example:

Buyer's option to renew expires at 10:00 p.m. on October 23, 2005. {Not shall expire, which is a false imperative}

*The interpretation and enforcement of this contract **is governed** by the laws of California. {Not shall be governed, which is another false imperative}.*

CONDITIONS

Conditions are different from duties in that a breach of a condition does not warrant a breach of contract, though there can be legal consequences. Also, conditions often trigger contract rights and duties.

- i. A condition may consist of conduct or non-conduct by one of the contracting parties. In this case, the term **must** should be used.

If the widgets do not arrive by the 15th of the month, the seller must...

Additional Notes:

REMEDIES / DAMAGES

A well drafted (written) contract should always contain remedies for if things go wrong with the contract. A lawyer dealing with English language contracts should also know what Common Law damages can be awarded.

Below are listed the 7 common types of damages awarded in the Common Law contracts. Match the type of damage with the definition

1. Expectation damages/ “benefit of the bargain”
2. Reliance damages
3. General / Actual damages
4. Liquidated / Stipulated damages
5. Restitution damages
6. Special / Consequential damages
7. Punitive damages

- A. Compensation that attempts to put the non-breaching party in the position they would have had if the contract had been performed. Referred to recovery “on the contract”._____
- B. Compensation necessary to reimburse the non-breaching party for efforts to expended or expenses incurred in the reasonable belief the contract would be performed. Referred to quasi-contract recovery and associated with the Common law idea of promissory estoppel._____
- C. Compensation determined by the amount of benefit unjustly received by the other party. Referred to quasi-contract recovery and associated with the Common Law idea of quantum meruit._____
- D. Compensation for a loss that is the natural and logical result of a breach of contract. _____
- E. Compensation for losses which are as a result of special facts and circumstances relating to a particular transaction which were foreseeable by the breaching party at the time of the contract. _____
- F. Compensation agreed to by the parties and put in the contract. It is a fixed dollar value and must not be to punish the party, but to cover costs that are hard to determine. _____

SAMPLE CONTRACT

This is an edited contract (sections are missing from the original). You can read through it, but the main purpose is for you to PRINT IT OUT and BRING IT WITH YOU to the contracts class, so that we can work together on it. I will use this contract to show you, along with the outline, where to find the different parts of the contract and the type of language which is commonly used (correctly and incorrectly) in contracts.

TeleCommunication Systems, Inc. Master Sales Agreement

This Agreement is made on this 8th day of June 2005 (the "Effective Date") by and between TeleCommunication Systems, Inc. a Maryland corporation with offices at 275 West Street, Annapolis, Maryland 21401 ("TCS"), and Vonage Network Inc., a Delaware Corporation, with offices at 2147 Route 7, Edison, New Jersey 08817 ("Customer"). TCS and Customer shall also be referred to as the "Parties" and each as a "Party") to this Agreement. The goal of this agreement is to formulate a working relationship between TCS and Customer and to create a cooperative relationship to forward the interests of both our companies.

The Parties agree as follows:

1. SCOPE OF AGREEMENT

- 1.1 This Master Sales Agreement is a framework agreement. TCS may sell, and Customer may purchase, Hardware, Systems, and Services and/or TCS may license Software to Customer, as specified in one or more Work Orders signed by TCS and the Customer, referencing this Master Sales Agreement and the General Statement of Work. Each such Work Order, together with the Master Sales Agreement and the General Statement of Work, shall constitute an agreement between the Parties (the "Agreement").

2. DEFINITIONS

The following terms used in this Agreement shall have the meanings stated in this Section 2:

- 2.1 "Affiliate" of a Party means any entity that, directly or indirectly, controls, is controlled by or is under common control with, the Party.
- 2.2 "Completion Criteria" means Customer's acceptance of the Product or Service as demonstrated by Customer's signature of the First Office Application (FOA) certificate which acknowledges the fulfillment by TCS of the obligations described in the Statement of Work, such as the delivery of a System.
- 2.3 "Hardware" means equipment or machines, such as computers sold and/or maintained by TCS under this agreement. Hardware may be manufactured by TCS or by third parties.
- 2.4 "Products" mean Hardware, Software, or Systems sold or licensed by TCS.

3. PRODUCTS AND SERVICES PROVIDED

- 3.1 TCS shall provide the Products and Services described in each Work Order, including attachments, for the prices and on the schedules specified therein and in accordance with the Master Sales Agreement and General Statement of Work and any exhibits to either of them referenced in the Work Order.
- 3.2 TCS and Customer shall each perform their respective obligations and carry out the responsibilities as described and according to schedules specified in each Work Order. To the extent either Party is delayed in performing any of its obligations under the Agreement due to the other Party's failure to perform any of its responsibilities in accordance with the applicable schedules, the first Party shall be permitted to delay the performance of its obligations and shall be entitled to compensation from the other Party for any additional actual and reasonable out-of-pocket costs incurred as a result. In the event of delay by Customer, TCS will prepare a change order of the costs associated with the delay. TCS will not continue performance of its obligations until Customer has approved the change order and amended the Work Order to include such costs. In the event of a delay by TCS, TCS will compensate Customer for such delay as set forth in the applicable Work Order or General Statement of Work.

4. ACCEPTANCE

- 4.1 Products and Services delivered by TCS shall be considered accepted by the Customer upon completion of the Completion Criteria, as defined in Article 2.1. If Customer has not signed the FOA within 30 business days of receipt, Products and/or Services will be deemed accepted unless Customer has provided TCS written notice of rejection detailing the reasons why they do not meet the specifications in the SOW. TCS shall promptly correct any such deficiencies or obtain the Customer's written agreement to a plan to correct such deficiencies. The System shall thereafter be considered accepted upon completion of the Completion Criteria.
- 4.2 If Customer believes that TCS has not provided a Professional Service in a workmanlike manner or according to the Specifications of the Work Order, Customer shall provide written notice to TCS of any deficiencies within ten (10) business days of the completion of the provision of the Professional Service. TCS may perform again or provide an appropriate credit for any Professional Service that was not delivered in a workmanlike manner or according to its Specifications of the Work Order.
- 4.3 Customer shall own all title and interest in all Hardware delivered under this Agreement, unless such Hardware is subject to the terms of a leasing agreement.

5. INVOICES AND PAYMENT

- 5.1 Customer shall pay the amounts indicated in the Work Order for the Products and Services delivered by TCS. TCS may invoice the Customer for the amounts specified in the Work Order for Products and Services only upon their acceptance. Customer shall pay TCS the full amount of such invoices (other than amounts subject to a good faith dispute) in U.S. Dollars within 30 days of the date of Customer's receipt of the invoice ("Due Date"). Except for any amounts reasonably disputed by Customer in writing, TCS may assess and Customer shall be liable to pay a late charge at a rate of one-half percent (0.5%) per month or the highest rate permitted by law, whichever is less, on all unpaid amounts (other than disputed amounts) from the due date until paid in full.

- 5.2 Failure to pay any fees or other charges or amounts (including taxes) due to TCS on or before the Due Date shall be a breach of this Agreement (“*Failure to Pay*”). Notwithstanding anything else contained in this Agreement, in the event of a Failure to Pay that is not cured within fifteen (15) business days after notice thereof, TCS may suspend delivery of Products and/or Services to Customer and/or upon five (5) business days written notice terminate this Agreement for default, unless said Failure to Pay is based on Customer’s good faith dispute of the amounts invoiced as presented in writing to TCS on or before the Due Date or the expiration of the fifteen (15) day notice period referenced above. Any suspension may be continued until the Failure to Pay has been cured but will cease upon cure. TCS shall be entitled to recover reasonable costs incurred prior to termination and attorney’s fees and costs in the event that any legal proceeding is brought by TCS in collecting all unpaid and undisputed amounts hereunder.
- 5.3 If Customer disputes any part of an invoice, then in order to withhold such amount from its payment, Customer must notify TCS in writing as to the specific amounts contested and the reasons for such dispute on or before the Due Date of the invoice, provided that this provision does not waive Customer’s right to subsequently place in dispute and seek a refund of amounts already paid.

6. TERM AND TERMINATION OF AGREEMENT

- 6.1 Subject to paragraph 6.3 below, this Agreement shall be effective upon signature by both Parties as of the date noted above for a period of three (3) years (“Initial Term”) and shall be automatically extended for additional one (1) year periods, unless either Party notifies the other to the contrary no less than sixty (60) days prior to the expiration of the Initial Term or any extension thereof. The expiration of this Agreement shall not terminate any Work Order referring to the terms of the Master Sales Agreement, and the terms of the Master Sales Agreement shall remain effective as to any such Work Order, until that Work Order has been completed or has terminated.
- 6.2 Either Party may terminate this Agreement and any Work Order for cause upon written notice to the other Party in the event that the other Party fails to perform any of its material covenants or obligations contained in this Agreement or such Work Order, unless such default is cured or a mutually agreed plan to cure is accepted within thirty (30) days of delivery of written notice of such default to the defaulting Party. If Customer is in material default of this Agreement and such default continues for a period of thirty (30) days after TCS’ written notice thereof to Customer, then TCS shall also have an independent and alternative right to suspend delivery of Products or Services in then effective Statements of Work upon written notice to Customer, provided that TCS will end such suspension upon cure of the default by Customer. Customer may terminate this Agreement and any Work Order upon written notice to TCS if TCS assigns this Agreement or all or a substantial part of the infrastructure used to provide Services hereunder, directly or through the sale or merger of TCS or any of its assets, to an entity that has a substantial business in VOIP services.

9. LIMITATION OF LIABILITY

NEITHER PARTY WILL BE LIABLE TO THE OTHER (OR ITS DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES, AGENTS, SUBCONTRACTORS, CUSTOMERS OR ANY OTHER THIRD PARTY) FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL

DAMAGES ARISING OUT OF THE SERVICES OR SUCH PARTY'S PERFORMANCE OF OR FAILURE TO PERFORM ITS OBLIGATIONS UNDER THIS AGREEMENT OR (EXCEPT AS PROVIDED IN SECTION 8) FOR THE CLAIMS OF THIRD PARTIES FOR LOSSES OR DAMAGES. EXCEPT FOR AMOUNTS PAYABLE BY CUSTOMER TO TCS UNDER SECTION 5, AND THE INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 8, EACH PARTY'S LIABILITY (WHETHER IN TORT, CONTRACT OR OTHERWISE AND NOTWITHSTANDING ANY FAULT, NEGLIGENCE (WHETHER ACTIVE, PASSIVE OR IMPUTED), PRODUCT LIABILITY OR STRICT LIABILITY OF SUCH PARTY) UNDER THIS AGREEMENT OR WITH REGARD TO THE SERVICES OR OTHER ITEMS FURNISHED UNDER THIS AGREEMENT WILL NOT EXCEED THE TOTAL COMPENSATION ACTUALLY PAID TO TCS FOR THE PREVIOUS TWELVE MONTHS UNDER SECTION 5 OR \$100,000, WHICHEVER IS GREATER.

10. ASSIGNMENT

This Agreement may not be assigned or transferred by either Party without the prior written consent of the other Party, except that upon notice to the other Party: (1) either Party may assign this Agreement without consent to any Affiliate of it, and (2) TCS may assign its rights to payments under this Agreement to a financial institution. In addition, Customer's rights under this Agreement and in the Software may be transferred, leased, assigned, or sublicensed without the consent of TCS to a successor in interest to Customer's entire business or substantially all of its assets which assumes the obligations of this Agreement.

11. FORCE MAJEURE

Neither Party shall be liable under this Agreement for delays, failures to perform, damages, losses or destruction, or malfunction of any equipment or software, or any consequence thereof, caused by fire, earthquake, flood, water, the elements, unavailability of transportation, acts of terrorism or acts or omissions of third parties other than subcontractors of a Party, or any other cause beyond the reasonable control of a Party and not caused by its negligence ("Force Majeure"). The Party whose performance is affected by such Force Majeure shall notify the other Party of the existence of such Force Majeure and shall use its best efforts to resume performance as soon as practicable. Customer shall not be obligated to pay for any Service which TCS is unable to perform because of Force Majeure.

14. DISPUTES

The Parties agree to submit to arbitration for any and all matters in dispute or controversy between them concerning this Agreement that cannot be resolved through discussion by senior executives of both Parties. In the event that discussions by senior executives cannot resolve any such dispute or controversy within sixty (60) days (or such other longer period as the Parties may agree) either Parties may submit such matter in dispute to arbitration, and such matter shall be resolved by a binding arbitration by a single arbitrator. Any such arbitration proceeding shall be held in the English language in New York, New York. The arbitrator will be selected and the arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties will share equally in the fees and expenses of the arbitrator and the cost of the facilities used for the arbitration hearing, but will otherwise bear their respective costs incurred in connection with the arbitration. The parties agree to use all reasonable commercial efforts to ensure that the arbitrator is selected promptly and that the arbitration hearing is conducted no later than three (3) months after the arbitrator is selected. The arbitrator may not award punitive or exemplary damages against any Party or any other relief in excess of the limitations set forth herein. The arbitrator's award shall adhere to the plain meaning of this Agreement and to applicable law, and shall be supported by written findings of fact and conclusions of law. The judgment and award of the arbitrator will be final and binding on each Party. Judgment upon the award may be entered in any United States federal or state court having jurisdiction.

16. MISCELLANEOUS

- 16.1 Neither Party shall perform or use the TCS Products or Services in any manner nor for any purpose which violates the laws or regulations of the jurisdiction in which the TCS Products or Services are being provided.
- 16.2 Customer shall not perform any service bureau work, grant multiple-user licenses, or enter into any time-sharing arrangements using Software licensed under this Agreement, except as expressly authorized in writing by TCS, provided that Customer's use of the software in providing service to its customers shall not be deemed to violate this Section 16.2.
- 16.3 Any provision or provisions of this agreement which in any way contravenes the law of any jurisdiction in which this Agreement is effective shall, in such jurisdiction, to the extent of such contravention of law, be deemed severable and ineffective. Such severance shall not affect any other provision hereof or the validity of this Agreement, unless one or more essential purposes of the Agreement is rendered ineffective, in which case either Party may terminate the Agreement without cause in that jurisdiction by notice to the other Party within a reasonable period.
- 16.4 No waiver by either Party to any provisions of this Agreement shall be binding unless made expressly and confirmed in writing. Any such waiver shall relate only to such matter, non-compliance or breach as it relates to and shall not apply to any subsequent or other matter, non-compliance or breach.
- 16.5 The relationship between and among the Parties hereto shall be that of independent contractors only, and without limiting the foregoing shall not be that of partners. Nothing herein contained shall be deemed to constitute a partnership between and amongst them, merge their assets, or their fiscal or other liabilities or undertakings. Nothing herein contained shall allow a Party to act as an agent of any other party, except that TCS

may be considered a limited agent of Customer when TCS is acting on the behalf of and at the direction of the Customer for the limited purpose of transmitting E9-1-1 data to Public Safety Answering Points (PSAPs). TCS shall be solely responsible for its own employees, including without limitation with regard to their employment, compensation, benefits and taxes relating to their employment. No TCS employee shall be deemed to be an employee of Customer for any purpose.

- 16.6 This Agreement, (which includes Exhibit A) sets forth the entire agreement and understanding between the Parties with respect to the subject matter hereof and merges, supersedes, terminates and otherwise renders null and void any and all prior discussions, negotiations and agreements between them. Neither of the Parties shall be bound by any conditions, definitions, representations or warranties with respect to the subject matter of this Agreement other than as expressly provided herein.
- 16.7 This Agreement, and all the rights and duties of the Parties arising from or relating in any way to the subject matter of this Agreement or the transaction(s) contemplated by it, shall be governed by, construed and enforced in accordance with the laws of the State of New York (excluding any conflict of laws provisions of the State of New York that would refer to and apply the substantive laws of another jurisdiction). To the extent court action is initiated to enforce an arbitration award or for any other reason consistent with Section 14, the Parties agree to submit to the personal and exclusive jurisdiction of the courts located within the state of New York and waive any objection as to venue or inconvenient forum.
- 16.8 For a period of one year from the termination of this Agreement, Customer and TCS each agree not to solicit the employment of any employee or consultant of the other Party who has been directly involved in the performance of services under this Agreement; provided that the employment of an employee of the other Party who replies to a general advertisement or employment listing not specifically targeted to employees of the other Party shall not be prohibited by this Section 16.8.

By its signature below, each Party signifies its agreement to the foregoing.

AGREED:

By: Richard A. Young
Signature:

By: John S. Rego
Signature:

Exec. VP & COO
TCS, Inc

CFO
Vonage Network Inc

Date:

Date:

Attachments:

Exhibit A: General Statement of Work (To be mutually agreed and incorporated by amendment to the Agreement)

Exhibit B: VoIP il 9-1-1 Statement of Work: