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Tech Contract Disputes

Bryony Hurst – Partner

James Maton - Partner

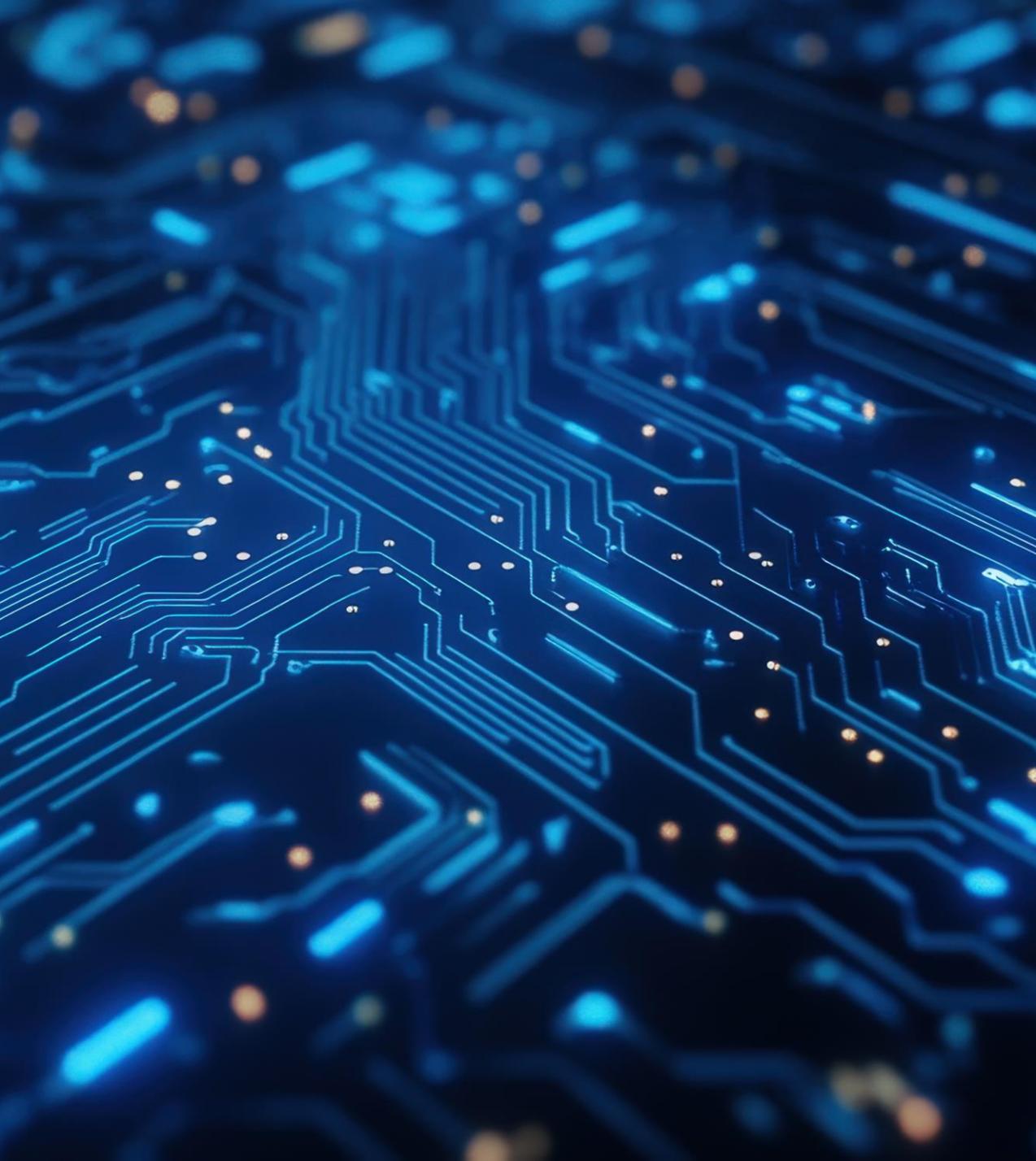


Agenda

1. Main types of tech contract
2. Commonly encountered problems – and drafting to avoid them
3. Termination and other remedies

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Types of Tech Contract



Option 1: Buy it

- **Hardware Purchase Agreement:**
- **Software Licensing Agreement:**
 - Install on your systems
- **Software as a Service/ Cloud Services Agreement:**
 - Access a service hosted by provider
- **Service Level Agreement:**
 - Performance metrics
 - Response times
 - Penalties for service lapses



Option 2: Build it

- **Software/App/Website Development Agreement:**
 - Waterfall or agile
 - Development milestones and design specifications
- **Maintenance and Support Agreement:**
 - Post-development/launch support
 - Response times
 - Support levels
 - Maintenance schedules

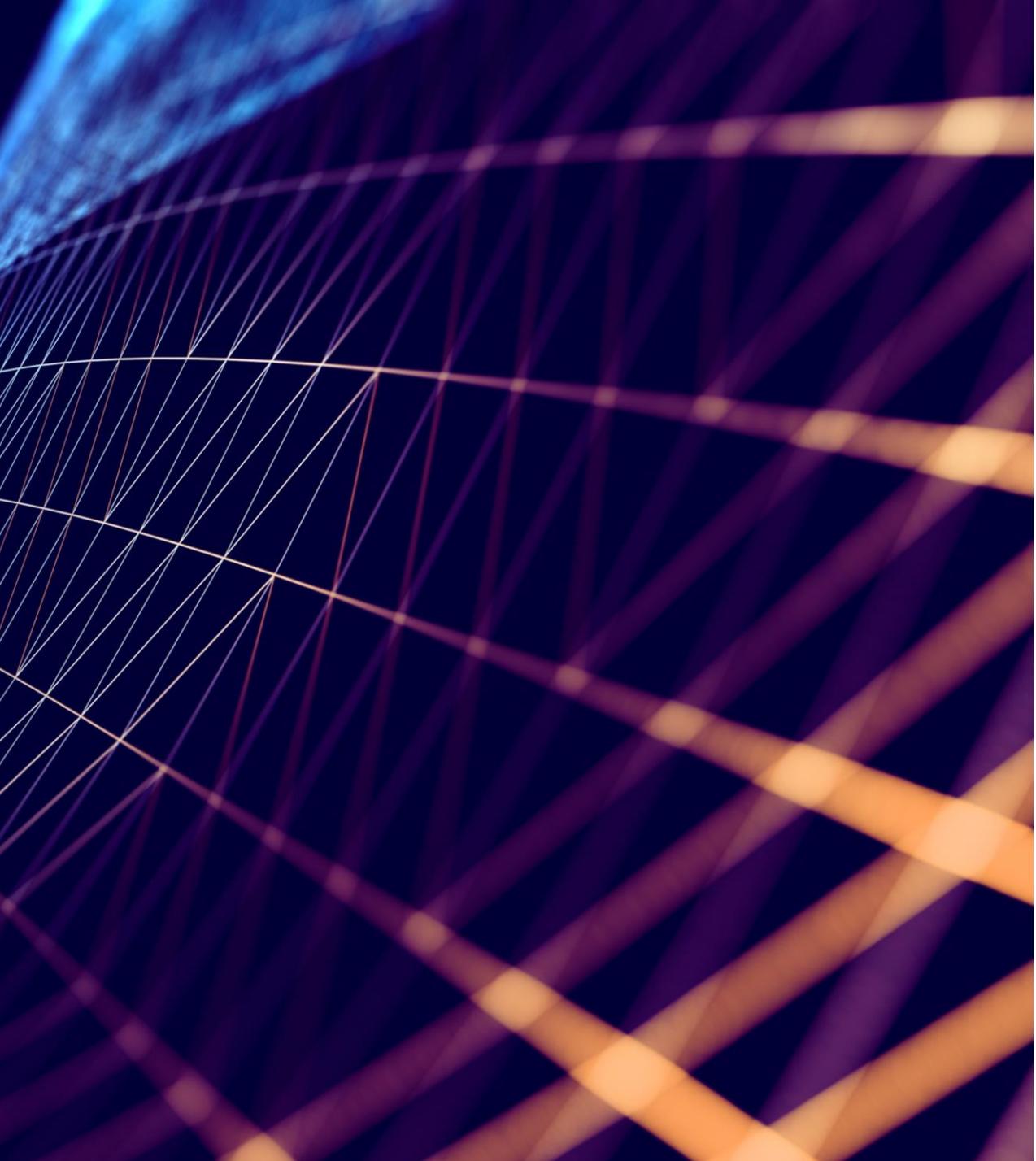


Option 3: Outsource it

- **IT Outsourcing Agreement:**
 - Scope of services
 - Performance standards
- **Consulting Services Agreement:**
 - Deliverables
 - Timelines
- **Cybersecurity Services Agreement:**
 - Security measures
 - Incident response protocols
 - Compliance requirements

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Commonly Encountered Problems (& some solutions)



Licence overuse

- Often discovered during exercise of an audit right
- Often resolved commercially
- Uncertain drafting can lead to litigation though – claims for licence and maintenance fees

Drafting/conduct tips

- Consider impact on existing IT estate
- Consider future plans/restructuring
- Audit and reporting mechanisms
- Clear consequences for excess use
- Document any agreed variations

Delay and/or cost overrun

- **Common in larger projects/builds**
- **Customer alleges:**
 - Inadequate personnel
 - Lack of skill
 - Poor project management
- **Provider alleges:**
 - Lack of engagement in design/scoping process
 - Change in scope/specifications
 - Informal variations agreed

Drafting/conduct tips

- Clear customer dependencies
- Personnel specifications
- Pricing structure
- Governance and oversight

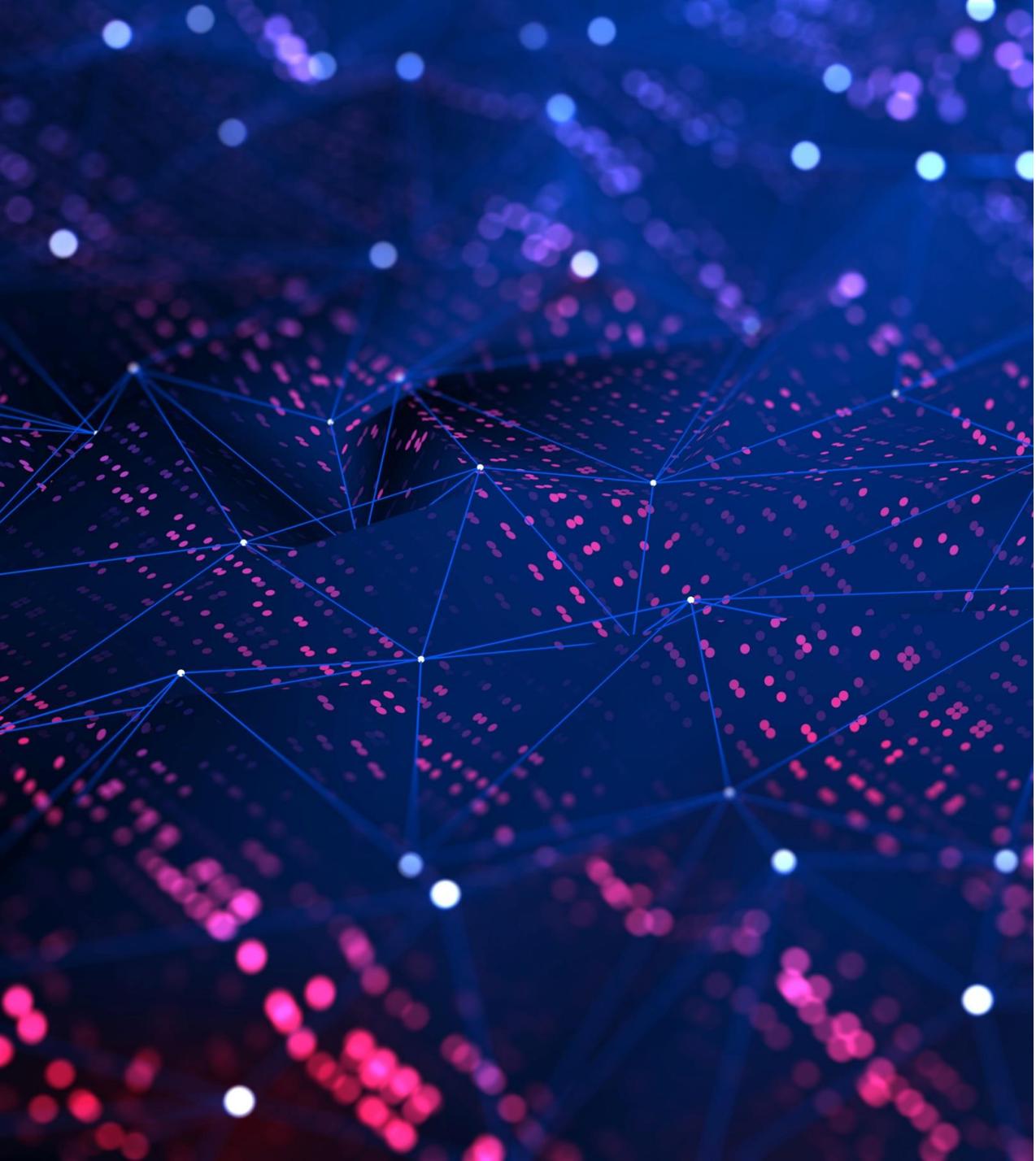


Solution not fit for purpose

- Discovered during testing or post-acceptance
- Customer alleges:
- Pre-contractual overpromises
- Incompetence
- Provider alleges:
- Objectives not properly expressed
- Lack of engagement in scoping/design

Drafting/conduct tips

- Technical specifications – be clear
- Service levels and appropriate remedies
- Be thorough on testing – particularly where interdependency
- Don't accept prematurely
- Watertight entire agreement clauses
- Stipulate order of precedence



Late payment

- Often related to dissatisfaction with performance
- Or, worse, insolvency
- Is it a serious breach? What are the remedies?

Drafting/conduct tips

- Timely payment = condition of contract/of essence.
- Non-payment of invoices = material breach
- Right to suspend services
- Parent company guarantee
- Include and follow process for disputing invoices

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Termination and other remedies

Remedies

Problem	Remedy	Issues to consider
Failure to meet service levels	Service credits	Sole remedy? Threshold for escalating remedies?
Delay/inadequate performance	Step-in rights	Trigger? Duration? Liability? Preclude other remedies?
Late payment	Interest Suspend service Termination?	How late is late? Is termination available, when?
Any breach of contract	Damages claim	Limitation/exclusions of liability Indemnities Liquidated damages/penalties
Material or serious breach of contract	Damages claim Termination?	Material or repudiatory breach? Cure period?



Termination is binary and challenging

- Identify and analyse all viable grounds
- And their financial and other consequences...
- Avoid inconsistent positions
- "Material", "Serious", "Persistent" - what do they mean?
- Investigate breaches.. (both ways)
- ... but avoid waiver of rights
- Respect cure periods
- Respect notice and process requirements
- Prepare and plan

Today's speakers

Cooley contacts



Bryony Hurst
bhurst@cooley.com



James Maton
jmaton@cooley.com

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Any questions?