



CalibrateK | Fine-Tuning the Contracting Paradigm

The contracting process can be excruciatingly inefficient and wasteful. Parties debate minutiae regarding what contract terms are essential and dwell on what is worth fighting for ... when all businesses want to do is cut to the chase. Smarter contracting, enhanced through the use of digital technologies, can help parties break out of these counterproductive habits, shorten the timeline to closing, and reduce attorneys' fees and other transactional costs without sacrificing quality and deal certainty. Crowell & Moring's Technology Transactions Team works with companies to adapt their contracting platforms into a new efficient digital paradigm.

We present the following approaches to simplify, expedite, and better manage your company's contract formation practices.

1 Electronic Contract Playbooks

Our playbooks convert our clients' contract forms and templates into "heat map" forms. These forms can provide scorecards that rank given contract terms by level of significance and that tie deviations from company norms and preferences to required levels of review and approval.

An example: A Fortune-500 client was repeatedly losing litigation over the scope and enforceability of its contract releases, and was fed up. We generated an electronic playbook for this client that contained various versions of release terms that the company could use in future negotiations with customers, based on governing law and an analysis on which release terms tend to be accepted by the courts. The client's releases have since held up and been enforced more frequently. By making the release terms virtual—literally plugged into contracts with the press of a button—drafting and closing timelines shortened dramatically. And outside counsel and their costly fees were all but eliminated, since the release provisions were pre-baked, vetted, and approved.

Another example: We centralized and standardized SAAS agreement and electronic contracting for a privately held technology client. The client had hundreds of versions of its main SAAS agreement needing to be executed by over 1,000 customers during an upcoming contract renewal process. We provided an electronic contract form focused on a handful of essential clauses and developed specific positions and alternative language for those clauses to arm the internal negotiating team. We converted the typical renewal clause into an auto-renewal process that extended over one- to three-year periods, depending on the customer, while remaining enforceable. We did the same with the limitation of liability clause—which we capped at insurance proceeds and made negotiable with the press of a button—and with other terms that could be readily automated. The digital playbook significantly reduced negotiation time and outside counsel spend.

2 Gating Protocols

We have developed automated protocols – essentially virtual checklists – to help clients determine if it makes sense to enter into a contract with a specific company. For example: Last year, a client decided to enter a new line of business that would mean contracting solely with startups, as opposed to their traditionally large and well-heeled contracting counterparts. The risks were high: the product in question is intensely litigated, and most of these possible contract partners had no history in the relevant industry, limited financial backing, and little-to-no track record. Our gating protocol offered a selection methodology for deciding which of these startups may be worthwhile risks, giving due weight to the sources of the startup's funding, its insurance, its employees, its industry credibility and staying power, and other material considerations. Once the protocol was established, the process has proceeded like clockwork, and the role of outside lawyers has nearly vanished.

Similarly, we developed an electronic due diligence process for a client to quickly assess whether foreign-based parties are on any of the prohibited parties/OFAC lists, as well as to provide a basic background due diligence set of searches. This particular gating issue had been a source of frustration for the client and was a drag on contracting speed. This issue needed to be addressed quickly using an electronic protocol so the client could move forward with contract negotiation expeditiously. With the digital fix implemented, the client was able to reduce the time it took to perform due diligence on a proposed counterparty.

3 Integrated Workflow Solutions for Contract Review and Approval

We regularly work with our clients' preferred workflow solution providers to help speed up the negotiation process. To the extent an automated workflow platform has not yet been identified and implemented, we can provide examples of how we collaborate comfortably with vendors to develop and implement these solutions.

4 Machine Learning

When creating digital clause libraries or building contract templates, contract review solutions like KIRA can dramatically quicken the process for reviewing multiple contracts. Such machine-learning contract review platforms allow us to quickly identify and extract key provisions to then develop best-in-class provisions. We have used these solutions to assist clients in identifying differences in negotiated clauses in multiple agreements simultaneously. We have even used these applications for contract due diligence in the mergers and acquisitions context, and can translate those experiences into a formal digital paradigm.

5 Contract Automation

For repeatable contracts, we suggest contract automation tools to increase the speed of contracting and ensure accuracy and consistency across negotiations. With one client in particular, we collaborated to develop a contract automation solution to not only increase accuracy but also to solve a particular problem. The client was increasingly spending time and resources managing and implementing a wide variety of contracts that were being negotiated one at a time. There was no consistency in key clauses over many agreements. Through automation, the client was able to increase its consistency across repeatable contracts and develop an efficient contractual framework.

A potentially revolutionary version of automation has customers creating their own customized contracts from a digital platform for submission directly for approval. We are exploring precisely this with certain firm clients, and would be glad to showcase our model to you.

6 Collaborative Client Sites

Powered by solutions such as HighQ, we put these sites online for clients to serve as a central contract repository for efficient contract organization and management, sometimes in dashboard format for instant accessibility. We have developed these client repositories for several public and private company clients, with features that vary depending on the needs of the client. The sites allow seamless collaboration on ongoing agreements and also allow easy retrieval of executed client documents, forms, playbook materials, and even invoices. The digitizing of these materials allows additional efficiency in the contracting process, down to a very granular level.

7 Pairing of Litigators and Contract Negotiators

While not digital per se, we find that such pairing makes for contract terms that stick. (Otherwise, what's the point?) Our litigators and trial lawyers know first-hand how a contract provision is likely to play out in a court of law. By reverse-engineering that knowledge into contract formation, the client becomes more secure and confident in its contracting outcomes. This pairing of litigators and contract lawyers was so well received by our client base that we developed a four-part series around best-in-practice contracting provisions called "Don't Sign that Yet!" We have presented this series over 50 times for clients ranging from start-ups to Fortune 50 clients.

8 Data Analytics

There is a wealth of data on contracting in technology spheres, and not tapping into it is a squandered opportunity for many of even the savviest companies. Mining data to determine heavily negotiated or disputed provisions can streamline the negotiation process by identifying key risk areas upfront. We utilize litigation data analytics solutions like Lex Machina and Westlaw Edge to analyze our clients' contract litigation history, and could do so for your company. If your company's key terms have not been litigated, analytics can locate comparable terms negotiated and litigated by similarly situated entities. We would propose to interview members of your procurement team to identify areas of historical challenge in the contracting process. All this gets factored into our data searches, and into development of playbooks and form templates to streamline and smarten up the negotiation exercise.

9 Up-front Risk Assessment

This harkens back to the "heat map" concept. Waiting to risk-assess contracts until they become disputed is waiting too long. Your company likely has some sense of which contracts and which terms matter and matter deeply, which do not, and which become contested brawls. You might make a considered, risk-analyzed decision to loosen (or tighten) negotiation reins on select contract provisions based on type of service, contract value, the contracting counterpart in question, and risk levels. Such decisions can be fed digitally into the company's contract playbooks and become systematic company practice, subject to a specific override process.

10 Rewards Tied to Your Company KPIs

Though again not digital per se, in appropriate circumstances, companies may consider incentivizing business partners through a reward system tied to key performance indicators – pricing incentives for swift time to closing, for instance.

About Our Digital Transformation Practice

Crowell & Moring established a Digital Transformation Practice at the direction of our Management Board in response to the ever-growing reality of digital transformation in the marketplace. Now ranked among Financial Times' top 20 "Most Innovative North American Law Firms," our multi-disciplinary team of digital transformation lawyers and professionals regularly share what they have learned on developments across the digital spectrum, from blockchain to autonomy to digital health to cyber to IoT to 3D printing and beyond. We are thus able to be our clients' eyes and ears on industry developments (recognizing fully that our clients are plenty savvy themselves on all things digital). This sort of learning and information-sharing is a value-add feature of our offering to your company that would be delivered at no charge.

About Crowell & Moring

Crowell & Moring is an international law firm with approximately 550 lawyers representing clients in transactional, regulatory, litigation, and arbitration matters. The firm is internationally recognized for providing innovative approaches to legal and business challenges, as well as creative alternative fee arrangements that demonstrate its personal investment in its clients' success. The firm has also been recognized for its ongoing commitment to pro bono service and diversity. Crowell & Moring has offices in Washington, D.C., New York, Los Angeles, San Francisco, Orange County, London, and Brussels.

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