

6 Client's Use of Information: 6.1 Exchange Requirements for Subscriber Agreements

How Exchange and Vendor allocate responsibility for use and distribution of Information by Client; extent that Vendor is responsible for compliance by Client with Exchange requirements.

- These issues are usually addressed by:

- * The form and content of Subscriber agreement under which Client receives Information.

- * Obligations on Vendor to discontinue supply of Information to certain Clients on request by the Exchange.

Business Consideration: Exchanges, Vendors and above all Clients have a common interest in ensuring that contract requirements for use of Exchange Information by Clients are simple, broadly consistent between Exchanges and interpreted in a broadly consistent manner by Vendors.

Globally consistent Subscriber Agreement terms for Exchange Information would enable Clients to develop standard reporting and compliance systems, improving the efficiency and cutting the cost of market data administration for all parties.

The fundamental Subscriber Agreement requirement is stated with admirable brevity by the New Zealand Stock Exchange contract.

The NZSE contract does not require Vendor-Subscriber agreements to protect the Exchange's right to obtain and audit all information necessary to confirm compliance and assess applicable fees.

With this exception, it provides a brief but comprehensive requirement specification and point of comparison for the more detailed Exchange specifications and requirements. (Sample)

Sample: "The Licensee shall ensure that contracts governing the dissemination of the Information from the Licensee to Subscribers shall not allow the Subscriber to:

(a) do anything which the Licensee has agreed herein not to do; or

(b) further disseminate the information to third parties." -- New Zealand Stock Exchange

Form of Subscriber agreement.

- Current Exchange-Vendor contracts address Subscriber agreements in three ways:
 - Exchange maintains its own Subscriber agreements
 - Exchange approves use of the Vendor's Subscriber agreements
 - Exchange specifies its own Subscriber agreement wording in addition to any Vendor-Client Agreement.

Business Consideration: The main differences between Exchange-specified Subscriber agreements lie in warranties, indemnities, disclaimers and other legal language inspired by local jurisdiction. As noted elsewhere in this guide, many of the assertions and disclaimers in these clauses may not be enforceable in other jurisdictions.

The FISD working group's "Rider C" is an attempt to identify generic, plain language requirements which can:

- * *Protect the essential commercial interests of Exchanges,*
- * *Be incorporated readily into Vendor's Subscriber agreements,*
- * *Be enforceable in jurisdictions around the world.*

Generic contents of Subscriber agreement for Exchange Information.

- The FISD working group has identified the following Subscriber agreement terms as necessary to protect the Exchange's interests:
 - To recognize the intellectual property rights asserted by the Exchange in the Information;
 - To recognize that the Information is provided under license from the Exchange, subject to terms agreed with the Exchange;
 - To recognize that the Information is provided for internal use by the Client;
 - To identify the limits within which a Client may redistribute Information to third parties without requiring permission from the Exchange and/or qualifying as an external distributor;
 - To require the Client to provide on request all information required by the Vendor or the Exchange;
 - To allow right of audit by the Vendor, the Exchange or their representatives;

Business Consideration: Vendors and Exchanges share an interest in making clear to Clients that Exchange Information may be subject to rights, rules and requirements in addition to, or different from, those which the Vendor applies to its own services.

There are however major practical disadvantages in maintaining Exchange-specific Subscriber agreement language in Vendor-Subscriber contracts. Neither Vendors nor Clients expect to sign

new Subscriber agreements whenever an Exchange changes its policies regarding Client use of Information.

Exchanges who may wish to review and/or approve language in Vendor-Subscriber agreements relating to their Information face the additional problem of foreign language contracts for overseas Subscribers.

Exchanges who want a more specific commitment that Subscriber agreement terms protect their interests have until recently had little option other than to take responsibility for their own Subscriber agreements or addenda to Vendor-Subscriber agreements.

Maintaining and updating separate Subscriber agreements while ensuring that all Subscribers are treated equally is beyond the resources of most Exchanges.

The additional protections perceived by Exchanges who maintain their own Subscriber agreements need to be balanced against the cost of updating and maintaining their own agreements, the unpopularity of additional paperwork for Clients and the risk that Exchange terms may be challenged and found unenforceable, particularly in overseas jurisdictions.

- Where applicable, to procure or guarantee compliance with Exchange requirements by other members of the Clients Group or the Clients agents or sub-contractors;
- To recognize the right of the Exchange to require Vendor to discontinue supply of the Information;

Business Consideration: The development of Internet services and use of electronic “click-on” agreements highlight the international shortcomings of Exchange-specific terms drafted according to local legal conventions and related to national laws. (See information on Disclaimers and Copyright Notices under Intellectual Property for additional information.)

It is relatively simple for an Internet Vendor to scan each Exchange agreement onto his site. But the result would be such a flood of conflicting and barely comprehensible language as to deter most Subscribers and keep lawyers, consumer affairs groups and regulators gainfully employed for a very long time.

The FISD working group draft, as adopted by Oslo SE and Bourse de Luxembourg among others allows the Vendor to use its own Subscriber agreement wording, provided that the wording

substantially provides specified protections for Exchanges.
(Sample)

Sample: “The Vendor shall take reasonable steps to ensure that its Clients will use the Information in accordance with this Agreement. For that purpose, the Vendor’s Group will substantially provide in the subscriber agreements the terms and conditions outlined....” -- Oslo Stock Exchange, Bourse de Luxembourg (similar wording)

- Intellectual property rights asserted by the Exchange in the Information.

Business Consideration: At its simplest, the Subscriber agreement can require the Client to recognize that the Exchange may assert IP rights, without taking any position on the validity or enforceability of these assertions. (See Intellectual Property for additional information.)

This approach has the advantage of being neutral from a Vendor perspective. The disadvantage for Exchange and Client is that it does not spell out for the Client exactly what rights are being asserted. (Sample)

Sample: “The Vendor shall take reasonable steps to ensure that its agreement with Clients:

* Recognizes that the (Oslo SE) may assert intellectual property rights in the Information;”

“The Vendor’s Group will substantially provide in the subscriber agreements with Clients that each Client:
...may not delete any copyright or proprietary notice contained in the Information.” -- Oslo Stock Exchange

Business Consideration: As noted in Intellectual Property, some Exchanges seek to assert IP rights via their market data contracts, whether or not those rights already exist by operation of law. These Exchanges usually require their IP assertions to be specified in Subscriber agreements, either via an Exchange-Subscriber agreement or an Exchange addendum to the Vendor-Subscriber agreement, as with the Uniform Subscriber Addendum (USA) used by the CBOT. (Sample)

Sample: “Subscriber acknowledges and agrees that each of the exchanges has exclusive and valuable property rights in and to its own Market Data, that such Market Data constitute valuable confidential information, trade secrets and/or proprietary rights of

each of the exchanges, not within the public domain, that such Market data shall remain valuable confidential information, trade secrets and/or proprietary rights of each of the exchanges at least until the exchanges place their respective Market Data in the public domain or authorize placement of their respective Market Data in the public domain, and that, but for this Addendum, Subscriber would have no rights or access to such Market Data.” -- Uniform Subscriber Addendum

Business Consideration: Where IP rights are spelled out in Subscriber agreements and/or addenda specified by the Exchange, either the IP rights assertion or the definition of Information or both may be wider than as specified in the Exchange-Vendor contract.

Business Consideration: For example the definition of Market Data in the USA, unlike that in the CBOT Vendor Agreement (see contract definitions above), is not limited to information received from the Board of Trade. (Sample)

Sample: “With respect to Subscriber’s obligation under this Addendum, Market Data includes information, data and materials that are derived from the foregoing and that convey information to Subscriber that is substantially equivalent to Market Data.” -- Uniform Subscriber Addendum

Business Consideration: Differences in definitions between Exchange-Subscriber Agreements and Exchange-Vendor Agreements may also mean that the Exchange’s assertion of IP and other rights is more limited in Subscriber agreements than it is in Vendor agreements.

Business Consideration: Clients may find that the Vendor’s own Subscriber agreement asserts rights and obligations to the Information as part of the Vendor’s service. The Vendor may, for example, restrict the authorized use of Exchange Information to users of other elements of the Vendor’s service.

- Recognition that the Information is provided under license from the Exchange, subject to terms agreed between the Vendor and the Exchange.

Business Consideration: It is common for Vendor and Exchange to ensure that this point is made in Vendor-Subscriber agreements, without specifying the exact terms under which Exchange Information is available.

Vendors, Exchanges and Clients in FISD have acknowledged a common interest in clarifying Exchange Information policies and compliance requirements. FISD is leading a project to collect plain language statements of Exchange Market Data Policies and to make them readily available in database form. (Sample)

Sample: “ The Vendor shall take reasonable steps to ensure that its agreement with Clients...

* Recognizes that the Information is provided subject to terms of an agreement with (Oslo SE)." -- Oslo Stock Exchange

Business Consideration: Each occasion on which Exchange-specified Subscriber agreement text makes specific references to Exchange–Vendor agreements creates an additional requirement for the Exchange to ensure it keeps Vendor and Subscriber agreements in line with each other. (Sample)

Sample: “Whether or not a particular exchange has placed its Market Data in the public domain or has authorized the placement of its Market Data in the public domain shall be determined according to the terms of such exchange’s agreement with Vendor...” -- Uniform Subscriber Addendum

- Recognition that the Information is provided for internal use by the Client.

Business Consideration: At a minimum, the Exchange –Vendor contract may require no more than an undefined reference to “internal use”, with or without a recognition that this includes redistribution within the Client’s Group.

Again, the problem with this approach, while it is convenient for Vendors and Exchanges, is that in the absence of a clear statement from the Exchange, the Client does not know what internal use(s) are allowed or how they qualify for fees and reporting requirements. (Sample)

Sample: “The Vendor shall take reasonable steps to ensure that its agreement with Clients:

Provides for the Clients obligation to use the Information for its internal business use.” -- Oslo Stock Exchange

Business Consideration: As noted under Contract Definitions, Exchanges such as Nasdaq maintain separate forms of Subscriber agreement for different types of internal use. (Sample)

Sample: See Contract Definitions for additional information.

Business Consideration: Where the Exchange chooses to incorporate specific text on internal use in its Subscriber Agreement it runs the risk that its contract language will fail to take account of new technology and fall behind accepted policies -- for example on unit of count and/or mobile use. (Sample)

Sample: “Subscriber will use Market Data only for its own internal business activities and only at the offices and locations and on the Devices designated by Subscriber in writing to Vendor from time-to-time. Subscriber agrees that it will not communicate or otherwise furnish, or permit to be communicated or otherwise furnished, the Market Data, in any format, to any other party or any office or location other than that designated above,” --
Uniform Subscriber Addendum

Sample: “The Distributor undertakes...to include in the agreements he concludes with...Subscribers a clause under the terms of which the Subscriber undertakes not to redistribute or retransmit all or some of the (Information) to any individual or entity...Or in-house beyond the premises where the Subscriber’s information receives (Information) directly from the Distributor.” -
- Paris Bourse

Business Consideration: Industry participants have a common interest in making contract language flexible enough to be informative without becoming obsolete and providing more detailed policy guidance in a form that can be readily updated to meet new situations.

- Identifying the limits within which a Client may redistribute Information to third parties without requiring permission from the Exchange and/or qualifying as an external distributor.

Business Consideration: Limits on the Subscriber’s rights to use redistribute Information may be set out in a “Scope of Use” addendum to the Exchange–Vendor contract. (Sample)

Sample: “To permit Subscribers to use the Information and to:

- * Re-distribute any amount of the Information to any end user within the Subscriber’s Group;
- * Re-distribute an insubstantial amount of the Information to any third party;

* Re-distribute any amount of the Information to any third party in the form of charts or graphs;

* Re-distribute any amount of the Information to any client or potential client of the Subscriber by way of illustration to or in connection with research materials (whether in hard copy or electronically); and

* Re-distribute any amount of information derived from the Information to any third party (provided that such derived information could not reasonably be used as a direct substitute for more than an insubstantial amount of the Information).” -- Primark

- Many Exchanges specify, either in their Vendor contracts, their Subscriber agreements or both, that the Client is absolutely prohibited from redistributing any Information to third parties without the prior permission of the Exchange.

Business Consideration: Taken by itself, this kind of restriction would prevent a Client from, for example, advising its own customers of the current price of a listed instrument as displayed in the Information on the Client’s screen. (Sample)

Sample: “Any use of the Information, whether by Vendor or by its Subscribers, including but not limited to, retransmission or reprocessing by a Subscriber, unless expressly described in Attachment A and approved by Nasdaq, is prohibited.” -- Nasdaq

Business Consideration: Such a ban would be extremely difficult to enforce. However, the Exchange may modify a total ban by granting exceptions in its own Subscriber agreements or policy statements. (Sample)

Sample: “Subscriber may, on a non-continuous basis, furnish limited amounts of the information and data received through and from the (Nasdaq) Service to individuals or entities in written advertisements, correspondence, client reports, or other literature; or during voice telephonic conversations not entailing computerized voice, automated information enquiry systems or similar technologies.” -- Nasdaq Workstation II Subscriber Agreement

- Many Vendor-Subscriber agreements, like those of Nasdaq, allow redistribution for “limited extracts.” This means that occasional references to data from the Vendor’s service included in Client’s regular business communications with third parties may not be regarded as redistribution.

Business Consideration: Exchanges who agree that their Information may be marketed under the Vendor's terms and conditions effectively accept whatever "limited extracts" wording may exist in the various Vendor-Subscriber agreements. These vary considerably both between Vendors and for the same Vendor between different generations of Subscriber agreement.

Business Consideration: References to limited extracts redistribution in Exchange Subscriber agreements or addenda also vary considerably. (See Contract Definitions for additional information.) (Sample)

Sample: "Subscriber may, in the regular course of its business, occasionally furnish, to each of its customers, branch offices, and guaranteed introducing brokers, in a quantity restricted to that necessary to enable subscriber to conduct its business, a de minimis number of segments of Market Data. Such re-dissemination must be strictly limited to telephonic communications not entailing the use of computerized voice synthesization or any other technology and must be strictly related to the trading activity of Subscriber or any such recipients." -- Uniform Subscriber Addendum

Business Consideration: The Exchange may further restrict "limited extracts" redistribution rules by applying extra obligations on this form of communication of data. (Sample)

Sample: "Any such recipients must be advised by Subscriber that such segments are proprietary and confidential information not to be disclosed or disseminated to other persons or entities." -- Uniform Subscriber Addendum

Business Consideration: Until recently there were very few occasions on which limited extracts redistribution raised any questions of major commercial significance for Exchange Information. With the arrival of the Internet this situation has radically changed.

Virtually every Client now has the technical ability to distribute information on its web-site; any third party may have the ability to collate and sell information services from information already available on the net.

Exchanges, Vendors and Clients who have an interest in protecting and marketing their own valuable property on the Internet

generally recognize a common interest in finding effective ways to discourage or restrict redistribution of a nature that will undermine that value.

The difficulty is defining limited extracts in ways that will be enforceable and generally acceptable in the context of the Internet.
(Sample)

Sample: “The Vendor’s Group will substantially provide in the subscriber agreements with Clients that each Client:

* May only redistribute limited extracts (i.e. purely ad hoc and insubstantial extracts of real-time Information, provided that any such redistribution complies with any and all of the following requirements:

- Is not continuous
- Does not constitute updating in real-time
- Is made on either infrequent or irregular basis
- Is incidental to the purpose of principal business
- Cannot be used as a substitute for any (Vendor’s) Service or any substantial part of it
- Has no independent commercial value
- Is not separately charged for

* is not made in connection with commercial information broking, information vending, publishing or credit rating, nor for substantial reproduction through the press or media, nor for transmission via any private or public network, cable or satellite system.” -- Oslo Stock Exchange, Bourse de Luxembourg (similar wording)

- “Limited extracts” redistribution.

Business Consideration: The definitions in FISD working group’s Rider C are based on input primarily from European Exchanges and Vendors in mid 1998. They have been incorporated into contracts by Bourse de Luxembourg and Oslo SE among others.

They leave a number of key issues unresolved or based on subjective assessments. In particular they are aimed at redistribution which is incidental to a business use but not for “commercial information broking”. Contrast this with the London SE contract (see definitions above) under which limited extract redistribution is limited to Subscribers in the investment services business - which on LSE’s definition excludes all non-professional Subscribers.

- Client redistribution of delayed data.

Many Exchanges provide either in their Vendor or Subscriber agreements that Information delayed by a period specified by the Exchange is free from all redistribution restrictions or fee obligations.

Business Consideration: Many Exchanges argue that allowing free access to delayed data is the cleanest and easiest means of safeguarding the fees and redistribution restrictions they apply to real-time Information.

These Exchanges also sometimes argue that promoting and endorsing the use of real-time Information, rather than policing the use of delayed Information, is the best means of developing their market data business.

Exchanges that apply redistribution restrictions and contract obligations both to real-time and delayed Information may argue that their approach to delayed data brings in extra fees. Executing redistribution contracts with delayed data Vendors may also help Exchanges develop new real-time data distribution prospects.

Some Exchanges also argue that they are compelled to police the display of delayed as well as real-time Information – with the implication that they need a framework of fees, contracts, reporting requirements and redistribution restrictions to do so.

Exchanges, Vendors and Clients all need to consider whether the benefits of applying contracts, fees, reporting requirements and redistribution rules to delayed data outweigh the increased difficulties and potential risks of enforcing these terms equitably in all jurisdictions.

The FISD working group's Rider C accommodates either option with sample contract text.

Business Consideration: The Oslo SE has used the FISD working group's text to reflect a policy under which delayed Exchange Information is subject to the same Subscriber usage restrictions as real-time data, but is not subject to fees or reporting requirements. (Sample)

Sample: “Redistribution of Delayed Information by Clients is also subject to (restrictions for limited extracts)

“Access Fees will be calculated...on the basis of ...Accesses to real-time Information (as reported).” -- Oslo Stock Exchange

- Some Exchanges make clear in their Subscriber agreements that certain types of Information (e.g. NYSE last sale data) cease entirely to be Market Data for the terms of the Agreement after a delay period specified by the Exchange.

Business Consideration: Where delayed data ceases entirely to be Information for the purposes of the Subscriber agreement the Exchange may be unable to require Clients to meet display and reporting requirements for the delayed data.

- Clients may be generally restricted from competing either with Vendors or Exchanges.

Business Consideration: Some Exchange- specified Subscriber agreement text requires a specific representation that the Subscriber will not use the Information to compete either with the Vendor or with the Exchange.

The enforceability of these terms may be in question in certain jurisdictions, especially where, as with the Uniform Subscriber Addendum, Market Data as defined is not limited to Information generated by the Exchange. (Sample)

Sample: "Subscriber agrees that it will not use Market Data in any way to compete with the Exchanges or Vendor, nor use the Market Data in any way so as to assist or allow a third party to compete with the Exchanges or Vendor." -- Uniform Subscriber Addendum

- Client required to provide on request all information required by the Vendor or the Exchange.

Business Consideration: The requirement to ensure Clients meet reporting obligations may be phrased in general terms so as to allow for variations in reporting requirements.

The main difficulty with this requirement is to ensure that Clients are not required to face (nor Vendors to enforce) onerous or unnecessary demands for information. (Sample)

Sample: "The Vendor shall take reasonable steps to ensure that its agreement with Clients:

* Requires the Client to provide on request all information requested by the Vendor or (Oslo SE) to invoice applicable fees or monitor compliance with agreements." -- Oslo Stock Exchange

Business Consideration: In particular there has been strong objection from Client groups where Exchanges or Vendors have attempted to obtain market research information as part of contractually binding reporting requirements.

The development of Internet services providing Information to millions of personal Subscribers has focused greater attention on information collected from Subscribers and personal privacy.

Some Exchanges already specify that Vendors must collect far more information from Internet Subscribers than is required to monitor compliance for non-Internet services. . (See Paris Bourse and Warsaw Stock Exchange Sample under Vendor's Use of Information for additional information.)

Other Exchanges have definitions of Non-Professional User which would require a great deal of personal information to verify -- and make Vendors liable to substantial claims for lost fees in the event of error.

- Responsibility for interpreting information from Clients.

Business Consideration: With the signal exception of Non-Professional User statements (which will be addressed in part 2 of this Guide), reports collected by Vendors from Clients on behalf of Exchanges are usually limited to access numbers and location details which need little subjective interpretation. (See next issue on Vendor's Reporting Obligations for additional information.)

- Vendors are not usually obliged to interpret information and exercise judgement on behalf of the Exchange.

Business Consideration: The best known exception is perhaps the CBOT datafeed surcharge. In this case the Vendor's responsibility is limited to making reasonable efforts and the Exchange must be consulted before any challenge to the Client's characterization of its datafeed/network environment. (Note CBOT has announced the end of this requirement.)

It is now generally accepted that where interpretation of Client reports or the exercise of judgement is required, for example to determine applicable fees, the best approach is for the Exchange to deal directly with the Client. (Sample)

Sample: "Vendor or Subvendor shall use reasonable efforts to obtain from each of its Subscribers the following:

i) If applicable, the type of Datafeed/Network environment (i.e., either Controlled or Open) in which its Subscriber operates;
ii) If applicable, a description of Subscriber's Technical Controls to demonstrate to Board of Trade's satisfaction that Subscriber's system comports with Board of Trade controlled Datafeed/Network Environment criteria;" -- Chicago Board of Trade

Business Consideration: However, the other side to this principle, which is equally valid, is far more rarely applied. Exchange-Vendor Agreements should aim to avoid requirements for the Vendor to exercise judgement in dealings with Clients.

Where exercise of judgement is unavoidable, Vendors may be expected to seek:

- * Clear, comprehensive and workable parameters*
- * Recognition that Vendor is not liable for good faith errors of judgement.*

- To allow right of audit by the Vendor, the Exchange or their representatives.
To date very few Exchanges (or Vendors) exercise existing rights to audit Client sites.

Business Consideration: In theory, a co-operative approach to audits would allow Clients to develop ways of making wider legitimate use of Information, would help Vendors and Exchanges ensure their contracts developed in line with the latest Client requirements and would enable all parties to develop more efficient reporting and payment approaches.

- All parties generally agree that in most cases the Client now has ultimate control over use of Information. This means that Exchanges, like Vendors, are now seeking to secure in Subscriber agreements the right to audit Client use of Information -- and looking for practical ways to exercise their audit rights.

Business Consideration: In practice, Exchange audits of Vendors have often been the cause of contentious disputes based on alternative contract interpretations. The FISD Data Audit Code of Practice was developed to promote a more co-operative approach that could be extended to Client sites. (Sample)

Sample: "The Vendor shall take reasonable steps to ensure that its agreement with Clients:

- * Allows rights of audit by the Vendor, (Oslo SE) or their appointed representatives;" -- Oslo Stock Exchange*

Business Consideration: Most Exchanges have little experience of auditing Client sites. The majority has:

- a) Accepted Vendor's representations, or*
- b) attempted to hold Vendors responsible for the completeness and accuracy of reports of Client's use of Information, or*
- c) depended primarily on prior approval procedures and descriptions of controls at Client sites, rather than on verification of whether the controls were working in practice.*

Of these approaches, (a) is becoming less acceptable to Exchanges and (b) less acceptable to Vendors. Prior approval is increasingly recognized as providing little assurance that controls as described are actually operating.

- Where applicable, Vendor may be required to procure or guarantee compliance with Exchange requirements by other members of the Client's Group or the Client's agents or sub-contractors.

Business Consideration: See Parties Allowed to Use Information under Contract Definitions for additional information. (Sample)

Sample: "In case a Client enters into a subscriber agreement with the Vendor on behalf of the Client's Group, the Vendor shall provide in any such subscriber agreement that the Client will be responsible for the good performance by any entity of the Client's Group, as well as any agent or sub-contractor, of any obligation under this Agreement stated to be in relation to a Client." -- FISD working group draft

- To recognize the right of the Exchange to require Vendor to discontinue supply of the Information.

Business Consideration: The usual reason for an Exchange to require Vendor to discontinue supply is a breach of contract by the Client affecting the Exchange's Information, whether delivered by the Vendor in question or by other means. Other reasons may include requirements of regulators or operational factors connected with protecting the Exchange's systems.

These may be made clear in the Exchange's Subscriber agreement text. (Sample)

Sample: "This Agreement may be terminated by:

- a) Either party, upon not less than (15) days prior written notice to the breaching party, unless, if the breach is capable of being cured, the breach is cured within the notice period;
- b) Nasdaq, immediately, in the event the Subscriber becomes insolvent...
- c) Nasdaq, immediately, in the event that the subscriber is not permitted to receive or Nasdaq is prevented from disseminating the Service...or any representation, warranty or certification made by the Subscriber is, as of the time made or furnished, false or misleading; or that Nasdaq, in its sole discretion, determines that any failure on the part of the Subscriber to comply with the Agreement has or is likely to have an adverse impact on the operation or performance of the System or Service or on the market
- d) Nasdaq, upon not less than fifteen (15) days notice, in the event that any representation, warranty or certification made by Subscriber in the Agreement or in any other document furnished by Subscriber becomes untrue or inaccurate and is not made true or accurate within the notice period.
- e) Nasdaq, upon not less than ninety (90) days prior written notice, should it determine that it will cease providing the same class of Service to all other eligible individuals or entities that were receiving the same class of Service as Subscriber.” -- Nasdaq Workstation II Subscriber Agreement

Business Consideration: Alternatively, the Exchange’s Subscriber agreement text may reserve the widest possible powers to direct Vendor to discontinue supply. (Sample)

Sample: “the Exchanges... retain the right to direct Vendor to terminate any Subscriber’s receipt of Market Data for any reason or no reason, in which event the Exchanges shall so notify Vendor and Vendor shall cease providing Market Data to Subscriber as soon as practicable.” -- Uniform Subscriber Addendum

Business Consideration: Exchanges which reserve broad rights in their Subscriber agreement text may have their powers to order cessation of supply limited by the terms of their contract with Vendors. (Sample)

Sample: “...if Subscriber continues to receive Market Data without authorization from Board of Trade or otherwise fails to comply with Board of Trade policies on Market Data within fifteen (15) days after being notified of its non-compliance, Vendor or Subvendor shall terminate the non-complying Subscriber’s access

to Market Data as soon as practicable, if so directed by Board of Trade.” -- Chicago Board of Trade

Business Consideration: The FISD working group’s Subscriber agreement requirements relate the power to order cessation to whether the Client agrees to the Subscriber agreement terms required by the Exchange -- rather than whether the Client subsequently complies with the terms. This appears to be a drafting error. (Sample)

Sample: “The Vendor further acknowledges that (Oslo SE) has the right to require the Vendor to discontinue the supply of Information to any Client who does not agree to the above terms.”
-- Oslo Stock Exchange

6 Client's Use of Information: 6.2 Discontinuation of Usage and Lead Times

Exchange rights to require Vendor to discontinue supply of Information to Client who fail to meet obligations, plus any procedures and notice periods associated with this type of termination.

- Exchange–Vendor contracts usually reserve the Exchange’s right to require disconnection by the Vendor of any Client that does not agree to the Exchange’s requirements or comply with them. Very few contracts specify procedures regarding the exercise of this right.

Business Consideration: It is generally recognized that Exchanges must have discretion to order the suspension of supply of Information. Vendors have concerns that their own business relationships with Clients may be damaged if they are required to discontinue supply of Information as a result of disputes which may not directly concern them. They may also wish to ensure that all sources of Information are treated equally in the event of a dispute between the Exchange and a Client, and all parties notified in the event that the ban on supply of Information is lifted.

In practice most Exchanges do not consider suspending supply of service to Clients for breach of contract except as a last resort following prolonged correspondence in which the Vendor is usually kept informed. So even where Exchanges reserve the right to order immediate termination, these powers are rarely used.
(Sample)

Sample: "(Oslo SE) may at its sole discretion require the Vendor to discontinue the supply of Information to any site for which a Client has failed to meet its obligations under this Agreement stated to be in relation to a Client.

In such cases:

- i) (Oslo SE) must provide 10 (ten) days prior notice of disconnection date in writing to Vendor and to the Client concerned;
- ii) The period of disconnection must be clearly stated. If disconnection is open-ended, (Oslo SE) must inform the Vendor as soon as the ban on supply of Information is lifted," -- Oslo Stock Exchange

Business Consideration: If the Vendor disconnects Information from a Client on instructions from the Exchange which have no

good reason, the Vendor may face claims from the Client or losses such as the refusal by the Client to pay Vendor's Subscription for the period the Information is not available.

Such losses or claims may far exceed the value of the Information itself or of any sum in dispute between the Exchange and the Client.

Vendors may seek indemnity from Exchanges for such losses or claims. Exchanges are usually reluctant to provide them. The FISD working group draft provides sample text should such an indemnity be agreed. (Sample)

Sample: "iii) (Oslo SE) will not under any circumstances indemnify the Vendor for any loss or claim, including without limitation unpaid fees or Service subscriptions arising as a result of the disconnection." -- Oslo Stock Exchange

Business Consideration: Oslo SE has used the draft text to make clear that no such indemnity is provided under any circumstances.

9 Confidentiality: 9.1 Confidentiality Agreement

Protection of confidential information disclosed under the contract.

- Confidential information relevant to an Exchange contract might include, for example:
 - The terms of the contract itself (although this is unusual where Exchanges seek to demonstrate that all contract partners are treated without discrimination),
 - Reports required by the Exchange from the Vendor under the contract,
 - Descriptions of Vendor or Client organization, systems, networks, products and product proposals, required by the Exchange under the contract,
 - Books and records of Vendor or Client inspected by Exchange representatives under contract audit provisions.
 - Personal information, including contact details etc, for employees or other individuals associated with any party involved by the agreement, including individual Subscribers.
 - Plans and proposals of the Exchange relevant to the Information feed disclosed to Vendors and/or Clients for product support purposes prior to public disclosure

Business Consideration: The reporting and product approval provisions in Exchange contracts may bring Exchange staff into contact with information of great commercial sensitivity.

Vendors and Clients usually provide this information on condition that it is not passed on to third parties without their prior permission, and is not used by the Exchange for any purpose other than the purpose specified in the contract. (Sample)

Sample: “Each party acknowledges that information of a confidential nature relating to the business of the other may be disclosed to it under this Agreement. Each party undertakes to hold such information in confidence and not, without the consent of the other, disclose it to any third party nor use it for any other purpose other than in the performance of this Agreement.” -- Oslo Stock Exchange, Reuters, Bourse de Luxembourg (similar clause)

Business Consideration: Exchanges may also provide confidential information to Vendors and Clients -- for example of forthcoming new feeds or changes to the Information or to fees structures -- so as to ensure that the industry is prepared to make best use of the new developments.

Confidentiality clauses are usually drafted so as to apply equally to both parties. They may also include specific references to protect the confidentiality of Client information and personal information. (Sample)

Sample: “The parties further agree that information disclosed to (Oslo SE) by way of Client’s access declarations or on the occasion of an audit shall be treated as confidential. The confidentiality undertaking under this clause...will be binding for as long as such information retains commercial value.” -- Oslo Stock Exchange

Sample: “Further, it is the Distributor’s duty to ensure that its employees and other persons working on its behalf comply with the undertakings given by the Distributor in this Agreement, in particular confidentiality in view of the nature of the information contained in databases and laws applicable to information concerning identified persons.” -- Paris Bourse

Business Consideration: Contracts may include terms which prevent the Exchange itself from either seeking or using information gathered from Vendors and Clients for any purpose other than monitoring compliance. (Sample)

Sample: “Board of Trade’s right of inspection shall extend only so far as may be necessary to ensure compliance by Vendor or Subvendor with the terms of this Agreement and shall not require Vendor or Subvendor to divulge any of its confidential or proprietary information except to the extent such information is required by Board of Trade to verify proper payment of Fees.

“Any records or information reviewed in connection with this Agreement shall be kept strictly confidential and shall not be utilized in any commercial manner other than in determining compliance with the terms of the Agreement.” -- Chicago Board of Trade

9 Confidentiality: 9.2 Confidentiality Exclusions

Limit on confidentiality obligation in the event that the information becomes public or disclosure is required by law or regulatory authority.

- These are standard circumstances under which commitments to confidentiality are usually waived.

Business Consideration: These circumstances usually apply equally to both parties. (Sample)

Sample: “This obligation of confidentiality will not apply to information that is generally available to the public through no act or omission of the receiving party, or becomes known to the receiving party through a third party with no obligation of confidentiality, or is disclosed by law, court order or request by any government or regulatory authority.” -- Reuters, Oslo Stock Exchange, Bourse de Luxembourg (similar clause)

9 Confidentiality: 9.3 Press Communication Policy

Agreement to consult before any public announcement relating to the contract.

- Parties may seek a right to be consulted prior to release of any public announcement relating to the contract.

Business Consideration: Unless any such commitment is strictly limited it could apply to any public announcement regarding the supply of Information or the use of it by Vendors and Clients.

These arrangements are rare for Exchange Information contracts; they are more common in relation to commercially sensitive contracts for supply of, for example, specialist data services.

The practicality and commercial value of such provisions in relation to standard, globally available contracts for supply of Exchange Information are open to question. (Sample)

Sample: “No public announcement, press release, communication or circular (other than to the extent required by law or regulation) concerning the content of this Agreement will be made or sent by either party without the prior consent of the other. This consent will not be unreasonably withheld.” -- Reuters, Oslo Stock Exchange

1 (a) Contract Definitions

Definitions should ensure that at least the following can be clearly identified:

- The contract documents
- Information subject to the contract
- Permitted uses of the information
- Parties allowed to use the information
- Fees and reporting obligations.

This section of the guide concentrates on these key definitions.

Where definitions of other concepts are essential to the contract they are dealt with in the main body of this guide.

- Definitions are used to achieve certainty and clarity in a contract.
- Definitions need to be broad enough to cover the scope of the contract and cope with changes in technology.

Business Consideration: Definitions and terminology in existing contracts usually reflect the business and legal traditions of the countries in which the contract parties are based. These differ widely around the world.

- Definitions need to be narrow enough to minimize uncertainty and to ensure the contract is enforceable.

Business Consideration: In today's global market all parties to exchange data contracts have an interest in defining key terms in ways which are clear and enforceable in all jurisdictions.

- Too broad a definition may result in the clauses where the defined term is used becoming unenforceable.
- Definitions should not cut across the provisions of the contract in which they are used, or contradict the plain language meaning of the terms defined. (Sample)

Sample: The ECG working group draft text has already been incorporated into many exchange contracts around the world. It is very clearly

reflected in the standard contracts developed by the Oslo SE, Bourse de Luxembourg and Reuters Ltd., which are included in this guide.

The Oslo SE, Bourse de Luxembourg and Reuters have at times chosen different options from the many available in the FISD working group draft text. On occasion the FISD draft text has been taken to spell out very clearly what the Oslo SE does NOT allow. Paris Bourse has incorporated many concepts and terms from the FISD working group text in a highly distinctive way.

There can be no clearer indication of the value of the FISD draft text as an aid in the preparation and negotiation of contracts.

This guide identifies some but by no means all of the many excerpts from the FISD draft text which have been adopted unaltered by both Exchanges and Vendors.

However, the FISD draft text is a consensus document. It is already nearly two years old. It does not address many issues dealt with in more detail (or with greater precision) by individual exchange contracts from Warsaw, London and Paris. On certain issues, notably the question of web-site disclaimers and copyright notices, the efforts of individual exchanges serve primarily to highlight the need for the FISD working group to continue its work.

The extension of this guide to include six new European exchange contracts -- with a guest star appearance from the New Zealand Stock Exchange -- therefore brings a wider and newer perspective. It also shows how much remains to be achieved.

Business Consideration: The balance of clarity and global enforceability was a major factor for the FISD's Exchange Contract Guide Working Group and strongly influenced the draft contract text developed by the FISD working group.

1 (a) Contract Definitions: Contract Documents

- Both parties need to be clear which documents together make up the contract.

Business Consideration: Exchanges need to be able to manage and update their contracts. Both parties have an interest in ensuring that certain elements of the terms and conditions can be changed easily and efficiently, while others may need agreement and/or prior approval.

For ease and efficiency of management, many Exchanges therefore divide up the contract documentation. The parties may agree separate rules or practices for the update of various sections.
(Sample)

Sample: "'Agreement' means these terms and conditions, the License Agreement, the Price List and the Dissemination Requirements." -- London Stock Exchange

1 (a) Contract Definitions: Information (Market Data) Subject to the Contract

- The definition of "Information" is an absolutely critical and often overlooked element of the contract as a whole. It usually determines the Exchange's supply obligation and the payment obligations of Vendors, Clients and redistributors.

Business Consideration: Exchange contract definitions are usually based on information supplied by the Exchange, even though most Exchanges consider data produced by Vendors or users from Exchange data also to be market data. (Sample)

Sample: "Market Data" shall mean any representation that conveys, either directly or indirectly, information and data pertaining to commodity futures and/or options traded on Board of Trade... and which Market Data Vendor receives directly from Board of Trade." -- Chicago Board of Trade

Business Consideration: Information is usually further defined by means of a schedule or description of the data provided. (Sample)

Sample: " 'Information' means Level 1 Information and/or Last Sale Information and/or NQDS Information and includes both Real-Time Information and Delayed Information, as defined herein" -- Nasdaq

- Information is sometimes defined as broadly as possible, in order for example to maximize the scope of fees. In these cases the parties may need to ensure that the Exchange can and will in fact deliver the Information as defined.

Business Consideration: Where schedules are used the contract needs to provide for additions and deletions to the instruments covered by the feed. (Sample)

Sample: "Information: market information described in Schedule 1, as it may be amended from time to time." -- Oslo Stock Exchange, Bourse de Luxembourg

Sample: "Schedule 1: (Exchange product(s) for which the agreement is valid, Applicable Fee Type, Terms of Payment and Point of Access, to be signed by both parties)." -- Oslo Stock Exchange

- Sometimes Information is defined purely in terms of information delivered by the Exchange. Here the parties need to consider the enforceability of clauses regarding intellectual property rights or fees obligations when Information delivered by the

Exchange is processed by Vendors or Clients. (See Exchange Requirements for Subscriber Agreements for additional details.) (Sample)

Business Consideration: Exchange contracts may refer in the body of the contract to information produced by Vendors from data provided by the Exchange. If this reference is limited to certain clauses, rather than included in the overall definition of information it may not be clear whether the definition of Information for other purposes (e.g. fees and reporting) includes Vendor-processed or derived data. (Sample)

Sample: “(Vendor may)...use, store, process, manipulate, reproduce, make available and distribute the Information (which in this clause 5 includes any Information so processed or manipulated).” -- Reuters (See

Business Consideration: Some Exchange contracts refer to their Information “as used” or “as compiled” in the Vendor’s services. It may not be clear from this approach whether data “as compiled” or processed by the Vendor ceases to be Exchange Information for the purposes of the contract. (Sample)

Sample: “The distributor shall be free to use the data only by incorporating the same into its database and redistributing the data as compiled in the distributor's own services to any client. The use of data for other services than real-time terminal display.... Is not covered by the terms and conditions of this Agreement and will require an additional addendum with new conditions.” -- Swiss Exchange

Note - None of the contracts reviewed specifically included client-processed exchange data in information or market data definitions.

Business Consideration: Contracts may keep the definition of Information totally open, by giving the Exchange discretion...

The more open the definition, the more the parties need to consider the enforceability of clauses governing ownership, use and other obligations relating to information included in the market data definition but not actually provided by the Exchange. (Sample)

Sample: “‘Level 1 Information’ means...or alternate information as determined by Nasdaq” -- Nasdaq

Business Consideration: Many contracts contain separate definitions for data (e.g. delayed data, end of day data, limited

extracts of data) which is included in the contract but to which specified rules or obligations do not apply. This approach helps to ensure that obligations set out in the contract remain practical and enforceable.

Sample 1: “Delayed Information: Information respect of which more than X Minutes...have elapsed from the time the Information was first transmitted to the market by the Exchange.” -- Oslo Stock Exchange, Bourse de Luxembourg (similar wording)

Sample 2: “‘Delayed Services’ ...shall mean the information...which ...may be disseminated after at least 15 minutes...or after the end of the trading session” -- Warsaw Stock Exchange

Business Consideration: Some contracts require the Exchange to include all its data in the feed. This may have disadvantages for all parties; it could cause capacity problems for Vendors and Clients, and it may oblige the Exchange to change its entire contract if it wants to make any type of information available under, for example, cheaper or more flexible conditions. Contracts need to be sufficiently flexible to allow the development and marketing on different terms and conditions of new categories of data for new markets. (Sample)

Sample: “ Information: (a) all market information...relating to the instruments traded on the Exchange, together with all supporting information relating to such information...and

(b) all additional information of a similar nature which may be made available to, collected or compiled by the Exchange and/or supplied by the Exchange during the term...” -- Reuters, Bourse de Luxembourg (similar wording)

Business Consideration: Some Exchanges retain broad rights to include information from other sources in their feed. This gives them the flexibility to market a wide range of information through their existing contract structure. (Sample)

Sample: “Instantaneous Market Feed...may also include securities market information generated by the computerized or non-computerized trading systems of other markets.” -- Paris Bourse

1 (a) Contract Definitions: Permitted Uses of the Information

- Definition of Distribution

Business Consideration: Contracts usually recognize that a certain amount of processing is required in order to distribute data within information services. The extent of processing allowed is usually covered in the main body of the agreement. An alternative approach is to include the permitted level of processing in the definition of Distribution. (Sample)

Sample: “ For the purposes of this agreement the expression ‘to distribute’ means the right of the distributor to use, process and reformat the data and thereafter to distribute the same as compiled in the distributor’s own database service(s) to its clients through electronic communication links.” -- Swiss Exchange

- Most contracts recognize the difference between:
 - Use of data for distribution to third parties as part of commercial information services and
 - Use of data within an organization as part of other trading or management activities.

Business Consideration: This distinction may be defined either as internal or external distribution or in terms of Information Vendor and Information User. The basic differences between these uses in most contracts are:

- *External distribution (Vendor) contracts often involve reporting, fees and other obligations relating to third party Subscribers,*
- *External distribution (Vendor) usually involves fees and reporting waivers for Vendor’s in-house use of data in connection with vending.*
- *Internal distributor (Subscriber) contracts usually involve a ban on redistribution of data to third parties.*

- Many Exchanges maintain different data contracts for internal and external distribution of data.

Business Consideration: Exchanges usually provide statements of policy or other guidance governing which Exchange contract is applicable. (Sample)

Sample: “An internal distributor is a firm that uses Nasdaq market data within the confines of its organization only. To become an approved internal distributor the Nasdaq Data Feed Agreement and Data Feed Questionnaire must be properly completed and

submitted to Nasdaq for prior approval.” -- nasdaqtrader.com (Distributor Agreements)

Sample: “An external distributor may also provide Nasdaq market data to outside third parties. To become an approved external distributor, the Nasdaq Vendor Agreement must be properly completed and submitted to Nasdaq for approval.” -- nasdaqtrader.com (Distributor Agreements)

- In practice the distinction between internal and external distribution is becoming increasingly blurred as “internal distributors” seek the right to include extracts from market data on their websites and/or in electronic communications with Clients.

Business Consideration: Many Exchange agreements define categories of Exchange data (e.g. delayed data, limited extracts of data) which can be redistributed to third parties by Internal Distributors without the need for prior Exchange permission, fees or reporting obligations. (Sample)

Sample: The “Uniform Subscriber Addendum” to vendor’s subscriber agreements required by CBOT sets out criteria for limited redistribution to third parties of exchange data. (See Exchange Requirements for Subscriber Agreements for additional details.)

Business Consideration: Similar clauses are found in many Vendor-Subscriber agreements. These apply to Exchange data where the Exchange -Vendor contract permits Exchange data to be distributed under Vendor’s standard terms and conditions.

The business rationale for these exemptions is that the cost and risk for an Exchange of trying to enforce an absolute ban on any redistribution of Exchange data by “internal distributors” may outweigh the economic or other gains of maintaining a ban. (Sample)

Sample: “Schedule 6” of the Oslo Stock Exchange agreement includes definitions of limited extracts as developed by the FIRD working group. (See Exchange Requirements for Subscriber Agreements for additional details.)

Business Consideration: Some Exchanges restrict even the most limited form of redistribution to particular types of customers such as brokers or those giving investment advice. This approach also means that Non-professional users have no rights to redistribute even limited extracts. (Sample)

Sample: "Customers may however be permitted by the Vendor to:

(a) Reproduce excerpts from the Data in printed documents (or such other means as the Exchange may approve in writing), for distribution to clients or potential clients. In cases where the Customer carries on investment business within the meaning of the Financial Services Act 1986 or is required to be regulated or supervised by a body concerned with the regulation or supervision of investment or financial services;" -- London Stock Exchange

- Vendor's Service

Business Consideration: External distributors permitted use of data may be related to the financial information service(s) they provide.

In most cases the Vendor's service is defined in general terms. This allows the distribution of data irrespective of technology or media, subject to any other terms in the agreement. It minimizes the need to change the contract to cover new forms of distribution. (Sample)

Sample: "Service: Any service provided by the Vendor's Group from time to time in any form, including by way of real-time distribution and/or historic database regardless of the means of access to the database or its delivery to a third party." -- Oslo Stock Exchange, Bourse de Luxembourg (similar wording), Reuters

Business Consideration: In other cases the external (or internal) distributor is not allowed to use Exchange data in any service unless that use has been described, recorded and approved in advance by the Exchange via an exhibit to the contract.

Sample: "'Service' means Vendor's service, including the data processing equipment, software and communications facilities related thereto, for receiving, transmitting and disseminating the Information to Interrogation devices owned and/or controlled by Vendor or its Subscribers, as further described in Attachment A." -
- Nasdaq

- It is increasingly common for users of financial information services to redistribute information outside their organizations, for example by Internet. In addition, Vendors may develop uses of Exchange data for market trading purposes. These companies' use of Exchange data could constitute both internal and external distribution.

Business Consideration: New uses of Exchange data by an “internal distributor” can lead to major new Exchange contract requirements. New internal uses of data by an “external distributor” can lead to major changes in Exchange fees and reporting obligations.

As uses of data become more complex, parties to market data contracts are beginning to question the value and cost of terms, which depend on the purpose for which data is used, as opposed to the type of access to the data.

1 (a) Contract Definitions: Parties Allowed to Use the Information

- Contract definitions should help parties distinguish the classification of users for the various different uses of data.

Business Consideration: Where the Exchange contract is with an external distributor (Vendor) the contract usually distinguishes between those Clients of the Vendor who redistribute the data to third parties and those who do not.

There is also a need to identify for contract purposes Vendors of information who obtain their market data from other Vendors rather than directly from the Exchange. These are usually referred to as Subvendors, Redistributors or Revendors. (Sample)

Sample: “‘Vendor’ shall mean any party or entity who or that (1) receives a direct feed from Board of Trade; and (2) executes a ‘Vendor/Subvendor Agreement’ with Board of Trade, which Agreement entitles Vendor to disseminate Market Data to Subscribers and Subvendors.”

“‘Subscriber’ shall mean any person or entity receiving Market Data from Vendor or Subvendor pursuant to a valid Subscriber Agreement.”

“‘Subvendor’ shall mean any person or entity who or that: (1) receives a direct feed from a Vendor that allows the Subvendor to retransmit market Data to Subscribers; and (2) executes a ‘Vendor/Subvendor Agreement with Board of Trade...’ -- Chicago Board of Trade

Business Consideration: Clients (or Subscribers or End-Users) are usually defined in terms of parties bound by Subscriber Agreement to use the data for internal purposes only. The term “End User “ can sometimes lead to confusion since it is also commonly applied to the individual personal user within a Client firm. (Sample)

Sample: “End-User: Any current or potential client who has signed a subscriber agreement with the Vendor or any member of the Vendor’s Group.” -- Bourse de Luxembourg

Business Consideration: Some contracts specifically allow in their user definitions for Subscriber agreements to allow Clients to redistribute certain categories of data without becoming Redistributors. (Sample)

Sample: “Redistributor: An individual or legal person receiving the Information from a Vendor or another Redistributor for the purpose of redistributing the information to third parties, except as provided under this Agreement. Unless otherwise agreed, any Redistributor shall enter into a separate agreement with (the Exchange), similar to this Agreement.” -- Oslo Stock Exchange, Bourse de Luxembourg (similar wording)

Business Consideration: Some Exchanges make distinctions between Clients who operate internal distribution networks and Clients who receive market data via terminals owned or controlled by Vendors. These distinctions arise primarily where the Exchange uses separate internal distribution contracts for Clients who operate their own networks. (See Exchange Requirements for Subscriber Agreements for additional details.) (Sample)

Sample: “In order to receive a data feed containing Nasdaq information, the applicant must fulfil two basic requirements: (1) execution of the Nasdaq data feed subscriber agreements for internal distribution and (2) submission of an acceptable description of the system that will receive, process, control and internally distribute Nasdaq data.” -- nasdaqtrader.com (Overview to Data Feed Subscriber Agreement)

Business Consideration: Contracts may also include definitions of third parties (sometimes known as delivery agents or service facilitators) who may be involved in the transmission of Information but who do not have the responsibilities of Vendors or Clients. The precise definition of these varies depending on their role regarding the Information. (Sample)

Sample: “‘Third Party’ shall mean any other party, who is not a Vendor or Subvendor but who is in a position to administer a datafeed/network environment and who has the capability to impose Technical Controls on the retransmission of Market Data.” -- Chicago Board of Trade

- Contract definitions usually set out what counts as a Vendor group entity, for the purposes of determining whether a particular use of data is internal or external to the entity.

Business Consideration: Vendor’s group is usually defined in terms of holding company and subsidiaries, but for some parts of the world where legislation requires distribution via local institutions the Vendor’s group is often extended to include these

distributors. Where the definition requires lists of group companies there needs to be provision for amendment of the list. (Sample)

Sample: “Vendor’s Group: Reuters Group PLC, its direct and indirect subsidiaries, including Reuters Ltd., and any third party agents authorized by the Vendor’s group to distribute the Information to the Clients, as listed in Schedule 5. This list may be updated from time to time and updated lists will be available on Reuters Website. Should the Exchange object to any update it shall inform Reuters in writing.” -- Reuters

Business Consideration: Many Exchange contracts specify criteria for the level of control needed over group companies. (Sample)

Sample: “Vendor’s Group: [Vendor’s name, its direct and indirect subsidiaries, including [.....], and any third party(ies) agents duly authorized by the Vendor’s Group to distribute the Data to the End-Users. For the purpose of this definition, a subsidiary means a company in which [Vendor’s name] owns directly or indirectly more than fifty (50) % of the issued share capital and over which it exercises effective control.

A list of the Vendor’s Group members and duly authorized third party(ies) agents is contained in Schedule 5." -- Bourse de Luxembourg

Business Consideration: Contracts may provide for Vendor to appoint a Nominee in relation to various rights and obligations under the contract. (Sample)

Sample: “(Primark) Nominee” means Datastream International Limited.....,or such other member of the Group as (Primark) may appoint from time to time on written notice to Supplier.” -- Primark

- Contract definitions may set out what counts as a Client group entity, for the purposes of determining whether a particular use of data is internal or external to the entity.

Business Consideration: The FISD working group developed a definition of Client’s Group, to cover internal distribution between various subsidiaries of a single end user organization. (Sample)

Sample: “Client’s Group: a Client and its subsidiaries, and any holding company of Client and any subsidiary of such holding company. For the purpose of this definition, a subsidiary means a company in which the Client owns directly or indirectly more than

50%(fifty percent) of the issued share capital and over which it exercises effective control.” -- FIRD working group draft

Business Consideration: An alternative approach with broadly the same aim is to define each Client company as a separate entity and license the Vendor to allow each Client group company to redistribute to other group companies under certain specified conditions. (Sample)

Sample: “Customers may however be permitted by the Vendor to:

(b) provide the data to their wholly owned subsidiaries (provided such subsidiaries do not re-distribute the Data).....For the purpose of this Agreement supply of Data by any Customer to such subsidiary shall be deemed to be redistribution by the Vendor directly to such subsidiary.” -- London Stock Exchange

Business Consideration: Some Exchange contracts specify that companies which share the same holding company but are not themselves directly linked must be treated as separate Clients.

This may be particularly important for Exchanges that maintain tiered price structures per Client group, in order to avoid customers forming holding companies for the sole purpose of consolidating Exchange fee reporting and therefore qualifying for lower fees. (Sample)

Sample: “ Clients owned by a holding company are considered as separate clients or end users.” -- Swiss Exchange

1 (a) Contract Definitions: Fees and Reporting Obligations

- Where fees and reporting obligations exist they are usually detailed either in the body of the contract itself or in schedules to it. References in the definitions section are usually limited to the types of fee applicable and the basis on which fees and reporting obligations may be charged (units of count).

Business Consideration: The most common kind of fee is paid by the Vendor or external distributor to the Exchange, either by way of a license fee or a variable fee based on the number of accesses to the data. It is important in these cases to define units of count so that they are enforceable, verifiable and not rendered obsolete by technological change.

Note that in this example “End User” is defined as a unit of count, rather than as another term for the Client organization. (Sample)

Sample: “Interactive Access: A Device or an End User authorized or allowed by a Client to access and control the display of Information by any means, including without limitation, a password, an identifier, a keyboard or other control device”

“Device: A keyboard or other control device and one or more displays intended for use by one person.”

“End User: An individual authorized or allowed by a Client to access and control the Information in accordance with this Agreement.”

(“Fees will be calculated...on the basis of Interactive Accesses...In a networked environment the unit of count in relation to Interactive Accesses will be the End User and, in a standalone environment, the unit of count shall be the Device.”) -- Oslo Stock Exchange

Business Consideration: Some Exchanges maintain separate prices for “Hand-held Devices”. As the functionality of “palm-top” computers and mobile telephones has increased, “Hand-held devices” need to be defined in terms of functionality as well as size. Even then, the definition risks being overtaken by technological advance. (Sample)

Sample: "Hand-held device...portable device of limited functionality (pager, cellular phone). This device may not be used as a tool to get...data which are subsequently processed." -- Warsaw Stock Exchange

Business Consideration: Some contracts also use the definitions section to clarify data to which fees and/or reporting obligations do not apply, or to which particular fees apply. (Sample)

Sample: “Delayed Information: Information in respect of which more than [] minutes have elapsed from the time the Information was transmitted to the Vendor by the Exchange and which may be distributed to the Clients without incurring information fees to the Exchange.” -- Reuters

Business Consideration: This is particularly important when the contract gives a very specific meaning for fees and reporting purposes to expressions which may be used in different ways elsewhere in the industry. (Sample)

Sample: “‘Real-Time Snapshot Market Data’ shall mean any Market Data for which ten (10) minutes have not elapsed from the time such Market Data was received by Vendor or Subvendor to the time such Market Data was retransmitted by Vendor or Subvendor at not less than ten (10) minute intervals prior to their being refreshed by subsequent Market Data. Retransmission is limited to the communication of real-time market data at a frequency of no more than six (6) times per hour with no less than ten (10) minute intervals between such updates.” -- Chicago Board of Trade

Business Consideration: In nearly all cases there is no obligation on the Vendor to charge the fees to the Subscriber, but there are a small number of exceptions. (Sample)

Sample: “Vendor shall invoice all Vendor Invoiced Subscribers for the fees and other amounts described in this Article IV and shall remit such fees and other amounts directly to Nasdaq in accordance with this Article IV.” -- Nasdaq

Business Consideration: Some Exchange contracts express their variable unit fee as an item to be collected from the Client by the Vendor, but also allow for a sliding scale of fees based on Vendor population. In practice most Vendors would experience administrative problems recalculating their fees to individual customers on this basis. (Sample)

Sample: “Subscribers shall pay the Distributor a variable monthly fee in exchange for receiving (the data) on a real-time basis; The Distributor shall collect such fee from Subscribers...The variable

monthly fee shall be invoiced quarterly by (Paris Bourse) to the Distributor....” -- Paris Bourse

Business Consideration: A number of contracts provide for fees to be paid by the Exchange or retained by the Vendor in respect of the Vendor’s cost of distributing Exchange data and administering Exchange fees and reports. (Sample)

Sample: “Administration Fees: The fees specifiedin respect of the administration by the Vendor’s Group of the Information.” -- Reuters

Next Issue

12 Contract Documents and Interpretation: General Issues

Specification of full and complete version of contract; guide to interpretation of contract.

- Contracts usually set out the form of documentation, which is to be considered a full and complete version of the agreement.

Business Consideration: This usually involves two or more identical copies executed by both parties, any one of which is regarded as an original and complete version of the Agreement. (Sample)

Sample: "This Agreement may be executed in one or more counterparts, which shall each be considered an original, but all of which shall constitute one and the same Agreement." -- Nasdaq

Business Consideration: Contracts may also clarify the significance of article and section headings and references to attachments.

Usually these clauses are for information only and confer no additional rights or obligations. (Sample)

Sample: "The article and section headings used in this Agreement are intended solely for convenience of reference and shall not in any way or manner amplify, limit, modify or otherwise be used in the interpretation of this Agreement. Unless otherwise specified: (i) references to articles, sections, or attachments in this Agreement are references to the articles or sections of, or attachments to this Agreement, and (ii) all references to this Agreement include the Attachments hereto." The Attachments referred to and appended to this Agreement are made an integral part of this Agreement." -- Nasdaq, Bourse de Luxembourg (similar wording)

Business Consideration: Sometimes however, clauses relating to interpretation may confer significant additional obligations, as, for example when knowledge of an event is deemed to include an obligation to inquire into circumstances which would disclose the existence of the event.

This kind of interpretation clause may in certain circumstances oblige the Vendor to police compliance by Clients with obligations to the Exchange, whether or not there is a specific obligation in the contract for the Vendor to do so or provision in the Exchange's Subscriber agreement for the Vendor to be allowed to do so. (Sample)

Sample: “For purposes of this Agreement, a party shall be deemed to have knowledge of an event or circumstance if such party has, or ought to have on the basis of such party’s obligations hereunder, knowledge of such facts as would reasonably cause the party to inquire about such event or circumstance, where such inquiry would disclose the happening or existence of such event or circumstance.” -- Nasdaq

12 Contract Documents and Interpretations: Schedule 1 Information

Information Supplied Under Contract

Specification of the Information to be supplied in terms of types of Exchange instrument (equities, bonds etc) and types of data (best bid/offer, indicative prices, indices etc.)

Business Consideration: Both parties might find it useful for the latest specification of Information to be available on a Website maintained by the Exchange. See Contract Definitions for additional information.

12 Contract Documents and Interpretations: Schedule 2 Premises

Premises to which Information is supplied by the Exchange.

Business Consideration: This is usually a minimum requirement for audit trail purposes. Exchanges may require more detailed descriptions of Vendor's systems, products and controls. See Permitted Uses of Information under Contract Definitions.

12 Contract Documents and Interpretations: Schedule 3 Technical Specifications

Technical Specification for transmission of Information or interface to Exchange's system.

Business Consideration: Both parties may find it useful to refer to a location on the exchange's Website where the most current specification is maintained. (Sample)

Sample: "This Attachment B consists of the most current specifications for Nasdaq system transmission for Level 1 Service, Last Sale Service, and NQDS Service, copies of which are available on www.nasdaqtrader.com." -- Nasdaq

12 Contract Documents and Interpretations: Schedule 4 Vendor's Group and Distributors

Vendor's group companies and authorized third party distributors.

Business Consideration: The contract may provide that the latest specification of Vendor's Group will be available on a Website maintained by the Vendor. In this case the onus may be on the Exchange to keep changes under review and advise Vendor of any objections. See Contract Definitions for additional information.

Exchange Contract Guide

The Exchange Contract Guide is a reference site for the development of new exchange contracts.

The Guide is an initiative designed to define and publish a common legal and commercial framework as the starting point for contract negotiations among exchanges, vendors and client firms.

11 General: 11.1 Entire Understanding

Confirmation that the contract is the entire understanding of the parties, and supersedes all other agreements, relating to supply of the Information.

- Contracts usually set out standard acknowledgements that the document reflects the entire understanding of the parties and supersedes all prior understandings or agreements relating to the provision of the Information.

Business Consideration: The parties should consider the effect of this clause on earlier contracts, side letters, correspondence and any current practices which are assumed to be accepted but are not reflected in the contract. (Sample)

Sample: “This Agreement constitutes the entire understanding of the parties with regard to the subject matter hereof and it supersedes all proposals, representations or prior agreements, whether oral or in writing, relating to the provision of Information.” -- Bourse de Luxembourg (similar clause)

Business Consideration: This clause may also render public statements of Exchange practice or Market Data Rules invalid and/or unenforceable to the extent they are not reflected in or referred to by the contract.

Business Consideration: The parties may seek to exclude terms implied by law, to the extent they can be excluded by contract. This kind of exclusion may affect the rights of third parties, not least Subscribers. (Sample)

Sample: “This Agreement constitutes the entire understanding of the parties regarding the Information to the exclusion of any terms implied by law which may be excluded by contract.” -- Reuters

Business Consideration: The parties may also wish each other to confirm that they have not entered into the contract on the basis of any inducement or representation not expressly incorporated in the contract. (Sample)

Sample: “Each party acknowledges that it has not been induced to enter into this Agreement (except in the case of fraud) by any representation, warranty or undertaking not expressly incorporated into it.” -- Reuters

11 General: 11.2 Assignment

Rights of either party to assign the contract. Contracting parties typically wish to be able to assign to their successor with their group.

- Further assignment would usually require the other party's consent.

Business Consideration: Exchanges may wish to prevent assignment of contracts, even within a group to parties with whom they have been in dispute, for example where an Exchange has had occasion to disconnect supply to the party in question or has required other Vendors to do so.

Vendors may wish to prevent the Exchange from assigning the contract to competitors or potential competitors of the Vendor or to other parties that might benefit commercially from access to the Vendor's reports. (Sample)

Sample: "This Agreement is not assignable by either Party without the prior written consent of the other Party hereto. Any attempt to assign this Agreement without the other Party's prior written consent shall be deemed an act of default." -- Chicago Board of Trade

Business Consideration: Contracts may hold that requests to assign the contract should not be unreasonably denied.

Parties may also seek to reserve their own freedom to assign while setting conditions for the other party. (Sample)

Sample: "Vendor shall not assign this Agreement without the prior written consent of Nasdaq. Nasdaq agrees not to unreasonably withhold its consent to an assignment by Vendor provided that:

- a) Such assignment would not adversely affect Nasdaq and would not cause any of the Corporations to be in violation of applicable law or regulations; and
- b) Such assignment is to (i) a successor corporation of Vendor by operation of law, merger or consolidation or (ii) an entity acquiring substantially all of the assets of Vendor or an affiliate controlling, controlled by, or under common control with Vendor, and Vendor unconditionally guarantees the payment and performance by such entity or affiliate of all obligations under this Agreement.

Nasdaq shall be free to assign this Agreement to one or more of the Corporations or to any person as security for or in connection with the borrowing of monies." -- Nasdaq

11 General: 11.3 Contract Amendments

Description of the validity of amendments to contracts.

- Parties usually want change controls (e.g. contract can only be changed in writing and by authorized individuals).

Business Consideration: The pace of change inspired by new technology and business relationships means that all contracts face rapid obsolescence in the absence of an agreed structure for changes.

Business Consideration: A formal structure for contract change management and communication is essential if Exchanges are to meet obligations to treat all contract partners equally. At one extreme, the Exchange may have total discretion to change any contract terms, giving the Vendor no recourse apart from a right to terminate. (Sample)

Sample: “The Exchange may amend this Agreement at any time on two months written notice. In the event that the Vendor considers any such amendment to be unfavorable it may terminate this Agreement on the date the amendment comes into effect, provided it gives the exchange notice in writing within one month of the date of the Exchange’s original notice.” -- London Stock Exchange

Business Consideration: It is more common for contracts to require all changes to be agreed in writing by both parties. (Sample)

Sample: “Unless otherwise provided in this Agreement, no variation or modification to this Agreement will be valid unless mutually agreed in writing and signed by both parties.” -- Bourse de Luxembourg (similar clause)

Business Consideration: Some Exchange contracts aim to strike a balance between efficiency and consultation by providing that certain parts of the agreement, such as price schedules, detailed reporting requirements etc, may be changed at the Exchange’s sole discretion. (Sample)

Sample: “(Oslo SE) reserves the right to make amendments to (Schedules covering;

- * Reporting requirements
- * Contracting parties and payment details

- * Vendor's Group and authorized distributors
- * Exchange IT services and support commitments
- * Web-site disclaimer and copyright notice requirements
- * Subscriber agreement requirements)

At its sole discretion giving the Vendor the applicable prior written notice set forth in this Agreement.” -- Oslo Stock Exchange

Business Consideration: Contracts may contain an obligation on the parties to consider changes designed to reflect developing best practices in the industry. (Sample)

Sample: “If, at any time, a party proposes a variation to this Agreement to reflect the current best practices in the information industry, the other party shall consider such proposed amendment in good faith.” -- Reuters

11 General: 11.4 Severability

Impact on legality or enforceability of remainder of contract in the event that any part is found to be illegal or unenforceable.

- Contracts usually contain language to ensure that the Agreement as a whole is not invalidated if any part of it is found to be illegal or unenforceable.

Business Consideration: This is a standard legal protection. The only point at issue is whether severability applies to any individual term of the contract or only to those which are not considered fundamental to the agreement as a whole. (Sample)

Sample: “ If for any reason one or more provisions of this Agreement is held invalid, the other provisions of the Agreement shall remain in full force and effect.” -- Chicago Board of Trade, Bourse de Luxembourg (similar clause)

Business Consideration: In practical business terms it may be impossible for a contract to remain in full force and effect if a fundamental term has been held to be invalid, illegal or unenforceable. (Sample)

Sample: “If any part of this Agreement that is not fundamental is found to be illegal or unenforceable, this will not affect the legality or enforceability of the remainder of the Agreement.” -- Oslo Stock Exchange, Reuters

11 General: 11.5 Sending Notices

Delivery of notices as required by contract.

- Contracts usually specify the forms of communication, and sometimes the addressees, necessary to constitute valid notice under the contract. They may also specify circumstances in which notice is deemed to have been received.

Business Consideration: Both parties have an interest in clarifying the contractual status of, for example, email correspondence or other electronic communications.

*The more elaborate the process for official notification, the more careful the parties need to be to ensure procedures are followed.
(Sample)*

Sample: “All notices relating to this Agreement will be sent [by registered post, fax, e-mail or delivered in person] to the addresses specified at the beginning of this Agreement or to such other Addresses as may be notified by either party to the other. Notices shall be deemed to be received on proof of delivery or [] days after being sent if earlier.” -- Bourse de Luxembourg (similar clause)

Business Consideration: Some contracts (e.g. Nasdaq) require the parties to maintain a contract schedule of addressees and authorized contacts for valid notices. Nasdaq has also introduced rules and guidance on procedures and circumstances under which electronic communications may be deemed to constitute agreement in writing. (See www.Nasdaqtrader.com for additional information.)

11 General: 11.6 Effect of Not Exercising Rights or Remedies

Determination that failure or delay in exercising rights or remedies under contract does not represent waiver of rights/remedies or acceptance of circumstance giving rise to the rights/remedies.

- Contracts usually provide that no failure or delay on the part of either party to exercise rights under the contract can be taken as a waiver of the relevant rights. This clause is usually taken to be in the best interests of both parties. Its enforceability is subject to local law.

Business Consideration: The practical value of the clause in any contractual dispute may be open to question, given that failure by a party to exercise a right or remedy provided for in the contract may be taken by the other party as an indication of lack of confidence in the enforceability of the right or remedy concerned. (Sample)

Sample: “ No failure on the part of Nasdaq or Vendor to exercise, no delay in exercising, and no course of dealing with respect to any right, power or privilege under this Agreement shall operate as a waiver thereof, or shall any single or partial exercise of any such right, power or privilege preclude any other or further exercise of any other right, power or privilege under this Agreement.” -- Nasdaq

Business Consideration: This determination may be accompanied by a commitment on behalf of both parties to act in good faith and as promptly as is reasonably practical in the exercise of their obligations under the contract. (Sample)

Sample: “Nasdaq and Vendor shall act in good faith in the performance of their respective obligations under this Agreement and shall act as promptly as is reasonably practicable under the circumstances in granting or denying any consent or approval required hereunder.” -- Nasdaq

11 General: 11.7 Force Majeure

Any limitations on liability and other provisions in the event of circumstance beyond the reasonable control of the parties to the contract.

- Contracts usually limit the liability of either party in the event of circumstances beyond the reasonable control of the parties concerned.

Business Consideration: Most contracts list without limitation examples of circumstances "beyond reasonable control". In some case the lists include breakdowns such as software and equipment failures. In other cases the emphasis is on thunderbolts, plagues, fire, flood and Acts of God. (Sample)

Sample: "Neither party shall be held liable or be deemed to be in default under this Agreement for any failure to perform its obligations hereunder, arising directly or indirectly from circumstances beyond its reasonable control..." -- FIRD working group draft

Business Consideration: Some Exchanges may wish to define force majeure in terms of local law. Unless the relevant definition is attached to the Agreement, other parties not familiar with local law may be at a disadvantage. (Sample)

Sample: "...if such a situation under Norwegian law must be regarded as constituting force majeure." -- Oslo Stock Exchange

Business Consideration: Contracts are fairly consistent in exempting the relevant party from liability. They differ on other related terms.

Business Consideration: In some cases force majeure may trigger a right to terminate the contract. In these cases, the parties may need to ensure that, for example, payment obligations survive termination. (Sample)

Sample: "If such circumstances continue for more than 14 (fourteen) days, either party may cancel this Agreement immediately on notice." -- Oslo Stock Exchange, Bourse de Luxembourg (similar clause)

Business Consideration: In other cases the suspension of obligations may last only as long as the circumstances beyond reasonable control and is specifically stated not to apply to payment obligations. (Sample)

Sample: “ The time for performance of any act delayed by such events may be postponed for a period equal to the delay. This Section...shall not apply to the payment of money and...the accrual of interest.” -- Nasdaq

11 General: 11.8 Vendor's Responsibility for Group Companies

Responsibility of the Vendor regarding performance obligations of Vendor group companies.

- If not specified elsewhere, the general section of the contract may have a clause recognizing the Vendor's responsibility for performance by other Vendor's Group companies of obligations arising under the contract.

Business Consideration: See Parties Allowed to Use Information under Contract Definitions. (Sample)

Sample: "(Oslo SE) acknowledges that the Vendor has concluded this Agreement for the benefit of the Vendor's Group, and the Vendor shall be responsible for the good performance by any entity of the Vendor's Group of the terms of this Agreement, to the extent they are applicable." -- Oslo Stock Exchange

11 General: 11.9 Applicable Law and Jurisdiction

Law governing contract and competent jurisdiction for disputes.

- Contracts usually specify a particular governing law. They may also determine a forum and procedure for resolving disputes, for example by arbitration of a specified body.

Business Consideration: In practice many other jurisdictions may have powers relating to the performance of the Contract inside or outside their territory. (Sample)

Sample: "This Agreement will be governed by the laws of []. "

Business Consideration: Many contracts recognize this situation and refer to the jurisdiction of the specified courts as non-exclusive. (Sample)

Sample: " Both parties submit to the non-exclusive jurisdiction of the [] courts." -- Reuters, Bourse de Luxembourg (similar clause with the notion of arbitration procedure)

Business Consideration: Some contracts may nevertheless seek to establish a local jurisdiction as the sole legal authority over the contract. (Sample)

Sample: "Judicial proceedings for the review of any arbitration proceeding (other than entry or enforcement of an arbitration award or decision) or of any other matter arising under the terms of this Agreement shall be brought solely in the federal or local courts of the District of Columbia. Nasdaq and Vendor hereby consent to submit to the jurisdiction of the courts of the District of Columbia in connection with any judicial action or proceeding instituted by Nasdaq or Vendor pursuant to the provisions of this Agreement." -
- Nasdaq

Sample: "Both parties submit to the exclusive jurisdiction of the Oslo City Court." -- Oslo Stock Exchange

Business Consideration: Contracts may also require both parties to waive any objection to the jurisdiction of the Exchange's home state on grounds that it may be inconvenient to pursue litigation in that jurisdiction.

Such provisions may not establish the home state jurisdiction as the sole jurisdiction or prevent recourse to other jurisdictions applicable under operation of law, but they may have a significant

impact on the respective costs for the parties of pursuing litigation.
(Sample)

Sample: “The parties hereto each hereby submit, for the sole purpose of this Agreement and any controversy arising hereunder, to the jurisdiction of the courts of the State of Illinois and waive any objection on the grounds of forum non conveniens.” -- Chicago Board of Trade

Business Consideration: Where the contract provides for arbitration it usually provides for details such as the selection of arbitrator, the arbitration process and location and the status of the arbitration decision -- in each case unless the parties agree other arrangements for a particular dispute.

Arbitration may be considered a less antagonistic form of dispute resolution than litigation before a court. It may also provide advantages of flexibility and confidentiality.

Depending on the process selected it could also however involve the parties in protracted and costly proceedings over disputes that might be more cleanly and quickly settled in a public court of law.
(Sample)

Sample: "In the event of a demand for arbitration by Nasdaq pursuant to (section covering default by Vendor), a demand for arbitration by Vendor subject to (section covering default by Nasdaq), or by mutual consent of Nasdaq and Vendor: the claims, disputes, controversies and other matters in question between Nasdaq and Vendor arising out of, or relating to this Agreement, or to the breach hereof (which cannot be resolved by the parties), shall be settled by binding arbitration in accordance with this Agreement and the procedures (or such other procedures as may be mutually agreed upon by the parties) set forth in this Section..." -- Nasdaq, Bourse de Luxembourg (similar clause)

Sample: “Except as otherwise provided herein, any arbitration proceeding shall be conducted in accordance with the rules and procedures of the American Arbitration Association, unless otherwise agree by the parties.” -- Nasdaq

11 General: 11.10 Relationship of Parties

Acknowledgement that the contract does not create a partnership or joint venture.

- It is standard for the contract to make clear that the contract does not create any form of partnership or joint venture.

Business Consideration: Any partnership or joint venture relationship with an Exchange would require a separate form of agreement. The Exchange would need to ensure any such agreement does not compromise commitments to parties under contracts to supply Information. (Sample)

Sample: "This Agreement shall not be deemed to create any agency, employment, partnership, or joint venture relationship between the parties hereto." -- Chicago Board of Trade

Business Consideration: The contract may also make clear that neither party can bind the other to any Agreement with a third party. (Sample)

Sample: "Neither Party shall have the authority or represent itself as having the authority to bind the other Party to any agreement with a Third Party." -- Chicago Board of Trade

Business Consideration: This type of provision may need to make exception for third party commitments specifically authorized under the contract, for example between Vendors and Clients for supply of the Information.

11 General: 11.11 Language and Translations

Language in which contract is valid; status of translations.

- Contracts are usually valid only if executed in a designated language. Many contracts include clauses specifying that translations of the contract into other languages are not binding.

Business Consideration: The parties may wish to emphasize applicable language if the language in which the agreement is valid is not widely understood around the world. (Sample)

Sample: “IMPORTANT NOTE;

The agreement is executed in the Polish language only. Any translation in another language is for indicative purposes only. In case of a discrepancy between the Polish wording and the translation, the Polish wording shall prevail.” -- Warsaw Stock Exchange

8 Indemnity and Liability: General Issues

- Indemnity and liability clauses can be used by both parties to set predictable limits to potential losses arising under the contract.
- They can also be used by either party to minimize its potential loss, usually at the expense of the other.
- Certain legal systems allow contracting parties to limit/exclude most/all liability whereas others do not.

Business Consideration: Both parties' legal advisors typically seek maximum protection against claims arising from the contract, either by minimizing the party's own liability, seeking indemnity from the other party or both.

The drafting of liability and indemnity clauses in Exchange Information contracts usually reflects the perceived strength of negotiating position of the parties and the local legal tradition.

The value and effectiveness of these clauses in any litigation may be severely undermined in certain jurisdictions if they do not reflect an equitable balance.

Wider business considerations may also favor a balance of indemnities and acceptance of liability.

Insistence on comprehensive indemnities for breach by the other party may result in a highly defensive and legalistic agreement in which neither party is prepared to make firm commitments for the benefit of the other, e.g. on quality of supply by the Exchange or completeness and accuracy of reporting by the Vendor.

The general impact on business prospects for either party of over-defensive contracts may outweigh the perceived benefits in any litigation of clauses excluding liability or seeking comprehensive indemnity from the other party.

8 Indemnity and Liability: 8.1 Liability of Exchange

Extent to which the Exchange accepts liability for and will indemnify the Vendor for losses caused in relation to the contract.

- Acceptance of liability and indemnification of the other party may involve a commitment to pay the other party's administrative and legal fees arising from relevant claims.

Business Consideration: Depending on local legal tradition, the legal costs associated with arbitration or other forms of litigation can provide a significant extra burden on the party providing the indemnity. (Sample)

Sample: "(Oslo SE) is solely liable for and will indemnify the Vendor's Group against all direct loss, damage, cost or expense (including legal fees) arising out of..." -- Oslo Stock Exchange

- Exchanges may be expected to provide an indemnity in respect of any claims that supply or use of the Information infringes the Intellectual Property rights of third parties.

Business Consideration: This form of indemnity -- and any limitation of it -- should be considered together with:

** Any representation or warranty that the Exchange has the right to supply the Information and to license its use by Vendors and or Clients, and*

** The definition of Information (Sample)*

Sample: "...a) all claims and proceedings relating to the possession, use or exploitation of the Information by the Vendor's Group and/or the Clients, based on the fact that such possession, use or exploitation infringes and intellectual Property Rights of any third party." -- Oslo Stock Exchange

Business Consideration: Exchanges may provide the indemnity only on condition that they are able to defend against the claim or take steps to minimize their risk. (Sample)

Sample: "...on condition that Vendor informs (Oslo SE) in writing of the infringement in such a way that (Oslo SE) may defend its position, or modify the infringing item such that it no longer constitutes an infringement;" -- Oslo Stock Exchange

- Exchange indemnifying Vendor in respect of intellectual property infringement claims by third parties.

Business Consideration: Exchange liability may be limited to Information as supplied to the Vendor, even though Information may be more widely defined with regard to Vendor and Subscriber obligations. (Sample)

Sample: “ Nasdaq shall indemnify Vendor against, and hold Vendor harmless from, any and all Claims or Losses imposed on, incurred by or asserted against Vendor as a result of:

b)...any assertion by any person that the Level 1 Service and/or Last Sale Service and/or NQDS infringes any patent, trademark, service mark, trade secret or copyright or violates any other intellectual property right;” -- Nasdaq

- Exchanges may be required to indemnify Vendors for losses arising from any breach of contract by the Exchange.

Business Consideration: Some contracts contain a very general clause indemnifying Vendor for losses from breach. Other Exchanges limit indemnities to material breach and set a limit to liability. (Sample)

Sample: “The Exchange is liable for and will indemnify the Vendor’s Group against all direct loss, damage, cost or expense (including legal fees) arising out of:

b)...any material breach by the Exchange of any express or implied condition, warranty or undertaking under this Agreement;”

c)...the Exchange’s gross negligence or willful misconduct.” -- Oslo Stock Exchange

Business Consideration: Contracts often provide for liability and indemnity in respect of gross negligence or willful misconduct by the other party. The definition of these terms may vary in jurisdictions around the world.

The value of a general indemnity to the Vendor may be offset if the Exchange is deterred from making contract commitments to quality of supply or maintenance of a level playing field.

For this reason a contract with limited indemnities and more specific commitments may be more valuable than one with blanket indemnities and no commitments.

Business Consideration: Indemnities may be drafted in such a way as to provide similar protections to both parties. (Sample)

Sample:

- "Except as otherwise stated in this Agreement, each Party hereto may be liable for and will indemnify the other Party against all direct loss, damage cost or expense (including reasonable attorneys' fees) arising from (i) one Party's failure to exercise due care and diligence in its obligations hereunder, (ii) any breach or default under the terms and conditions of this Agreement, or (iii) from any willful misconduct or negligence on the part of any such Party.
- Either Party shall hold harmless and shall indemnify the other Party with respect to all costs or liabilities incurred by any such Party relating to actions, proceedings, claims, costs, demands and expenses (including reasonable attorneys' fees) arising out of or connected to this Agreement." -- Bourse de Luxembourg

8 Indemnity and Liability: 8.2 Exchange Procurement of License and Authorization

Actions to be taken by Exchange in event of loss.

- Exchanges may be expected to take prompt action to rectify the circumstances giving rise a third party's intellectual Property rights claim.

Business Consideration: In many cases the cost and difficulty of rectifying the loss may be disproportionate to the loss incurred, or the loss may have been incurred in circumstances beyond the Exchange's control (e.g. changes in legislation). (Sample)

Sample: (In the case of a third party claim for infringement of intellectual property rights)...

“without affecting the Vendor Group's other rights, (OBI) will, at its own expense in relation to any such claim or proceeding, promptly:

- a) Procure for the Vendor's Group any required license, consent or authorization necessary to permit the Vendor's Group to perform any act authorized by this Agreement; or
- b) Modify or replace or procure the modification or replacement of any part of the Information which is necessary to ensure the relevant infringement is prevented.” -- Oslo Stock Exchange

8 Indemnity and Liability: 8.3 Limit of Exchange Liability

Limit of Exchange liability.

- Indemnity and liability clauses may be balanced in the same contract by provisions limiting the liability of the Exchange.

Business Consideration: Contracts that result from detailed negotiation -- and this includes the FISD working group draft -may include both a comprehensive indemnity and a comprehensive limitation of liability inserted by the other party. (Sample)

Sample: “(Oslo SE) shall not be liable for any loss, damage, costs, claims and expenses whatsoever:

a) Arising from mechanical or electrical or telephone breakdown or power failure or malfunction of any computer and/or data transmission or receiving apparatus and/or auxiliary equipment or any other cause beyond the reasonable control of the Exchange;

b) Arising from any error or omission in the collecting, recording, processing, storing, making available for supply or supplying of the Information, unless such loss, damage, costs, claims or expenses arise from the gross negligence or willful misconduct of (Oslo SE).” -- Oslo Stock Exchange, similar articles within Bourse de Luxembourg’s agreement

Business Consideration: This may be compared with Nasdaq’s limitation of liability clause. (Sample)

Sample: “The Corporations shall not be liable to Vendor, the Subscribers, or any other person, regardless of the cause (unless resulting from the gross negligence or willful misconduct of the Corporations) or duration, for any errors, inaccuracies, omissions, or other defects in, or untimeliness or unauthenticity of, the Information, or for any delay or interruption in the transmission thereof to Vendor, or for any Claims or Losses arising there from or occasioned thereby.” -- Nasdaq

8 Indemnity and Liability: 8.4 Liability of Vendor

Extent to which the Vendor accepts liability for and will indemnify the Exchange for losses caused in relation to the contract.

- Vendor may be required to indemnify the Exchange for losses arising from any breach of contract by the Vendor.

Business Consideration: Considerations noted in 8.1 above as applying to the Vendor generally apply here to the Exchange, and vice versa. (Sample)

Sample: “a) Vendor shall indemnify the Indemnified Parties against, and hold the Indemnified parties harmless from, any and all Claims or Losses imposed on, incurred by or asserted against the Indemnified Parties as a result of, or relating to:

(i) Any non-compliance by Vendor with the terms and conditions hereof;” -- Nasdaq

Business Consideration: Vendor may also be expected to indemnify Exchanges against claims or losses arising from any non-compliance by Subscribers with the terms of the Exchange-Vendor contract or of the Exchange Subscriber Agreement terms.

Where Exchanges impose this kind of obligation, Vendors may need to seek indemnification from Clients. (Sample)

Sample: (ii) any non-compliance by the Subscribers with the terms and conditions hereof or of their respective Subscriber Agreements, if Vendor has failed to notify Nasdaq of such non-compliance within ten (10) days after Vendor knows of such non-compliance.” -- Nasdaq

Business Consideration: Exchanges may require indemnity for claims or losses arising from use of Information by customers of the Vendor or third parties who do not qualify as Clients because they have not subscribed to the Information – and so are not bound by the Exchange’s Subscriber Agreement terms. (Sample)

Sample: (iii) any assertion of Claims or Losses against the Indemnified Parties made by a person who receives the Information from Vendor (or any person relying upon the Information received by such a person) and who is not a party to a Subscriber Agreement...” -- Nasdaq

- Indemnity may extend to any interference of the Exchange's System caused by the Vendor's Service.

Business Consideration: There may be a requirement to indemnify Exchange for any breach of any warranty from the Vendor that the design, maintenance and operation of its Service will not damage or interfere with the Exchange's System.

- Indemnity may also cover claims that the Vendor's Service infringes third party intellectual Property rights.

Business Consideration: This may have major significance for Vendors and Clients if, for example, a Client asserts intellectual property rights to compilations incorporating Information and these claims conflict with Intellectual property assertions of the Exchange. (Sample)

Sample: "Vendor shall indemnify the Indemnified Parties against, and hold the Indemnified Parties harmless from, any and all Claims or Losses imposed on, incurred by or asserted against the Indemnified Parties as a result of...any assertion by any person that Vendor's Service infringes any patent, trademark, service mark, trade secret, or copyright, or violates any other intellectual property right;" -- Nasdaq

- The Exchange may limit Vendor's liability for any untimeliness or errors in the Information delivered by Exchange.

Business Consideration: Limitation of liability may be of limited value where, as with the Nasdaq contract, there is no corresponding indemnity for claims and losses incurred by the Vendor and the Subscriber Agreement terms do not contain similar protections for the Vendor. (Sample)

Sample: "Except with respect to Claims or Losses asserted against the Indemnified Parties (by a non-Subscriber), Vendor shall not be liable to the Corporations, the Subscribers, or any other person, for any errors, inaccuracies, omissions, or other defects in, or untimeliness or unauthenticity of, the Information as provided to Vendor by Nasdaq." -- Nasdaq

- The Vendor may be required to indemnify the Exchange against all costs or damages, even if these arise as a result of the Exchange's own negligence.

Business Consideration: These clauses may apply either to all claims, in which case they amount to the Vendor assuming all

commercial risk from the Exchange, or to claims arising from the Vendor's group, in which case they effectively prevent the Vendor gaining from any legal proceedings against the Exchange.

This kind of limitation may not be enforceable in all jurisdictions.
(Sample)

Sample: "Vendor or Subvendor further agrees to indemnify and Hold Board of Trade harmless from and against all damages and expenses (including court costs and reasonable attorneys fees) incurred by Board of Trade as the result of or arising out of any proceedings instituted by Vendor's or Subvendor's affiliated entities or authorized distributors." -- Chicago Board of Trade

Business Consideration: Some Exchange contracts may require Vendors to indemnify the Exchange from claims but limit the Vendor's risk. (Sample)

Sample: "The distributor will at all times indemnify SWX against all kind of actions, claims, demands, proceedings, liabilities, costs or expenses whatsoever (including all legal and other fees or disbursements) which SWX has sustained, incurred or already paid to any third party directly or indirectly arising from the access to, transmission to or use by the distributor or the distributor's clients of the data.

The distributor will only be obligated to indemnify SWX if the actions, claims, demands, proceedings, liabilities and all kinds of expenses are resulting from SWX's ordinary negligence. In case of gross negligence or willful misconduct, the distributor shall not be obligated to indemnify SWX.

SWX promptly notifies the distributor in writing of any actions, claims, demands, proceedings, liabilities, costs or expenses whatsoever. The distributor shall have control of the settlement and defense of any action to which this indemnity relates. SWX co-operates with the distributor to facilitate such defense.

This indemnity shall be capped to the amount of fees paid or to be paid by the distributor for the last twelve months prior to the date of the claim. Further, this indemnity shall in no event extend to indirect or consequential losses or damages of any kind such as loss of profits." -- Swiss Exchange

- Alternatively, the contract could absolve either party from liability for losses occurring due to the fault of the other party.

Business Consideration: This type of clause is far more balanced, and relatively rare in market data contracts. (Sample)

Sample: “The Parties shall not be liable for any loss occurring...due to exclusive fault of the other Party.” -- Warsaw Stock Exchange

- The Vendor may limit liability for loss to the Exchange from Vendor’s processing of Information.

Business Consideration: In the absence of specific liability clauses to the contrary, this type of limitation could limit liability for a broad range of Vendor errors, including those related to reporting and payment. (Sample)

Sample: “The Vendor will not be liable for any loss, damage or cost incurred by (Oslo SE) arising from any delays, errors or omissions however occasioned in using, storing, processing, attributing, reproducing or redistributing the Information, except in the case where such loss, damage or cost is caused by the Vendor’s gross negligence or willful misconduct.” -- Oslo Stock Exchange

8 Indemnity and Liability: 8.5 General Limitations on Liability

Both parties (and their insurers) may wish to limit liability under certain circumstances.

- Liability for losses and claims may be capped at a fixed amount or by reference to a formula (e.g. the level of fees paid in the preceding 12 months).

Business Consideration: This option may be particularly applicable where the potential exposure of one or both parties would otherwise outweigh the benefits of entering into the contract.

Either party might wish to make exceptions to the general limitation.

Clauses limiting liability in this way may not be enforceable in all circumstances in certain jurisdictions. (Sample)

Sample: “To the extent permitted by law, under no circumstance will each party’s liability under this Agreement exceed the total amount of NOK500,000, regardless of the cause or form of action, except with regard to underpayment or non-payment of fees due by the Vendor...” -- Oslo Stock Exchange

8 Indemnity and Liability: 8.6 Indirect and Consequential Losses

- Either party may seek to exclude liability for indirect, special or consequential losses.

Business Consideration: Either party may also seek to make exceptions to this exclusion, effectively reserving the right to hold the other liable for consequential losses, punitive damages etc. (Sample)

Sample: “Except for loss of fees due Nasdaq...the Corporations and Vendor shall not be liable to each other or to any other person for indirect, punitive, special, consequential or incidental damages, including lost profits, even if Vendor or the Corporations knew or should have known of the possibility of such damages.” -- Nasdaq

Business Consideration: For general business considerations see General Issues under this section.

Business Consideration: It is sometimes argued that losses incurred by a Vendor or Clients are more likely to be indirect or consequential than losses incurred by an Exchange, for example where the prospects and/or profitability of a new Service are adversely affected by delay in allowing use of Information, unreasonable refusal to allow, or conditions attached by the Exchange to such use.

Business Consideration: The most common outcome is a mutual restriction. (Sample)

Sample: “Neither party will be liable to the other for any indirect, special or consequential loss or damage including without limitation loss of profit, business revenue or goodwill or loss of data arising out of this Agreement.” -- Reuters, Oslo Stock Exchange

8 Indemnity and Liability: 8.7 Survival of Termination

Determination of whether or not indemnity and liability terms survive termination of the agreement.

- Indemnity and liability clauses usually survive termination of the agreement.

Business Consideration: It would be extremely difficult in practice for any party to an Exchange Information contract to enforce indemnity and liability clauses, assess the full extent of any claims and losses etc if the relevant clauses did not survive termination.

(Sample)

Sample: “This clause...survives termination of this Agreement.” --
Reuters, Oslo Stock Exchange

4 Quality of Information: 4.1 Quality of Supply

No discrimination on data quality.

- Most Vendors seek a representation that the Information is the best available and at least equal in quality and quantity to comparable data supplied to any third party.

Business Consideration: Exchanges typically have general “level playing field” obligations imposed by local regulations which apply not only to data quality but to all other aspects of the Information supply. These may be specifically acknowledged in the contract.

Whether or not there is an anti-discrimination clause in the contract, there may be further reasons under local or overseas anti-trust legislation for the Exchange to ensure no discrimination on data quality or other terms. This applies in particular where an Exchange is the sole or dominant supplier of the Information, as is usually the case. (Sample)

Sample: “Nasdaq acknowledges that, as a registered securities information processor, Nasdaq is obligated to assure that all qualified vendors are able to obtain the Level 1 Service, Last Sale Service and NQDS on terms that are not unreasonably discriminatory, subject to such orders, rules or regulations as the SEC may adopt.” -- Nasdaq

Business Consideration: Exchange anti-discrimination clauses may be expressed specifically in terms of other Vendors or Subvendors. (Sample)

Sample: “(Paris Bourse) undertakes to provide (Data) to the Distributor with a level of quality (consistency, accuracy and speed) equal to that which (Paris Bourse) provides to any other Distributor.” -- Paris Bourse

Business Consideration: Vendors and Clients may have concerns that such clauses could still allow Exchanges to discriminate in favor of Clients fed directly from the Exchange, and/or Clients who are members of the Exchange. Some contracts directly address these concerns. (Sample)

Sample: “(The Exchange) represents that:
a) It provides the Vendor with the best available Information and that the Information is of a quantity and quality (including in terms of consistency, accuracy, timeliness and comprehensiveness) at

least equal to comparable Information supplied by (the Exchange) to any third party from time to time. The Exchange ensures that the Vendor will not be discriminated compared to other information vendors or Clients receiving the Information directly from (the Exchange)... with respect to the quality and scope of the current or future Information;" -- Oslo Stock Exchange, Reuters (similar wording)

Representations and warranties as to quality of the Information.

- Exchanges are not usually expected to warrant that the data is complete or error-free, but may agree to procedures to address errors and omissions.

Business Consideration: As Vendors and Clients develop more complex data processing models the value of Information depends increasingly on the quality of the data and the procedures established for dealing with errors.

As with other data support procedures, any commitment in the Exchange contract is likely to be of a general nature. More specific arrangements may be covered by a separate Service Level Agreement or an IT support Schedule. (See Service Level Agreement and Support Services for additional information.) (Sample)

Sample: "(the Exchange) represents that:

(b) The Information is regularly and promptly updated or otherwise modified to reflect current activity on (the Exchange) and the market, as well as any other change or development affecting any matter to which the Information relates; -- Reuters

(c) It will use reasonable efforts to ensure that any Information delivered or transmitted to the Vendor by electronic methods shall be free from viruses; and..." -- Oslo Stock Exchange, Reuters

d) Although it does not warrant that the Information will be complete or error-free, (the Exchange) will however use reasonable endeavors (Reuters – "best endeavors") to:

- * Ensure that the Information is accurate and complete;
- * Notify the vendor of any errors or omissions in the Information as soon as reasonably practicable; and
- * Take the necessary steps to have such errors or omissions corrected as soon as reasonably practicable..." -- Oslo Stock Exchange, Reuters

- Disclaimer of warranty.

Business Consideration: Some Exchanges emphasize a legal disclaimer of warranty. As noted above (virtually identical disclaimer per Chicago Board of Trade contract, see Warranty of Supply and Interruptions) these disclaimers may not be valid in certain jurisdictions. (Sample)

Sample: “**No warranties.** Nasdaq will furnish the Information...as promptly and accurately as is reasonably practicable, but the Corporations do not warrant or guarantee the timeliness, sequence, accuracy or completeness of the Information. Further, with regard to the Information, there are no warranties, express or implied, including without limitation, the implied warranties of merchantability and fitness for a particular purpose.” -- Nasdaq

Business Consideration: Exchanges may also limit or waive their obligations relating to quality of Information supplied indirectly. (Sample)

Sample: “If Vendor has contracted to obtain the Information from a Retransmission Vendor, then Vendor and Retransmission Vendor are responsible for all communications and other arrangements necessary for Vendor to receive the Information.... Further, Vendor acknowledges and agrees that Nasdaq is not responsible for, and makes no representations or warranties regarding, the quality of service Vendor obtains from a Retransmission Vendor.” -- Nasdaq

Business Consideration: Some contracts aim to balance a commitment of effort to maintain quality with more specific disclaimers of liability.

Note that disclaimers of legal liability can help the Exchange make commitments and suggestions that should be helpful to third parties but must be accepted at own risk. (Sample)

Sample: “(Paris Bourse) undertakes to carry out data integrity checks and, wherever possible, promptly to make appropriate corrections to any errors or omissions detected.

However, (Paris Bourse) is obligated only to use its best efforts in performance of the present Agreement, in particular as regards the integrity, completeness, quality or accuracy (of the Information).

(Paris Bourse) is under no obligation to provide advice with regard to the equipment used or implemented by the Distributors or Subscribers...in order to receive and/or use (the Information).

(Paris Bourse) merely suggests the configuration needed...the Distributor being at liberty to implement such configuration or any other ...at the Distributor own risk and without right of recourse against (Paris Bourse).

(Paris Bourse) may not be held liable for any temporary interruption of service for technical reasons affecting Distributors equally or for any regulation of the data feed in the general interests of the markets or with the aim of preserving equal treatment of the Distributors.

In the current state of technology, the possibility of...transmission being interrupted or partially unavailable cannot be excluded. Data may also be corrupted as a result of transmission...(Paris Bourse) shall not be held liable in any way whatsoever in this respect.” -- Paris Bourse

4 Quality of Information: 4.2 Addition or Deletion of Information

Exchange discretion to add or delete any part of information.

- The contract usually allows the Exchange to retain discretion to add/delete or modify information.

Business Consideration: The drafting of these clauses needs to be considered carefully together with the definition of Information (Market Data) and any clauses providing the Vendor with a right to receive Information (see Contract Definitions and Scope of Agreement for additional information). (Sample)

Sample: “Vendor or Subvendor acknowledges that Board of Trade, in its sole discretion, may choose to: (i) discontinue its retransmission of any item of Market Data; (ii) retransmit Market Data in different form...” -- Chicago Board of Trade

Notice periods for additions and deletions.

- A distinction may be drawn between:
 - a) Those changes in the information which are evolutionary in nature (e.g. new stocks added to a market),

Business Consideration: The Exchange might be expected to give reasonable notice of changes, which are evolutionary in nature. (Sample)

Sample: “a) (The Exchange) reserves the right with reasonable notice and in its absolute discretion to:

- i) Introduce in addition to the existing Information newly traded instruments;
- ii) Withdraw from the Information the prices of any traded instrument that ceases trading;” -- Bourse de Luxembourg, Oslo Stock Exchange

- b) Those which substantially alter the nature of the Information and may add or detract from its value.

Business Consideration: The Exchange might be expected to give specific notice (for example in accordance with the FISD change notification guidelines) of changes, which may materially alter the nature or value of the Information and to allow the Vendor a right of termination. (Sample)

Sample: "b) In addition, (The Exchange) reserves the right to add to, alter or delete any part of the Information in its sole discretion provided, however,

i) (Bourse de Luxembourg) that, unless otherwise agreed by the parties, In case such proposed alteration involves changes to the Vendor's network or system, the exchange shall give to the Vendor not less than 120...

(Oslo SE) that Oslo SE shall give to the Vendor not less than 90 (ninety)...

days prior written notice, whenever possible, and

ii) that any such addition, alteration or deletion shall be applied equally to all information vendors who have selected the same type of Information as the Vendor." -- Bourse de Luxembourg, Oslo Stock Exchange

Sample: c) If, in the Vendor's reasonable opinion, such proposed alteration or deletion would significantly reduce the quality of or alter the nature of the Information, the Vendor may terminate this Agreement..." -- Oslo Stock Exchange, Reuters

Next Issue

1 (b) Scope of Agreement (Grant of License): Parties Covered by the Contract

This usually outlines:

The parties covered by the contract.

- These issues are common to all Exchange agreements, whether or not they involve fees for the information.

- The contract usually has general language to clarify the position of:

- Exchange party

Business Consideration: This may be the Exchange itself or a separate company responsible for supply of Information from one or more Exchanges. Other parties to the contract may want assurance that the Exchange party can indeed continue to supply the information through the term of the agreement.

- Vendor/Vendor's Group

Where the contract involves obligations incurred by one Vendor group company on behalf of others in the group or of unaffiliated distributors, the Exchange may want assurance or a guarantee by the contracting party to cover other group companies or third parties. (Sample)

Sample: "Vendor or Subvendor may distribute Market Data through affiliated entities or authorized distributors which may or may not be affiliated with Vendor or Subvendor... Vendor or Subvendor hereby unconditionally and irrevocably guarantees to Board of Trade the full and timely performance by its affiliated entities or authorized distributors of all their obligations in and under this Agreement..." -- Chicago Board of Trade

- Clients

Business Consideration: The contract scope section usually defines Vendors distribution rights by reference to Clients as defined, and to the terms of the agreement – which usually set out the circumstances in which Clients must register as Redistributors (Subvendors). (Sample)

Sample: "BDL shall provide the Vendor and the Vendor's Group with a non exclusive, non-assignable license to disseminate the

Data hereunder to any third party (ies) subject to due compliance with the terms and conditions of this Agreement, and only if any such third party (ies) (i) is a duly appointed End-User of the Vendor's Group or (ii) has concluded a similar agreement with BDL." -- Bourse de Luxembourg

- Redistributors (Subvendors)

Business Consideration: Most redistribution contracts are designed to apply both to Vendors who receive the information directly from the Exchange and to Redistributors or Subvendors who receive the Exchange information indirectly from a Vendor.
(Sample)

Sample: "Oslo Stock Exchange will throughout the term of this Agreement....supply the Information, whether directly or indirectly, to the Vendor's Group..."

"In the event this Agreement (or an agreement on identical terms to this Agreement) is signed by a Redistributor, rights and obligations applying to a 'Vendor' shall be construed and interpreted as applying to any such Redistributor." -- Oslo Stock Exchange

1 (b) Scope of Agreement: Agreement of Supply and Use

The Exchange's agreement to supply the information and the Vendor's agreement to use it, both in accordance with the contract terms.

- Some contracts aim to cover the broadest possible supply or use of information.

Business Consideration: Drafting the contract scope in broad terms means that the rights and obligations effectively apply to any service or medium unless the parties agree otherwise. (Sample)

Sample: "The Exchange will throughout the term of this Agreement...grant to the Vendor's Group a non-exclusive license to use, store, process, reproduce, make available and redistribute the Information to Clients in accordance with the terms of this Agreement." -- Oslo Stock Exchange, Reuters (similar wording)

- Others may aim to restrict supply or use of Information to those specified and/or allowed by the Exchange from time to time.

Business Consideration: Restricting the scope of supply or use obligations means that all parties may need to keep their supply or use activities under review and may need to amend or extend the contract to take account of changes. (Sample)

Sample: "The use of data for other services than real-time terminal display...is not covered by the terms and conditions of this Agreement and will require an additional addendum with new conditions." -- Swiss Exchange

Business Consideration: In some cases the contract may restrict use without identifying what is excluded.

In these cases, all parties to the contract should ensure they have a common understanding of what uses are excluded. (Sample)

Sample: "Board of Trade grants to Vendor or Subvendor the... right to... transmit Market Data worldwide and to store such Market Data solely for the purpose of retransmitting or making available to Subscribers Delayed Continuous Market Data and Delayed Snapshot Market Data in accordance with the terms and conditions of this Agreement." -- Chicago Board of Trade

Business Consideration: Scope of use may be specified in a schedule to the Agreement which gives examples of services for different business areas.

This approach provides the parties with a number of options. Use can be limited to the specified examples. Examples can be used to illustrate Services for which use is NOT permitted.

The “Scope of Use” schedule can be combined with clauses defining permitted Subscriber usage.

This approach can provide a more efficient alternative to extensive product descriptions, in particular where the contract also provides for the Exchange to have access to the Vendor’s Services.
(Sample)

Sample: “SCOPE OF USE

1. To incorporate the Information, in any manner, in the Services
2. To redistribute the Information by any means and in any format as part of the Services to Subscribers [[except]/[only] in the Business Areas defined below].

Business Area

(NB. These are the business areas for which the Services have been developed and at which they are marketed. They may nevertheless be used by Subscribers in other or additional business areas)

- Retail Sites
- Front Office
- Transactions
- Reference
- Portfolio Analysis
- Financial /Investment Research
- Back Office

Example Services (Primark Services listed for each Business Area noted above)

(NB. These are examples only. (Primark) or any member of the Priimark Group may; (1) change the content and delivery mechanism of these Services at any time (2) cease to provide a Service (3) rename a Service or (4) add additional or alternative Services to any Business Area.” -- Primark

- The obligation to supply Information is sometimes written as a right to receive Information.

Business Consideration: This approach needs to be carefully considered together with the definition of Information and the right of the Exchange to alter or delete items of Information from the Information feed (see Addition or Deletion of Information for additional details). (Sample)

Sample: “During the Term of this Agreement, Board of Trade grants to Vendor or Subvendor the non-exclusive and non-transferable right to receive and retransmit Market Data worldwide...” -- Chicago Board of Trade

- The burden for the Exchange of meeting the supply obligation can vary substantially depending on the definition of Information (Market Data).

Business Consideration: Exchanges should beware of setting an all-encompassing definition of Information for fees purposes if they do not wish to make all such Information in their possession available in their market data feeds.

It may also be necessary to check whether the definition of Information allows for indirect supply via Redistributors or Subvendors.

1 (b) Scope of Agreement: Whether or Not the Contract License is Exclusive

- Most external redistribution contracts for Exchange data are non-exclusive licenses.
- An overall scope clause may be unnecessary or unduly repetitious where Exchanges need to make complex distinctions regarding supply or permitted use. Direct -billing Exchanges such as Nasdaq may distinguish between different classes of Subscriber and to keep Vendor's use of data under review on a case by case basis for billing and administration purposes.

Business Consideration: In these cases the overall scope of the Vendor Agreement may be a single sentence in the Recitals section of the contract, while terms for supply and permitted use are dealt with in detail in the relevant sections of the Agreement. (Sample)

Sample: "Nasdaq is willing to make available and Vendor is willing to receive the Level 1 Service and/or Last Sale Service and/or NQDS subject to the terms and conditions of this Agreement." -- Nasdaq

Next Issue

3 Supply of Information: 3.1 Intellectual Property

The extent to which supply and use of the Information affect ownership rights of the parties to the contract.

- Intellectual property (IP) rights as existing by law vary considerably around the world. Many countries have specific laws affecting the ownership of exchange data. In many countries intellectual property laws are changing.

Vendors and their Clients may gain ownership rights in law where they manipulate the information to produce compilations.

Certain legal systems do not give protection to databases; therefore the database owner may wish to reinforce its position in the contract.

Business Consideration: Exchange contracts usually address this complex and vital area in one of three ways:

- *By defining IP rights in terms of rights which exist anywhere in the world, so that assertions of IP rights leave untouched the situation that arises at law. (Sample)*

Sample: “Intellectual property rights: patents, trade marks, service marks, trade and service names, copyrights, topography rights, database rights and design rights whether or not any of them are registered and including applications for all of them, trade secrets and rights of confidence; all rights or forms of protection of a similar nature or having similar or equivalent effect to any of them which may subsist anywhere in the world.” -- Oslo Stock Exchange, Bourse de Luxembourg, Reuters

- By expressly stating that the contract does not transfer any intellectual property rights. (Sample)

Sample: “The Vendor agrees that the copyright, database right or other intellectual property rights of whatever nature contained in the Data and in the London Market Information Link shall remain the property of the Exchange.” -- London Stock Exchange

Sample: “This agreement does not entail the transfer of any intellectual property rights, nor of any producer rights to the said databases.” -- Paris Bourse

- *By seeking to replace any existing legal provisions with contract terms (i.e. by having one party agree to abrogate any ownership rights that might arise at law).*

Clauses of this nature may deny or prevent IP rights arising for Clients as well as Vendors. They may not be enforceable in all jurisdictions and may render the Exchange vulnerable to legal challenge under local anti-trust laws. (Sample)

Sample: “Vendor or Subvendor expressly acknowledges and agrees that: (a) Board of Trade has the exclusive property rights in and to Market Data; (b) Market Data constitutes valuable confidential information and proprietary rights of the Board of Trade, not within the public domain; and (c) but for this Agreement or any other written agreements between Vendor or Subvendor and Board of Trade, neither Vendor or Subvendor, its Subscribers, nor any other individual or entity would have any rights with respect to, or rights to Access or receive, any Market Data.” -- Chicago Board of Trade

- Contracts may address IP rights both for information supplied by the Exchange and for compilations or information services, put together by Vendors and Clients, which includes information supplied by the Exchange.

Business Consideration: These clauses can be non-contentious where the definition of IP rights is limited to those rights that exist in any event by operation of law. (Sample)

Sample: ● “The Parties agree that BDL shall hereby retain the exclusive proprietary rights with respect to the original Data, regardless of whether and the manner in which the Data, or any part thereof has been or will be used, stored, processed, reproduced, upgraded, adapted, made available and/or distributed or whether any other action is performed, regardless by which Party, including but not restricted to the Vendor, in relation to this use, storing, processing, reproducing, upgrading, adaptation, availability and/or distribution of the Data.

● However, Intellectual Property Rights relating to (i) the inclusion of the Data (as processed by the Vendor) in a Service and (ii) any collection, compilation or other work in which the Data or any part of it is included which is created by or on behalf of the Vendor’s Group will be owned by the Vendor’s Group. The right of the Vendor’s Group over the Data once integrated in one of its services shall not affect BDL’s Intellectual Property Rights related to the original Data sent to the Vendors” -- Bourse de Luxembourg

- Exchanges may wish to include specific provisions for disclaimers and copyright notices on Internet sites that carry their information.

Business Consideration: Exchange-specific disclaimers, IP rights assertions and copyright notices may be contentious, inapplicable or unenforceable in various jurisdictions or unintelligible in local languages. They may contradict each other and any assertions by the Vendor. They may be inconsistent with the Exchange's acceptance of liabilities in the Exchange-Vendor agreement.

Exchange-Vendor Agreements may not specify the extent to which Vendors may consolidate disclaimer and copyright notices from data providers to provide a generic, acceptable and broadly applicable notice.

Requirements for Internet Vendors to carry multiple and often contentious disclaimers from various exchanges are likely to deter Subscribers. (Sample)

Sample: "The Vendor's Group will make all reasonable efforts to ensure that any users accessing Vendor's group web-sites or in any other way gaining access to the Information from any Vendor's Group non-access and agreement-controlled environment, are made aware of the (Oslo SE) disclaimer and copyright notice.

For this purpose, the Vendor's Group will substantially provide at their web-site or in other of their non-access and agreement-controlled environments the disclaimer and copyright notice outlined (Disclaimer and Copyright Notice). -- Oslo Stock Exchange

Disclaimer and Copyright Notice

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The material may be read on-screen, on-spot and on-line. -- Oslo Stock Exchange

Note: Note, none of the contracts reviewed included an acknowledgement of any Client's IP rights in compilations of Information.

Obligations to protect IP rights.

- Some contracts require either or both of the parties to take action to protect the intellectual property rights of the other.

Business Consideration: These clauses could potentially involve enormous commitments to extensive international litigation. IP Rights legislation varies between countries and is in a constant state of development.

Business considerations include:

- *What level of "co-operation" is required?*
- *Who pays?*
- *Whether the relevant IP assertions are themselves reasonable and clearly supported by law. (Sample)*

Sample: "The distributor will at SWX's request and expense do all such further reasonable acts, deeds and things and execute such further documents, deeds and instruments, both during the term and thereafter, from time to time requested as being reasonably necessary for the protection and enforcement of SWX's copyright and other proprietary rights." -- Swiss Exchange

3 Supply of Information: 3.2 Supply of Information

The obligation of the supplier to supply the information.

- Contracts usually have a clause indicating how or where the Information is supplied or made available.

Business Consideration: Parties may wish to specify the location to which information is supplied (usually via a schedule or Exhibit to the contract).

The Exchange is not always the supplier to the Vendor with which it is contracting. It may use a separate distribution company, or the Vendor may use another Vendor to supply the Information.
(Sample)

Sample: “(The Exchange) will make the Information available to the Vendor either indirectly or at the Premises if directly...” -- FISD Working Group Draft, Oslo Stock Exchange (similar wording), Bourse de Luxembourg (similar wording), Reuters (similar wording)

Business Consideration: The contract might deem Information to have been delivered as soon as it leaves the Exchange, rather than on receipt by Vendor or Client.

If this is the case Vendors and Clients may need to be particularly careful about clauses related to changes in technical specifications or any other Exchange-generated event that could prevent proper reception of Information without inhibiting its transmission.
(Sample)

Sample: “FIM data is deemed to have been delivered to the Distributor on transmission by Paris Bourse.” -- Paris Bourse

3 Supply of Information: 3.3 Technical Specification and Lead Time

Technical specifications for the feed and procedure for changes to specification.

- Technical specifications for the feed are usually defined by reference to a schedule. The parties need to agree procedures for changes to specification.

Business Consideration: Exchanges need to reserve the right to make changes to the Technical Specification. They could not continue their business if each technical change was subject to the agreement of every Vendor. (Sample)

Sample: “Vendor acknowledges and agrees that nothing in this Agreement shall be deemed to constitute any undertaking by Nasdaq to continue to disseminate the Information in its present form or configuration or to continue to use existing communication facilities. Nasdaq, in its sole discretion and without Vendor’s consent, may from time to time make modifications to the Information and the System...Irrespective of whether such modifications would require changes to be made by Vendor to its Service, the Interrogation Devices, or other equipment, or would render them inoperative with respect to the Information.” -- Nasdaq

- All parties have an interest in ensuring that Vendors and Clients have adequate notice of changes, which may affect their ability to receive and use the Information. These issues are addressed in the FISD’s guideline on Lead-Times and Change Notifications.

Business Consideration: It is generally recognized that some changes need less notice than others do. The FISD guideline recognized that the Exchange may not always be able to give adequate notice and that some flexibility was needed. (Sample)

Sample: “Unless otherwise agreed by the parties, the Exchange shall give the Vendor not less than 120 (one hundred and twenty) days’ written notice of any changes to the Technical Specifications, which requires hardware or software modifications by the Vendor. Minor changes to the Technical Specifications which do not require any such modifications can be made on 60 (sixty) days’ notice or less.” -- FISD working group draft, Bourse de Luxembourg (similar wording)

Business Consideration: Exchanges may have accepted the principles and concepts of the FISD guideline but specified shorter periods or provided additional flexibility when incorporating these principles into their contracts. (Sample)

Sample: "Unless otherwise agreed by the parties, (Oslo Stock Exchange) shall give the Vendor not less than 90 (ninety) days written notice of major changes to the Technical Specifications. Minor changes to the Technical Specifications and other changes in the Information that does not affect the Technical Specifications can be made with adequate, reasonable written notice." -- Oslo Stock Exchange

Business Consideration: Contracts may include specific definitions of "Material Change" and "Non-Material Change" for the purposes of notice requirements and related rights and obligations. (Sample)

Sample: "Non-Material Change" means a change to the Specification which would require (Primark)... to make minor modifications to its equipment and software to receive the Information.

"Material Change" means a change to the Specification which would require (Primark) ... to make substantial modifications to its ...equipment and software to receive the Information.

Supplier shall give (Primark's Nominee) sixty (60) days' prior written notice of any Non-Material Change to the Specification and on hundred and twenty (120) days' prior written notice of any Material Change to the specification. If, as a result of any change to the Specification, it takes (Primark) more than one hundred and twenty (120) days to modify its equipment and software (Primark) may either:

- (a) Deduct from the Fees a sum equal to the amount of Fees due for the period from the expiry of the ...(120) days notice period until (Primark) is able to resume receiving the Information; or
- (b) Be entitled to terminate this Agreement forthwith upon written notice. -- Primark

3 Supply of Information: 3.4 Maintenance

The responsibilities of the parties to maintain equipment and communication facilities necessary for the supply of Information.

- Most contracts clearly state that the Vendor is responsible for maintenance of the equipment and communication facilities needed to receive the Information. (Sample)

Sample: “The Vendor shall be solely responsible for ensuring that its hardware and software are available to receive the Information and for correcting errors and overcoming breakdowns and interruptions occurring after the Information has been delivered.” - Oslo Stock Exchange

Business Consideration: Some contracts also ascribe responsibility for the communications link to the Vendor and reserve to the Exchange rights to specify the location and nature of Vendor’s facilities for interfacing with the Exchange’s system. (Sample)

Sample: “Vendor shall be responsible for (a) obtaining the requisite quantity and quality of common carrier communication lines, (b) the reliability and continued availability of such communications lines, and (c) interfacing with the (Nasdaq) System at (location); and at such other places, if any, as may be designated from time to time by Nasdaq. Vendor will meet any reasonable requirement of Nasdaq concerning the location of the interface or interfaces with the System.” -- Nasdaq

- Contracts may also oblige the Exchange to maintain adequate technical resources for the supply of the Information.

Business Consideration: It is generally agreed that the Exchange needs to be able to exercise its reasonable judgement on the necessary technical resources.

Exchanges may regard such clauses as unnecessary given their commercial incentive to maintain the flow of market data feeds.

The clauses may however have real substance if the contract defines Information or Market Data in terms of all information related to instruments traded on the Exchange, and the Exchange does not make adequate provision for collecting and incorporating all such Information into its market data feed. (Sample)

Sample: “The Oslo Stock Exchange shall maintain technical resources which in its reasonable opinion are necessary to maintain

the hardware and software required for the provision of the
Information." -- Oslo Stock Exchange

3 Supply of Information: 3.5 Warranty of Supply and Interruptions

Limitation of responsibility for interruptions in data supply.

- It is usual for Exchanges not to warrant that the Information will be free from errors or interruptions. The extent to which Exchange disclaims any warranty and the effectiveness of the disclaimer may depend upon local law.

Business Consideration: Some contracts include and require parties to acknowledge disclaimers or exclusions of all liability for performing obligations under the contract. These may be invalid in certain jurisdictions. (Sample)

Sample: “Vendor and Subvendor expressly acknowledge that Board of Trade does not make any representations or warranties, express or implied, with respect to Market Data including, without limitation, any implied warranties of merchantability, quality or fitness for purpose.” -- Chicago Board of Trade

Business Consideration: The Exchange’s position might be considerably enhanced if the contract can also refer to an official published record of Exchange transactions. (Sample)

Sample: “The Stock Exchange states that the only reliable and official source of stock exchange information is “Cedula Giieldy Warszawskiej.” -- “The Warsaw Stock Exchange Official Bulletin,” Warsaw Stock Exchange

Agreed procedure for handling interruptions.

- In practice, Vendors and Clients are usually more interested in ensuring that the contract has practical and useful proposals for dealing with the errors and interruptions that arise.

Business Consideration: References in contracts to error reporting and correction therefore usually take the form of obligations to use reasonable efforts where practical to achieve the desired aim. (Sample)

Sample: “The Exchange does not warrant that the supply of Information will be free of interruption. However, the Exchange will use reasonable endeavors:

- To give the Vendor immediate notice of any such interruption;
- Where possible, to give an estimate of how long it will take to remedy it;

- In any case, to promptly remedy such interruption as soon as practicable after it becomes aware of it.” -- FISD working group draft, Bourse de Luxembourg (similar wording), Oslo Stock Exchange (similar wording), Reuters

Business Consideration: Vendors and Clients place increasing value on provisions for the resending of information lost during interruptions of the feed. (Sample)

Sample: “In case of an interruption in the delivery of the Information (whether such interruption is caused by the Exchange, by the Vendor or by an external cause), the Exchange agrees, [Oslo Stock Exchange may, at its sole discretion,] upon the Vendor’s request and where reasonably practicable, to resend the Information lost during the interruption.” -- FISD working group draft, Bourse de Luxembourg (similar wording), Oslo Stock Exchange, Reuters

Impact, if any, of interruptions in supply on payment obligations.

- Vendors and Clients may seek relief from fees obligations in the event of interruptions of supply which exceed agreed parameters.

Business Consideration: These clauses are rarely invoked. Where the clauses exist, the length of interruption, which qualifies for an adjustment to fees, would probably constitute such a failure to meet delivery obligations as to allow Vendors and/or Clients other legal or commercial remedies. (Sample)

Sample: “In the event that, during any Quarter, the Exchange fails to provide the Information, the Fees payable...shall be reduced in respect of each trading day during such Quarter that such failures occur by an amount equal to the Fees for the Quarter divided by the quarterly number of trading days, without prejudice to any other rights and remedies the Vendor may have...” -- Reuters, FISD working group draft (similar wording)

Business Consideration: Exchanges may make provision for fee rebates direct to Clients. These may be available only on application from the Client and may not be reflected in Exchange-Vendor contracts. (Sample)

Sample: “In the event that the Information is not available, is delayed, is interrupted, is incomplete, or is not accurate or is otherwise materially affected for a continuous period of four (4) hours or more...due to the fault of Nasdaq (except for a reason

permitted in this Agreement or in Nasdaq's agreement with Retransmission Vendor if any), Subscriber's...exclusive remedy against Nasdaq shall be...a prorated month's credit of any monies due for the affected Information to Nasdaq...or (if Subscriber no longer receives Information)...a prorated month's refund..." -- Nasdaq Data Feed Subscriber Agreement

3 Supply of Information: 3.6 Service Level Agreement

Agreed procedures for monitoring service quality and co-operating to investigate and address data quality problems.

- The Service Level Agreement (SLA) is a framework for co-operation on data quality issues that can be adopted by the parties either as a binding commitment or a non-binding statement of intent.

Business Consideration: Exchanges will not need SLAs with all Vendors. Some Vendors will have more resources to apply to the introduction of SLAs than others will. All Vendors and Clients are likely to benefit from improvements in Exchange data quality that can arise from these agreements.

- The framework as reflected by FISD working group draft in Rider B typically provides for the Exchange to:
 - * Respond within given parameters to breakdowns in service.
 - * Take reasonable steps to ensure Information is timely and accurate.
 - * Establish notification procedures for system problems and changes to instruments covered by the Information feed.
 - * Provide a help desk contact.

Business Consideration: For these reasons SLAs may best be regarded as an option to be included in the Exchange contract which both parties choose, rather than as an integral part of the Exchange contract that can be claimed as of right. (Service Level Agreement Sample)

Sample: Rider B: Service Level Agreement

1. EXCHANGE'S COMMITMENTS

1.1 If any individual service is unavailable for more than a (cumulative) period of 30 minutes within any month, the Exchange will make operational recommendations to improve the resilience of the service. The daily service availability period is defined as the period during which trading is taking place under the auspices of the Exchange.

1.2 When central system problems occur, the Exchange will notify the Vendor as soon as possible by means of a fax and confirmatory phone call. Designated names and contact numbers will be posted and reviewed on a regular basis.

1.3 When central system problems occur, the Exchange will endeavor to restore the service within [...] minutes.

1.4 The Exchange will take all reasonable steps to ensure that data services provided to the Vendor are timely and accurate.

1.5 The Exchange will provide any amendments to its instrument coverage via a fax service to a designated fax number. These amendments will be sent at least 48 hours prior to start of trading.

1.6 The Exchange will provide a manned operational Help Desk during trading hours and for 30 minutes beyond market close.

1.7 The Exchange's Help Desk is manned between 7:00 a.m. to 7:00 p.m. Monday to Friday.

1.8 The Exchange's contact numbers are as follows:

Market Help Desk
General Inquiries

2. VENDOR'S COMMITMENTS

1.1 The Vendor will return a completed Service Availability Report to the Exchange within the first five working days of each month. The completed report will relate to service advisability for the previous month.

1.2 The Vendor will return a completed Data Quality Report to the Exchange within the first five working days of each month. The completed report will relate to data quality for the previous month.

1.3 The Vendor will notify the Exchange's Help Desk immediately once a fault relating to the receipt of the Exchange's price information has been isolated.

1.4 The Vendor will escalate faults where appropriate through the Exchange's Help Desk, or via an alternative contact designated by the Exchange.

1.5 Should the Vendor be dissatisfied with the Exchange's Help Desk service, the issue should be raised with the [Director of

Technical Services or other person/title specified by the Exchange].

1.6 The Vendor will take reasonable steps to ensure that data from the Exchange disseminated via its real-time networks is timely and accurate.

1.7 The Vendor will provide a 24-hour hot line for operational issues and problems.

1.8 The Vendor's Help Desk is manned between [7:00 a.m. to 7 p.m.] Monday to Friday. (Amend as appropriate to your Area.)

1.9 Contact numbers are as follows:

Help Desk.....
Network Control.....

3. JOINT COMMITMENTS

The Exchange and the Vendor will meet at regular intervals to review Service Availability and Data Quality Reports. The Vendor and the Exchange will endeavor to put into effect, within a reasonable period, the recommendations of the review meeting.

4. FORCE MAJEURE

Neither party shall be under any liability to the other party for any delay or failure to perform any obligation hereunder if the same is wholly or partly caused by circumstances beyond its reasonable control.

Signed

For the Vendor :
Exchange:

For the

Name:
.....

Name:

Title:
.....

Title:

Alternatively, the SLA may be the subject of a separate agreement or limited to direct Vendors and/or covered by a contract Schedule that may be changed at the Exchange's discretion.

The SLA also gives Exchanges an opportunity to pilot data quality measures, representations or requirements.

Experience gained via SLAs that proves generally applicable in managing data quality can be incorporated into subsequent Exchange data contracts. (Sample)

Sample: Oslo Stock Exchange undertakes to provide "IT Services and Support" to all Vendors receiving Information directly from the Exchange.

Oslo Stock Exchange's commitments, contained in a Schedule to the Market Data Agreement that can be changed at the Exchange's sole discretion, include:

- When central system problems occur, (Oslo SE) will notify the Vendor as soon as possible by means of electronic mail and/or phone call,
- When central system problems occur (Oslo SE) will endeavor to restore the service as soon as possible.
(Oslo SE) will take all reasonable steps to ensure that data services
- Points of Contact (dept, hours, phone and e-mail details provided for Operational issues, Technical issues and product issues)...are manned Monday to Friday on ordinary trading days.
- Designated names and contact numbers ...will be posted and reviewed on a regular basis. -- Oslo Stock Exchange

- In return, the Vendor may typically:
 - * Provide regular reports on service availability and quality
 - * Keep Exchange help desks promptly informed of problems or errors
 - * Take reasonable steps to ensure that Exchange information as disseminated in the Vendor's service is timely and accurate
 - * Provide a hot-line for operational issues and problems
 - * Provide a help-desk contact.

In addition the parties usually agree to meet on a regular basis to review service availability and data quality. (Sample)

Sample: ● "The Vendor will notify (Oslo SE) immediately once a fault relating to the receipt of information from (Oslo SE) has been isolated and qualified.

- The Vendor will escalate faults where appropriate through (Oslo SE), or via an alternative contact designated by (Oslo SE)

Should the Vendor be dissatisfied with (Oslo SE's) IT and Support Service, the issue should be raised with (Oslo SE's) IT Manager.

- The Vendor will take reasonable steps to ensure that data from (Oslo SE) disseminated via its real-time networks is timely and accurate. In case of fault finding, the Vendor shall perform a reasonable problem qualification of the problem before contacting (Oslo SE).

- Points of Contact for Vendor are (Specify dept, hours, phone and e-mail contacts for Operational issues, Technical issues and Product issues). Vendor's point of contact for Operational issues will be manned Monday to Friday on ordinary trading days at (Oslo SE)

- The Vendor shall provide (Oslo SE) with updates of the above contact information."

-- Oslo Stock Exchange

3 Supply of Information: 3.7 Support Services

Co-operation during the development phase of information feed.

- For new Exchange feeds or where a Vendor has not previously distributed the Information, it may be mutually beneficial for the contract to provide for support and consultation facilities, to operate during an initial development and testing period before the release of the information by the Vendor to Clients.

Business Consideration: This commitment may not be necessary or advisable in all cases. Exchanges would need to consider the resources and level of commitment that would be required.

The Exchange might also consider whether there would be any charge for the provision of these facilities. (Sample)

Sample: “During an initial development and testing period, which shall commence on [date] and end on the date on which the Vendor achieves commercial release of the Information (the “Release Date”). If the Vendor requires any information or raises any queries concerning the Information or its supply, the Exchange shall use reasonable endeavors to supply such information or answer such queries...” -- FISD working group draft

2 Term and Termination

Period of the contract and provisions for contract duration, renewal and termination.

- Contracts usually allow for an initial term to be specified followed by successive terms of one or more years -- automatically rolling over unless either party provides written notice of termination [x] months prior to the expiration of the current term.

Business Consideration: Termination of a Vendor's Exchange information feed will normally result in many Clients having to make alternative supply arrangements to ensure access to Information (and so maintain continuity of Exchange fees). It is therefore in the interests of all parties that termination periods should be at least 90 days except where one or other party is in breach. (Sample)

Sample: "Term. The original term of this Agreement shall commence on the date specified... and shall continue until the date one (1) year thereafter. The term of this Agreement shall automatically be extended for successive additional periods of one (1) year unless terminated by written notice by a party hereto given to the other at least ninety (90) days prior to the expiration of the original term or any such additional one (1) year period as the case may be." -- Nasdaq, Bourse de Luxembourg (similar wording)

- Contracts usually provide for early termination by one party in the event of breach or default by the other. These are covered in detail under section 10 of this guide.

Business Consideration: Termination for breach or default is usually a last resort leading to lasting damage to any wider relationship between the parties. Most contracts also provide other, more flexible ways to address compliance issues. (Sample)

Sample: See Termination for additional information.

- Contracts may also need to provide for termination in the event of changes in technical specifications or regulations, which prevent or impair the Exchange from supplying the Information or the Vendor from using it in accordance with the contract.

Business Consideration: These clauses can help both parties if acts by regulators or other third parties are thought likely to bring material changes to the commercial aims underlying the contract. (Sample)

Sample: "...this Agreement may be terminated by:

- (i) Either party upon termination of the right of the Vendor to receive information pursuant to...(exchange's statutory obligations); or
- (ii) Either party, if performance hereof by Nasdaq is impaired or rendered unnecessary by reason of changes after the Effective Date in the statutes, rules and regulations ...(imposed under governing law); or
- iii) Vendor, should it be unable to receive the Information as a result of any modification to the operational requirements notified by Nasdaq... or
- iv) Vendor, by notice to Nasdaq within thirty (30) days after approval by the SEC of an NASD rule that imposes obligation on Vendor that materially exceed the obligations imposed on Vendor as of the Effective Date... or
- v) Nasdaq, should it cease providing Level 1 Service, Last sale Service and NQDS to all persons in the same class of service as Vendor, provided, however that Nasdaq has given Vendor not less than ninety (90) days notice..." -- Nasdaq

Next Issue

10 Termination: 10.1 Termination Causes

This provision defines circumstances in which one or both parties are able to terminate the contract.

- One or both of the parties usually reserves the right to terminate the contract in the event of default or breach of contract by the other.

Business Consideration: Parties need to consider whether the right of termination should apply equally to both, and whether it should apply

** For any default or breach*

** For any material default or breach*

** For any default or breach of specified terms.*

Contracts usually specify a time period and process for remedy of breaches or default before termination takes effect. (Sample)

Sample: "Either party may terminate this Agreement forthwith in the event of:

a) Any material breach of this Agreement by the other party which is:

i) Incapable of remedy; or

ii) If capable of remedy, is not remedied within 30 (thirty) days of written notice by the other party requiring it to be remedied;" --

Oslo Stock Exchange, Bourse de Luxembourg (similar clause)

- Both parties usually reserve the right to terminate in the event of the other party beginning winding-up proceedings.

Business Consideration: Many existing contracts use language specific to local insolvency or bankruptcy law. Exchanges dealing with overseas Vendors and Clients need to ensure they are covered for the overseas equivalents to domestic winding-up proceedings.

The FISD working group draft deliberately aimed to provide broadly applicable language. (Sample)

Sample: b) any proceedings, whether voluntary or involuntary, are instituted for the winding-up of the other party or the appointment of a receiver, other than for the purpose of a bona-fide reconstruction." -- Oslo Stock Exchange, Bourse de Luxembourg (similar clause)

10 Termination: 10.2 Exchange's Rights to Other Remedies

Rights of the Exchange to other remedies in the event of default by the Vendor.

- Termination may be recognized in the contract as only one of a number of options for the Exchange.

Business Consideration: Provision of other remedies may help both parties develop a graduated and practical response in the event of default.

Both parties need to consider which party has discretion over the choice of remedies. The parties should also consider the potential time and cost of remedies such as arbitration proceedings, by comparison with other forms of remedy available outside the contract under operation of law. (Sample)

Sample: "Nasdaq shall have the right, in its sole discretion, to take one or more of the following actions: (i) to terminate this Agreement and Vendor's right to receive the Information hereunder; (ii) to suspend transmission of the Information to the Vendor; (iii) to demand arbitration... (iv) to pursue such other remedies.... As it may be entitled by virtue of or under this Agreement, before regulatory authorities, or at law or in equity." -- Nasdaq

Business Consideration: Circumstances leading to breach or default might not be capable of remedy in the period of days that could trigger termination clauses (in Nasdaq's case, 15 days). In these cases some contracts maintain that a state of default is deemed not to exist provided the defaulting party is making diligent efforts to remedy the default or breach. (Sample)

Sample: "If such default, untruth or inaccuracy cannot be remedied by Vendor in good faith and with due diligence within fifteen (15) days and the failure to so remedy within fifteen (15) days does not cause any of the Corporations to be in violation of applicable law or regulations, or to otherwise materially injure any of the Corporations, then an event or condition of default... will not be considered to exist or to have occurred for so long as Vendor commences such actions as are necessary to remedy such default, untruth or inaccuracy within such fifteen (15) day period and thereafter diligently pursues such actions to remedy such default, truth or inaccuracy." -- Nasdaq

10 Termination: 10.3 Vendor Rights after Termination

Rights of the Vendor to use Information acquired under the contract after termination of the contract.

- Vendors and Clients may both have created Services, databases or other records incorporating information. These may continue to store historical Information even after supply of Information to a particular Vendor has been terminated. In the case of Client databases, the database information may be updated by Information sourced via another Vendor or direct from the Exchange.

There is a need for Exchange contracts to specify whether Vendor and Client may still use historical information and, if not, what must be done with it.

Business Consideration: The Exchange may regard a right to use historical Information as a valuable right for which it expects compensation. (Sample)

Sample: “Upon termination of this Agreement for whatever reason, Vendor shall immediately cease any and all use of the Information.” -- Nasdaq

The extent to which the Exchange can enforce either a ban or a license to use historical Information may depend upon its definition of Information and upon locally applicable law.

Business Consideration: In practice it may also be extremely difficult for an Exchange to insist on Vendors eliminating all historical Information from their databases, or Clients eliminating all Information received from a Vendor who was no longer authorized by the Exchange.

Business Consideration: Many Exchanges have therefore accepted that there is no practical benefit in seeking to enforce a ban on or to require a separate license for use historical Information acquired under the contract. Exchange contracts may also allow Vendors after termination to permit use of historical Information stored by Subscribers.

This kind of clause in the Exchange-Vendor agreement does not prevent Information Vendors from setting their own conditions and charging license fees for use of historical data compiled from their Services on termination of their Vendor-Client supply contract. (Sample)

Sample: “In the event of the termination of this Agreement for any reason SWX shall be relieved forthwith of any obligation to deliver

to the distributor any further data but the distributor shall have the non-exclusive non-transferable right to continue distributing in perpetuity the data acquired during the term of the distributorship in accordance with and subject to the terms of this agreement.” -- Swiss Exchange

10 Termination: 10.4 Other Clauses Which Survive Termination

Impact of termination on other rights and obligations under the contract.

- It is common to most contracts that certain rights/obligations accrued prior to termination shall not be affected by termination or by the completion of performance under the contract.

Business Consideration: Both parties have a common interest in ensuring that the provisions of the contract designed to protect their commercial interests cannot be invalidated after termination. Areas which commonly survive termination include the following, derived from Nasdaq:

- * *Warranties, limitations of liability and indemnities;*
- * *Rights and obligations In case of default;*
- * *Payments, interest, reporting and audit rights and obligations;*
- * *Confidentiality rights and obligations;*
- * *Intellectual property rights and obligations.*

Business Consideration: Termination may trigger immediate payment of all sums due. (Sample)

Sample: "On termination of the present Agreement for whatever reason, all sums owed by the Distributor hereunder shall become immediately payable." -- Paris Bourse

5 Vendor's Use of Information: 5.1 Vendor's Use of Information (Details)

Rights of Vendor to use the information; any restrictions on these rights.

- The two main approaches to granting Vendor's use rights are by prior approval of Exchange and at Vendor discretion subject to contract:
 - Prior approval. Vendor is not allowed to use Information except as specifically described and agreed with the Exchange,

Business Consideration: Prior approval of uses of Information is a practice adopted primarily by the major North American equities Exchanges. These Exchanges maintain various different forms of Subscriber Agreement and bill certain categories of Subscriber direct. Contract administration, fees, reporting and billing arrangements may all vary depending on the Exchange's assessment of how the Information is used.

Direct-billing Exchanges require specific forms and procedures and considerable resources to sustain the "prior approval" approach. This approach also makes major resource requirements of Vendors and Clients, most of whom would not need to categorize their use of Information in a similar way for any other purpose or Information provider.

Each decision by the Exchange to approve, disapprove, categorize or seek further information on an application for use of Information may have commercial and legal significance. Delays in approval or inconsistent categorization of Information use by these Exchanges can directly affect the competitiveness of Vendor and Client Services – especially since, in most cases, the Exchange includes derived or processed Information in its definition of Information. (Sample)

Sample: "Except (for distribution to Authorized Vendors), Vendor is authorized by this Agreement to receive, process, transmit and use the Information only for the purposes of providing the Information on Interrogation Devices (i) approved by Nasdaq and described in Attachment A, (ii) listed on Attachment C, and (iii) owned or controlled by Vendor or its Subscribers. Vendor's Subscribers are authorized to receive and use the Information only for the purposes set forth in their Subscriber Agreements. Any use of the Information, whether by Vendor or by its Subscribers, including, but not limited to, retransmission or reprocessing by a Subscriber, unless expressly described in Attachment A and approved by Nasdaq, is prohibited."

“(b) Should Vendor desire to make any use of the Information (including, but not limited to, developing or communicating derivative information based upon the Information, retransmission, redistribution, reproduction or calculation of indices) in any manner not then described in Attachment A, Vendor may do so only with the prior approval by Nasdaq of such use, which approval shall be reflected in an amendment to Attachment A, and upon payment of the fees applicable to the use approved.” -- Nasdaq

Business Consideration: The Exchange may undertake to act promptly and in good faith, but the Vendor bears the risk of developing or proposing uses which may not be approved.
(Sample)

Sample: “Nasdaq shall promptly and in good faith approve or disapprove modifications to Attachment A proposed by Vendor. Vendor acknowledges and agrees that it acts at its own risk in developing any modification to its Service prior to receiving approval from Nasdaq, since Nasdaq is not obligated by this Agreement to grant such approval.” -- Nasdaq

Business Consideration: New technologies and a rapidly increasing spectrum of Information usage are bringing into question the assumptions on which decisions have been made in the past.

Most Exchanges are under legal obligations to avoid unreasonable discrimination.

Exchanges that maintain or adopt the “prior approval” approach may therefore face major challenges to ensure that the processes and criteria on which they approve or categorize use of Information remain valid, appropriate, consistent and reasonable.

- Vendor discretion: Vendor is allowed to use Information at its discretion, provided that it meets Exchange obligations specified in the contract -- which usually include provisions allowing the Exchange to audit compliance.

Business Consideration: This is the most common form of Exchange data contract. It means the Exchange is not required to determine in advance whether or how a particular use of Information is in compliance with the contract. This makes it easier and quicker for Vendors and Clients to introduce new uses of Information and new media. The contract usually includes a requirement not to misrepresent the Information.

The Vendor discretion approach makes it more difficult for the Exchange to charge different fees where Information is used for different purposes. It favors simple fee structures. (Sample)

Sample: “(a) The Vendor’s Group may:

i) Use, store, process, reproduce, make available and distribute the Information (which in this clause...includes any Information so processed) in any way or form (including but not limited to by means of teleprinter, datafeed, screen-based news retrieval services, historical database services, graphics services, radio, television, print media, Internet or any other means), on a real-time or delayed basis, subject to the terms of this Agreement. However, the Vendor’s Group will not knowingly misrepresent the Information, in particular it may not pass off delayed Information as real-time Information.” -- Oslo Stock Exchange, Reuters (similar wording)

Business Consideration: The Vendor is not usually compelled to use all of the Information in the Vendor’s service. (Sample)

Sample: ii) compile the Information in whole or in part in a Service

Business Consideration: Vendors are usually given discretion on whether and how they market, promote and charge for the Information, provided their approach and Subscriber agreements allow them to meet obligations to the Exchange. (Sample)

Sample: iii) redistribute (including via a datafeed), make available for retrieval (including via database) and otherwise market the Information in whole or in part, in any way or form, on a real-time or delayed basis to the Clients on a world-wide basis, through private or public networks, on the terms which the Vendor Group considers appropriate from time to time, which terms shall be substantially in accordance with this Agreement.” -- Oslo Stock Exchange, Reuters (similar wording)

● Exchange contracts may however restrict the Vendor’s discretion to use and market Information by, for example:

- * Setting dissemination requirements
- * Applying prior approval approaches to specified uses such as Internet services
- * Specifying prices charged by Exchange
- * Other restrictions

Business Consideration: Each restriction needs to be considered by all parties affected by the contract (including Clients) on the key criteria of whether it is enforceable, equitable and efficient as a means of achieving the desired aim.

- There may be an obligation to observe any display or format requirements the Exchange may issue (for example in accordance with regulatory requirements) or to ensure that real-time information is redistributed promptly.

Business Consideration: Dissemination requirements may include a combination of general principles and specific display requirements.

Vendors and Exchanges both need to consider:

- * *Whether Vendors will be able to meet these requirements in practice,*
- * *How the requirements can be applied to processing and display of the Information by Clients on the Client's own systems,*
- * *Whether the requirements can be applied to internal re-distribution of Information by Clients*
- * *Whether the requirements are relevant to all Information, or just to real-time Information*
- * *Whether the requirements are appropriate when Information is disseminated to non-professional Clients.*

Dissemination requirements also raise the question of whether real-time data can still be regarded as Information for the purposes of the Agreement when it is processed to the extent that the information supplied by the Exchange is no longer identifiable (for example by combination with data from other sources).

(Sample)

Sample: "The Vendor must ensure that the Data is re-distributed accurately and so as to not create a false or misleading impression as to the market in or the price or value of any security.

Where the Vendor re-distributes the Data by means of a formatted product, it may abbreviate numbers, provided the third party has been notified and abbreviation is kept to the minimum...digits of 5 or more must be rounded up.

Vendor... may aggregate orders of the same price, when required to do by systems constraints, provided the end user has been notified.

The Vendor must, except when it has notified the third party that the Data may be supplied on a delayed basis, ensure that, upon receipt, it is re-distributed on a real-time basis.

(Conditions on which a Vendor may distribute only best bid and offer rather than all individual bids and offers and related Market Status Information.)

(Details of information, which must be re-distributed whenever Vendor re-distributes: any Data relating to a particular security, a quotation for any security, an order for any security.)

The Vendor must ensure that, where data is supplied in relation to a security, equivalent Data relating to all other securities in the relevant market sector (which is received) is redistributed. Unless the third party is notified by the Vendor that Data relating to one or more securities in that market sector will not be re-distributed.

The Vendor must ensure that if the full text of any announcement provided as part of the Regulatory Announcements service is re-distributed, the Announcement number is also supplied.

The Vendor must ensure that, if quotations or orders are re-distributed so as to give priority according to price, priority is given according to (detailed selection criteria).

Where the Vendor uses the Data to calculate a mid price, best bid price, best offer price, (other examples of calculated values)... which differs from that supplied by the Exchange, the Vendor shall not represent that price or volume was calculated by the Exchange.” -- London Stock Exchange

- Exchange contracts may also set specific provisions, including prior approval procedures, for services in new media such as Internet.

Business Consideration: Some contracts provide in general for a Vendor discretion approach but require specific types of data distribution, for example those related to Internet, to be submitted for prior approval by the Exchange.

The risk in these cases, unless the terms requiring prior approval are clearly defined and restricted, is that Exchanges who are not prepared to run their entire Market Data business on a prior approval basis find themselves required to do so.

It is also frequently argued that market data contracts should operate independent of medium because medium-specific restrictions are rapidly overtaken by technology and outdated restrictions rapidly become causes for unnecessary and potentially unfair discrimination.

For example, controls over individuals accessing information via secure Internet links may be far more effective than controls in a datafeed dealing room environment. Similarly, tools for auditing unauthorized use of information on the public Internet may be more highly developed than tools for identifying unauthorized use of information on an organization's internal networks.

(Sample)

Sample: “Internet Distribution. Vendor or Subvendor shall have no right to disseminate or otherwise distribute Market Data or other data of Board of Trade over the Internet unless Vendor or Subvendor receives the prior written approval of Board of Trade and executes an Internet Distribution Attachment to the Vendor/Subvendor Agreement.” -- Chicago Board of Trade

Business Consideration: However, recently developed Internet Annexes and Appendices aim not only to ensure adequate controls approaches but to use the Internet's capabilities to maximum advantage.

This may include, in addition to commitments on controls:

- * Displaying the Exchange's fees on the Vendor's site,*
- * Offering links to a list of “approved suppliers” on the Exchange's site,*
- * Specifying information (including personal information) to be obtained from Subscribers.*

The commercial advantages of this kind of requirement are open to question. There may be legal risks in requiring representations, control standards and collection of personal Subscriber information from Internet service Vendors if these are not deemed necessary from other Vendors and are not clearly related to general compliance requirements. (Sample)

Sample: “It is expressly agreed that the Distributor shall undertake to:

- * Display on his Internet sites the amount of the variable monthly fee payable to Exchange,*

* Prior to any onward transmission of Exchange data or Services provide the following information:

- a) The name of a person responsible for the Internet data feed system,
- b) A description of the data feed transmitted via the Internet,
- c) A detailed description of the distributor's transmission system and its architecture,
- d) Its functional and security characteristics;

* Undertake to maintain the service quality of the Internet site if he wishes to benefit from a link between his site and the Exchange Internet site, which will provide to that effect a list of <<approved>> suppliers on its own site;

* Be able to prove to Exchange:

- a) That its security systems are reliable against any attempted <<piracy>> or unauthorized reception or onward transmission of Exchange,
- b) That there is an identification procedure and that a unique access code has been attributed to each Subscriber, by whatever means. It is desirable that the Distributor should use a point-to-point link with the access software. For security purposes, the Subscriber should receive only the information for which he has contracted with the Distributor. Exchange may not under any circumstances be held liable for the non-confidentiality of the Distributor's Subscriber's access codes or passwords,

* Undertake to inform Exchange immediately if it comes to his attention that prices are being <<pirated>> either on reception or on onward transmission. In the event of <<pirated>> reception or onward transmission of Exchange (in particular in the context of non-contractual utilization of Exchange data) by one of Distributor's Subscribers or in the event of a transmission problem, the Distributor shall be liable for payment of the variable monthly fee for each item of Exchange data that has been unlawfully used or exploited;

* Undertake to inform Exchange if he offers the possibility of consulting Exchange data via an access point that is not the access point of his own service and to inform such access provider that he should also conclude an agreement with Exchange so that Exchange can ensure that operations relating to the provision of Exchange Services hereunder comply with the terms hereof, the

Distributor agrees to send his Subscribers a subscription form including the following data fields:

- a) Company name and business name
- b) Surname and forename of the Subscriber
- c) Address of the company's registered office
- d) Subscriber's home address
- e) Telephone number
- f) Fax number
- g) Internet e-mail address

The Subscriber must fill in all these data fields." -- Paris Bourse, Warsaw Stock Exchange

- Exchange contracts may restrict the way in which Vendors represent Exchange prices.

Business Consideration: As noted above in definitions, most Exchanges do not specify the price that Vendors charge for Information as incorporated into Vendor's services. (Sample)

Sample: "The distributor shall be free to establish and alter the prices to and the pricing agreements with its clients..."

Business Consideration: However, some Exchange contracts require the Exchange's fee to be separately identified in the Vendor's price list. (Sample)

Sample: The Stock Exchange's royalty has to be a separate component of the distributor's price list." -- Swiss Exchange

Business Consideration: Other Exchanges do not require their fees to be specified but require that any reference to their charges be accurate. (Sample)

Sample: "Where the Vendor advises any Customer of any charges shown in the Price List, the Vendor shall ensure that such charges are stated accurately." -- London Stock Exchange

Business Consideration: These restrictions may not be in the interests of any party, including the Exchange and the Client.

Practical objections include the following:

** Most of the Exchanges concerned have complex rate structures involving both fixed and variable elements that cannot be readily translated into simple costs per Subscriber.*

- * *Exchange fees structures are generally expressed in one currency only; comparisons with Vendor services in local currencies may be meaningless.*
- * *It is very difficult to determine the “accuracy” of a currency conversion.*
- * *Transparency on Exchange fees can be achieved more easily and at lower cost by each Exchange making full details of its entire price list, including any negotiable elements, discounts or pilot schemes, available on the Exchange’s own web site. (Sample)*

- Other restrictions on Vendor’s discretion.

Business Consideration: Some Exchange requirements are clearly designed for the protection of Clients; others are of questionable value. As noted above, these requirements need to be considered in the context of:

- * *Whether they are enforceable,*
- * *How much it costs the various parties to comply with and/or enforce them,*
- * *Whether they are or may become inequitable, thus exposing the Exchange to legal risks. (Sample)*

Sample: “ Distributor shall...

- * Not include in disseminated Services (Information) either own or third party advertisement,
- * Disseminate the services with ...equal diligence ...to all Subscribers and with no unjustified preferences with regard to any of them.” -- Warsaw Stock Exchange

- Comparison of “prior approval” and “Vendor discretion” approaches.

Business Consideration: In summary, the “Vendor discretion” approach can accommodate as many or as few Exchange restrictions as the “prior approval” approach – and usually involves broadly the same kind of obligations. The main difference between the approaches is the extent to which the Exchange is involved in how the Vendor meets its obligations.

The “Vendor discretion” approach involves fewer resources for both Vendor and Exchange. It means the Exchange is not routinely drawn in to commercially sensitive decisions to the same extent as Exchanges involved in prior approval.

Advocates of the prior approval process sometimes suggest that prior approval provides the Exchange with a greater degree of insight into and control over the Vendor's use of Information.

This might not be considered commercially desirable or appropriate if Exchanges seek to develop commercial activities, which could lead to competition with Vendors

Advocates of Vendor discretion usually argue that prior approval confers in any event a misleading impression of control. The Exchange usually has no practical means of confirming that the use of Information is as described or that the criteria on which uses of Information are categorized (e.g. control over use of Information) remain valid.

Approaches contained in many agreements are open to the charge of an over-emphasis on rules and restrictions with inadequate attention to enforceability and verification.

Vendor's editorial freedom over Service.

- Vendors may wish to assert editorial freedom for the Service in which the Information is contained.

Business Consideration: Usually non-contentious; Exchanges rarely seek to determine the content and shape of the Vendor's service as long as it does not misrepresent the Information. (However, see Dissemination Requirements above.) (Sample)

Sample: "The Vendor Group will have complete editorial freedom in respect of the form and content of the Service, subject to... (Vendor's license to use data as expressed in the Agreement)." -- Oslo Stock Exchange, Bourse de Luxembourg (similar wording), Reuters (similar wording)

Other restrictions on use of Information.

- Exchanges may seek to relate use of Information to use of other Exchange products.

Business Consideration: Linkages of this nature may not be enforceable in all jurisdictions. (Sample)

Sample: "Vendor or Subvendor represents and warrants that it will not retransmit or otherwise redistribute Market Data in any format substantially identical to Market Profile or any component thereof, including but not limited to the LDB, unless Vendor or Subvendor

has executed a Market Profile License Agreement with Board of Trade and paid all applicable fees.” -- Chicago Board of Trade

Attribution of the Information to the Exchange.

- Whether and to what extent the Vendor is required to attribute the Exchange as the source of Information.

Business Consideration: Attribution of Information by the Vendor to the Exchange may be in the commercial interests of the Vendor or of the Exchange or both, depending on the perceived brand value of the Vendor and the Exchange in different parts of the world. (Sample)

Sample: “Subject to technical constraints, concerning which the Vendor’s decision will be final, the Vendor’s Group will attribute the (Oslo SE) as a source of Information.” -- Oslo Stock Exchange

Business Consideration: Attribution clauses may again raise the question as to whether real-time data can still be regarded as Information for the purposes of the Agreement, if it is processed to the extent that the data provided by the Exchange can no longer be identified. (Sample)

Sample: “The Vendor will ensure, when re-distributing the Data, that the data is always identified as being from the London Stock Exchange.” -- London Stock Exchange

Business Consideration: Parties should also take into account that attribution notices may in any event be stripped out by Client applications processing the Information prior to display.

Business Consideration: Some Exchange agreements address this issue by requiring Vendors to require Subscribers to keep the Exchange Information attribution notices in any communication of limited extracts to third parties. Vendors may also be held responsible for internal redistribution between Subscriber locations. (Sample)

Sample: “Where the Vendor permits Customers to reproduce excerpts of the Data... Vendor undertakes to include in its contracts with Customers... a provision to ensure that Customers attribute the source of the Data to London Stock Exchange.” -- London Stock Exchange

5 Vendor's Use of Information: 5.2 Vendor's Intellectual Property Rights

Vendor's intellectual property rights to Services in which the information is included.

- Vendors generally seek to assert intellectual property (IP) rights to their Services – which are usually compiled from a number of sources including the Information from various Exchanges.

Where the definition of Information includes all data processed or derived from Information the assertion of IP rights by the Vendor may compete with IP rights asserted by the Exchange in Information.

IP rights asserted by Vendors and Exchanges may also clash with IP rights asserted by the Client in the case of Client-generated compilations derived from Vendor Services based on Information from Exchanges.

Business Consideration: See Intellectual Property for additional information.

5 Vendor's Use of Information: 5.3 Vendor's Right to Use Other Sources

Vendor's rights to use and promote same or similar information from other data sources.

- Until recently most Information was only available from a single Exchange source. This situation is beginning to change. Vendors may seek to assert their rights to use sources other than the Exchange.

Business Consideration: No Exchange contract compels the Vendor to obtain Information only from the Exchange, so this type of clause may not be strictly necessary – other than perhaps as a reminder to Exchanges of Vendors' rights to develop other sources of supply. (Sample)

Sample: "Nothing in this Agreement will affect the rights of the Vendor's Group to use, promote and redistribute any market information legally obtained from other primary sources whether or not such information is the same as or similar to the Information." -- Oslo Stock Exchange

7 Warranties: 7.1 Supply Warranties

Representations or warranties by the Exchange regarding the supply of Information.

- In addition to any representations or warranties regarding the quality of the Information (see Quality of Supply for additional information), the contract may include representations or warranties by the Exchange that:

Business Consideration: Vendors are facing increasing pressure from Clients to provide representations or warranties in relation to the Vendor's Service and any Exchange Information included in the Vendor's Service.

- It has the right to supply the Information to the Vendor

Business Consideration: The form and nature of any such clause (i.e., as representation or warranty) are usually influenced by local legal practice. (Sample)

Sample: "Board of Trade represents that it owns or has the right to transmit Market Data to Vendor or Subvendor." -- Chicago Board of Trade

Sample: "The Exchange warrants that it has all necessary rights to license the Vendor to redistribute the Data in terms of this Agreement." -- London Stock Exchange

- Use of Information as specified in the contract will not infringe any third party rights.

Business Consideration: Any representation to this effect will need to take due consideration of the definition of Information and the extent to which the Exchange seeks to assert sole intellectual Property rights in the Information (see Contract Definitions and Intellectual Property for additional information).

Third parties potentially affected include Clients, either as Exchange members (i.e. generators of price data gathered by the Exchange or similar to that gathered by the Exchange), or as processors of Information received. (Sample)

Sample: "The Exchange represents and warrants that:

- a) It has the right to supply the Information to the Vendor's Group and that the Information and its use as specified in this Agreement will not infringe any intellectual Property Rights of any third party." -- Oslo Stock Exchange

- The supply of Information will not infringe any law or regulation.

Business Consideration: Vendors and Clients may seek a representation that use of the Information as specified in the contract will not infringe any law or regulation.

Representations by Exchanges are usually limited to the supply of Information by the Exchange. Exchanges cannot easily represent that use of the Information by Vendors or Subscribers will necessarily comply with all local laws.

This applies particularly to Internet services that may make Information technically available in countries that ban its use. Vendors and Exchanges may need to consider appropriate disclaimers and reminders in their Subscriber agreements for on-line use. (Sample)

Sample: “b) The supply of the Information to the Vendor will not infringe any applicable statute, law, rule or regulation.” -- Oslo Stock Exchange

7 Warranties: 7.2 Warranties Surviving Termination

Determination of whether or not warranties survive termination of contract.

- The contract may make clear whether warranties will cover claims made after termination for information supplied prior to termination or for damages resulting from events that took place before termination.

Business Consideration: The value of many warranties may be substantially reduced if claims can be effectively avoided by the other party terminating the contract. On the other hand there may be practical difficulties in pursuing or contesting old claims preceding termination.

Sample: “This clause (Warranties) survives termination of the Agreement.” -- Oslo Stock Exchange

Business Consideration: The contract may acknowledge that some obligations (i.e. rights of the other party, asserted by contract) would not implicitly survive any cancellation or termination. The extent of this will depend on applicable law. (Sample)

Sample: “The terms of this Agreement apply to those obligations that do not otherwise implicitly survive any cancellation, termination or rescission, namely, obligations relating to intellectual property and indemnification.” -- Nasdaq Data Feed Subscriber Agreement