

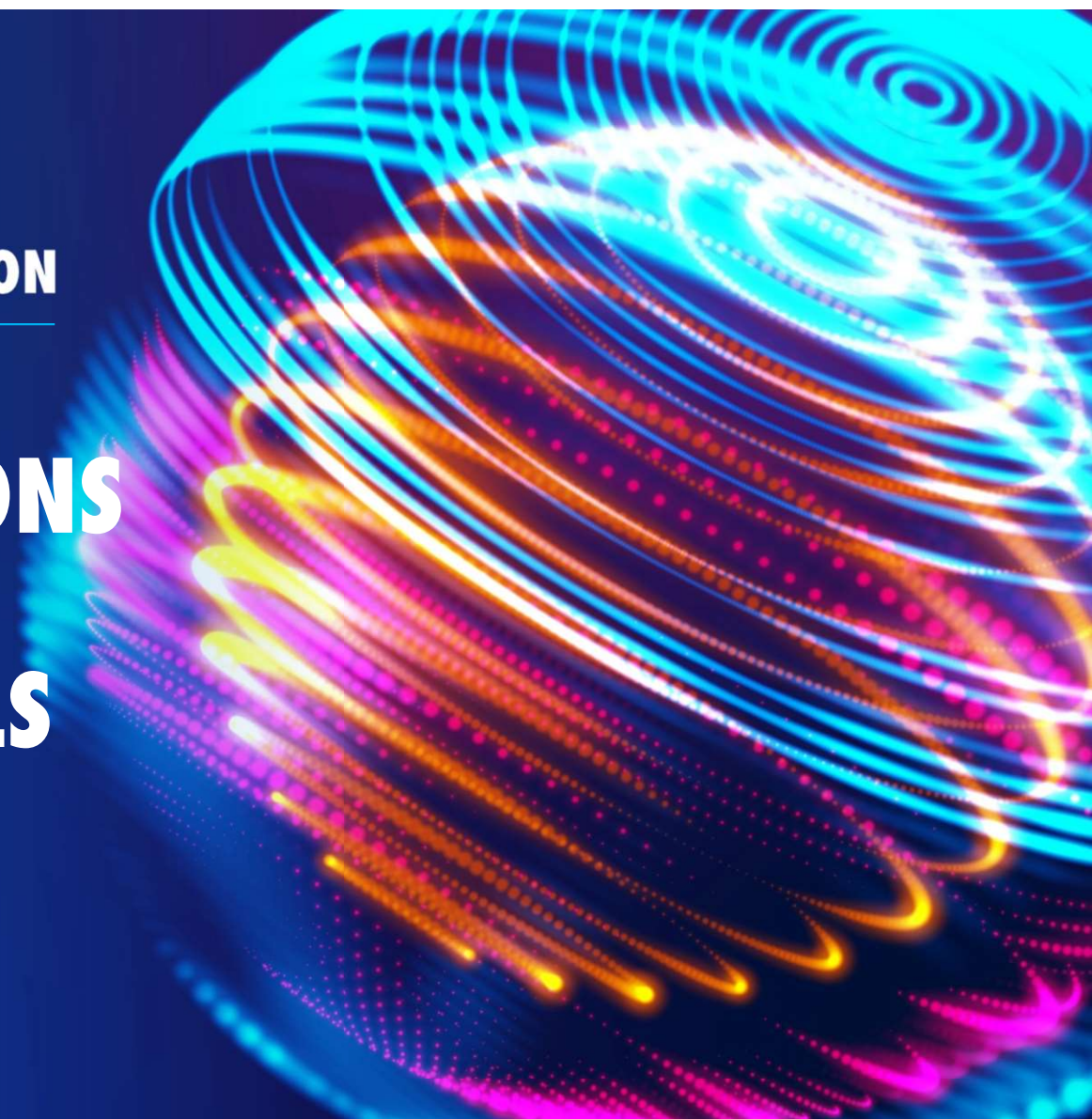
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**GLOBAL DIGITAL TRANSFORMATION  
WEBINAR SERIES**

# **KEY CONSIDERATIONS FOR TECHNOLOGY INTEGRATION DEALS**

April 12, 2023

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# Presenters



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# Agenda

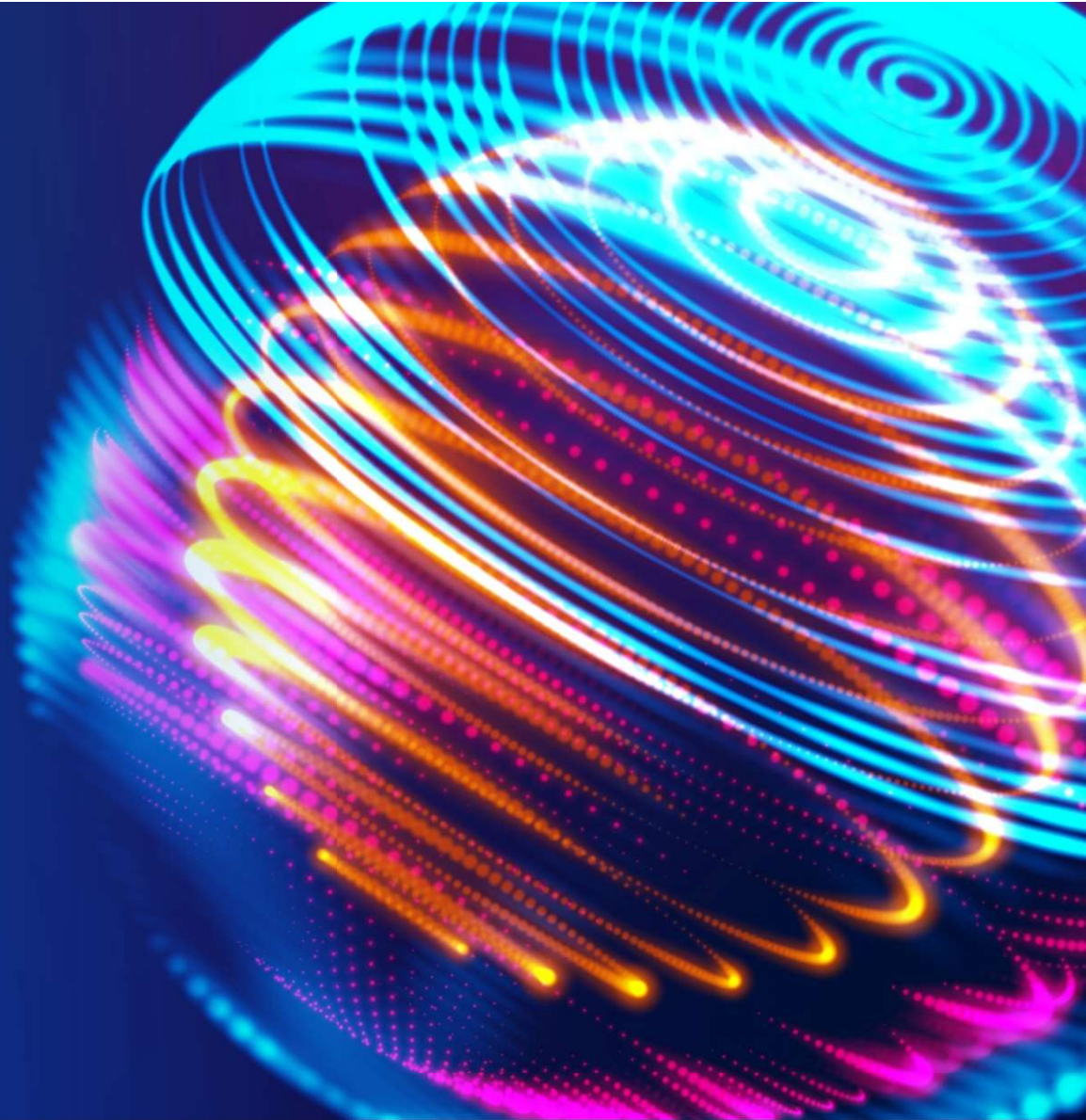
- Defining Integration Scope and Milestones
  - Defining the System and Milestones
  - Addressing Dependencies
  - Acceptance Tests and Exit Criteria
  - IP Rights
- Integration Planning and Governance
  - Integration Governance
  - Change Management
- Customer's Protections and Remedies
  - Remedies menu
  - Warranties and indemnities considerations



# Practitioner Best Practice

**Balancing objectives and  
measuring results are critical  
to a good integration**

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# Integration Scenarios

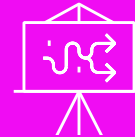
Development of  
**customized**  
solution



**License** of  
existing third  
party solution



Acquisition of  
**live** third-party  
product

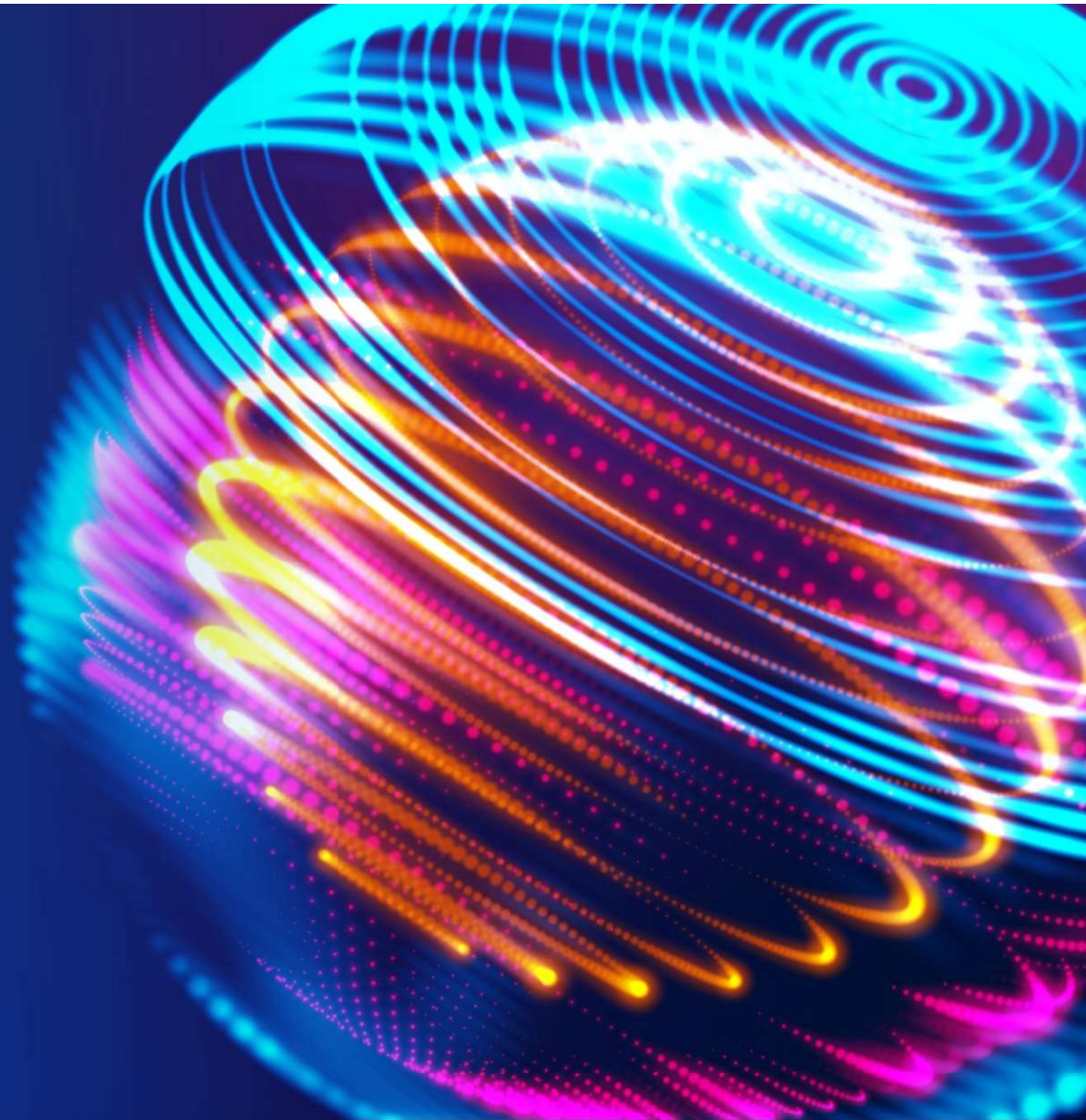


Acquisition of  
third party **side**  
product



# Defining Integration Scope and Milestones

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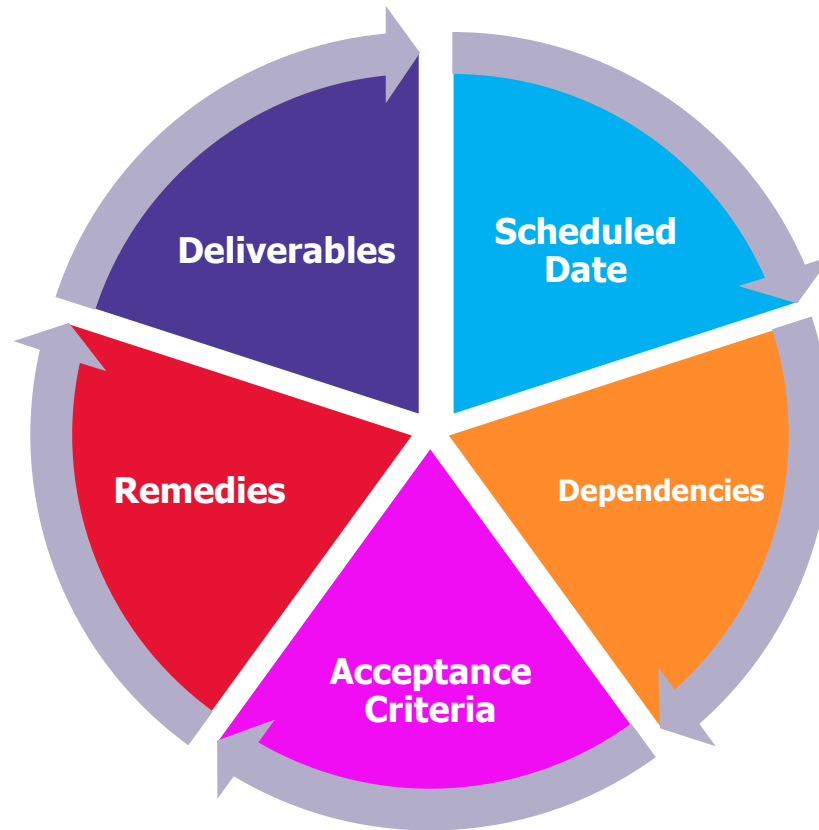


# Documenting and Defining the System

- Documenting requirements is critical for every IT project, but even more so for an integration project
- Best practice is to list all deliverables, interfaces and development items in the SOW attachment (in a format that an independent third party can understand)
- Critical part is properly defining the ultimate deliverable, which is the integrated, fully functioning “System” that includes:
  - Software
  - Data (?)
  - Equipment (?)
  - Third party services (?)



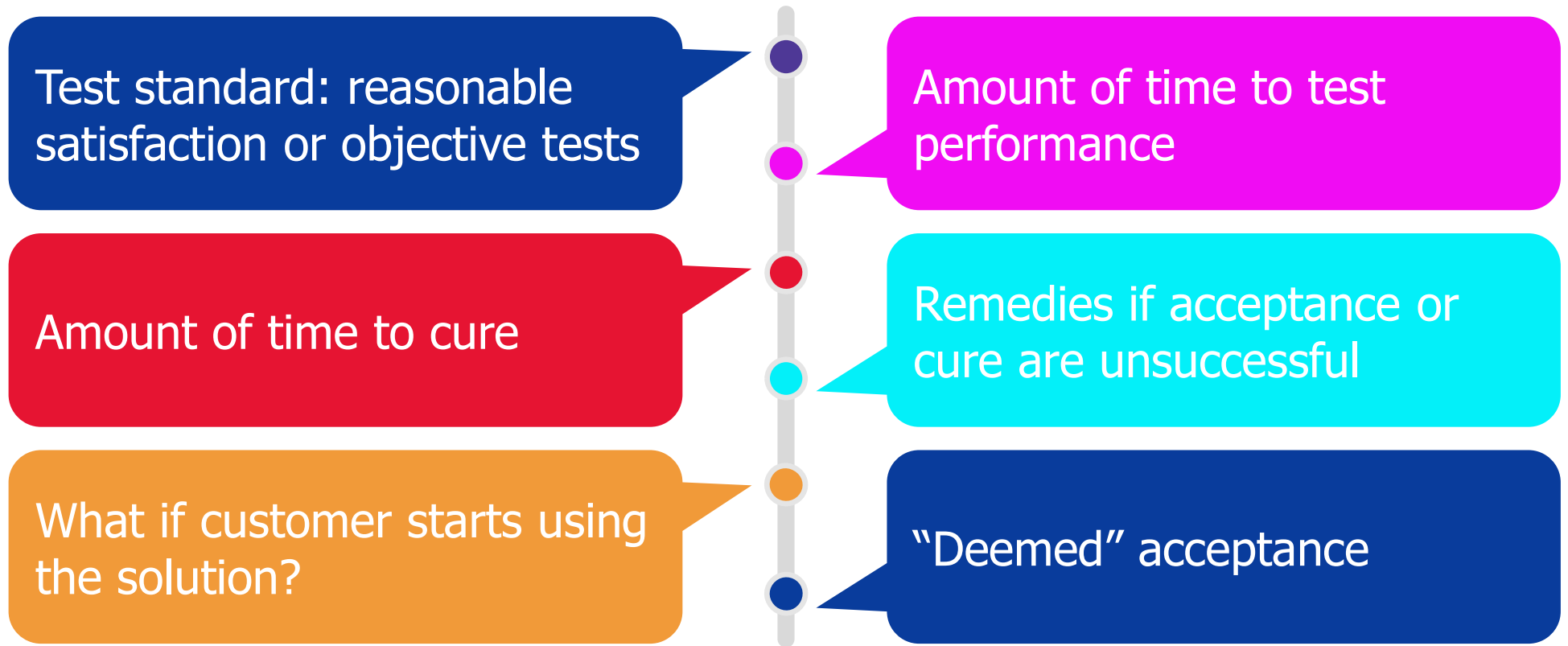
# Milestones: What To Address



# Addressing Dependencies

- Dependency is an interrelation between tasks of Customer and Supplier where one cannot perform its task without another first performing certain actions
- Step 1: Identify party who is primarily responsible for integration
- Step 2: Identify what assistance is required from the other side for the responsible party to complete the integration (‘dependency mapping’)
  - Software and services
  - Personnel with knowledge and decision-making authority
  - Hardware required to run the product
  - Information, historic data, documents
  - Third-party software, services, or data
  - Sign-off on deliverables / milestones

# Acceptance Criteria and Acceptance Tests



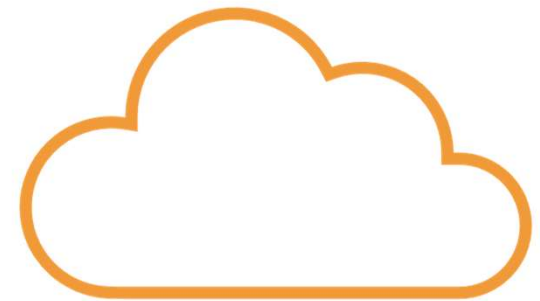
# Stabilization / Exit Criteria

- Supplier supports the customer by answering ad hoc queries, additional coaching, an increased level of quality checks, and performance feedback.
- Exit Criteria (include as attachment) – requires Customer sign-off:
  - All Service Levels are being accurately measured and reported on
  - Minimum Service Levels are being met for at least three consecutive months
  - System is operating in accordance with the specifications, all integrations and interfaces are operational
  - No high-level risks, issues or incidents outstanding, Supplier remediated any defects identified during testing
  - (for integration projects of live products) minimum retention ratio for active users pre-integration



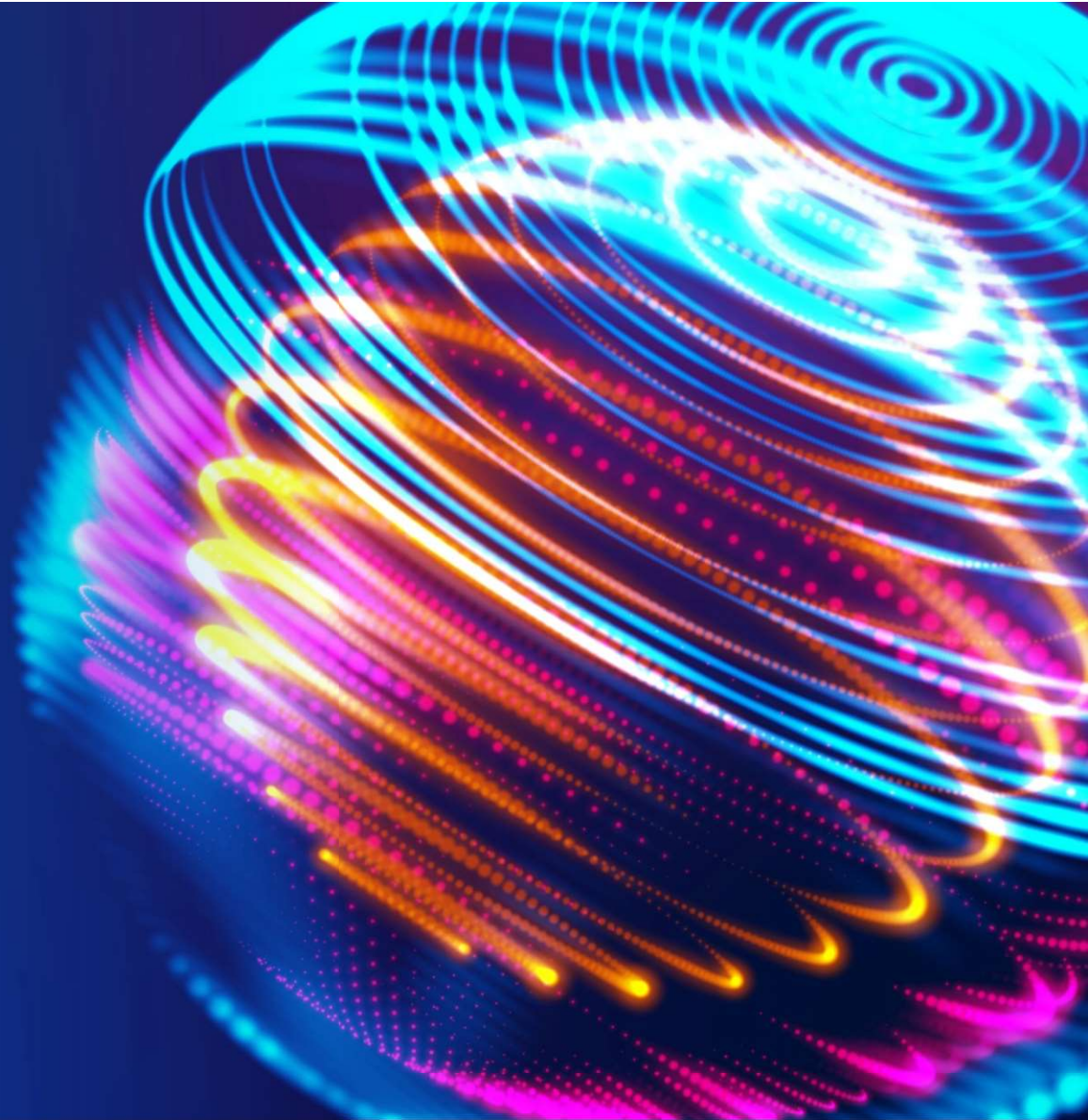
# IP Rights

- Specific identification of any Supplier Pre-existing IP or third party technology (including open source software)
  - Duration & scope of license rights for Supplier Pre-existing IP
  - Competitive protections for customer-facing integrations
- Be sure to classify all transition artifacts as “deliverables” owned by Customer
  - Transition Plans
  - Documentation
  - Recordings (e.g., Teams, Zoom, Webex)
  - Training materials
  - Procedures Manuals
- Right to access/obligation to turn Deliverables over

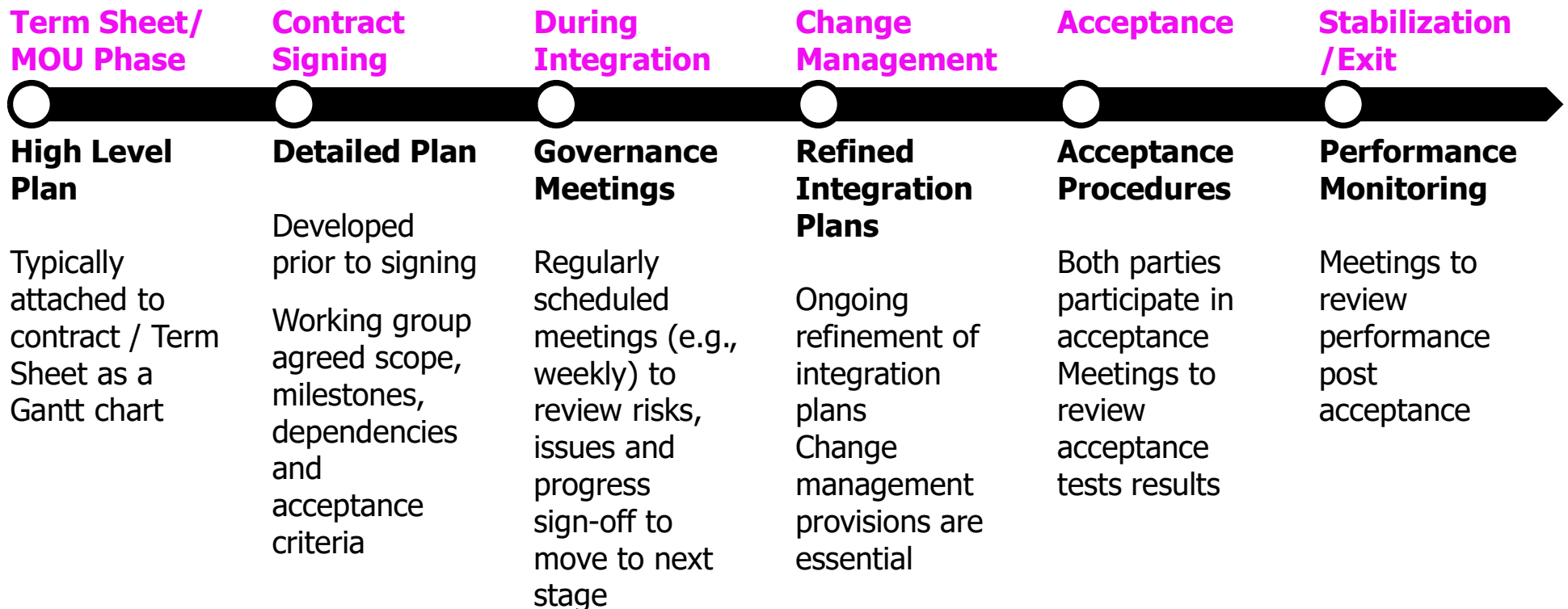


# Integration Planning and Governance

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# Integration Planning and Governance



# Integration Governance

## Integration Program Management

- Set up the governance structure necessary to manage the overall Integration and coordinate with Customer
- Set up Integration tools and working environment
- Conduct the kick-off meetings
- Develop and implement Integration Decision Rights Model

## Issue and Question Management

- Facilitates the tracking, resolution, and escalation of issues that arise during Integration
- Issues may be related to obligations, performance, personnel, difference of opinion, approach, perspective, or interpretation
- Objectives
  - Resolve issues in a constructive way
  - Minimize unnecessary escalation by resolving issues at appropriate levels of authority
  - Ensure issues are resolved as quickly as possible



# Integration Governance

## Reporting

- Finalize the process to gather Integration status information and report it to various Customer stakeholders
- Define report formats, tools and templates
- Process should include management actions arising from various status meetings, issues meetings

## Key Personnel

- Identify by role and name
  - Integration Leads
  - Other integration specific roles
- Include in exhibit/attachment to contract
- Must stay on account through the end of integration
- Authorize to agree changes and sign documents?

# Change Management

- Process for requesting and approving all changes
- Supplier responsible for preparing proposals
- Not all change requests justify fee or timeline adjustments. For example:
  - No material change in level of effort or requirements
  - Results from Supplier's breach or negligence
  - Necessary to comply with laws or specified responsibilities of Supplier
- Factors to be taken into account when pricing change proposals
- Certain changes outside the scope of typical change management. For example:
  - Customer's right to extend milestones or go-live for business reasons
  - Extensions to account for missed Supplier milestones

## Your CLE Credit Information

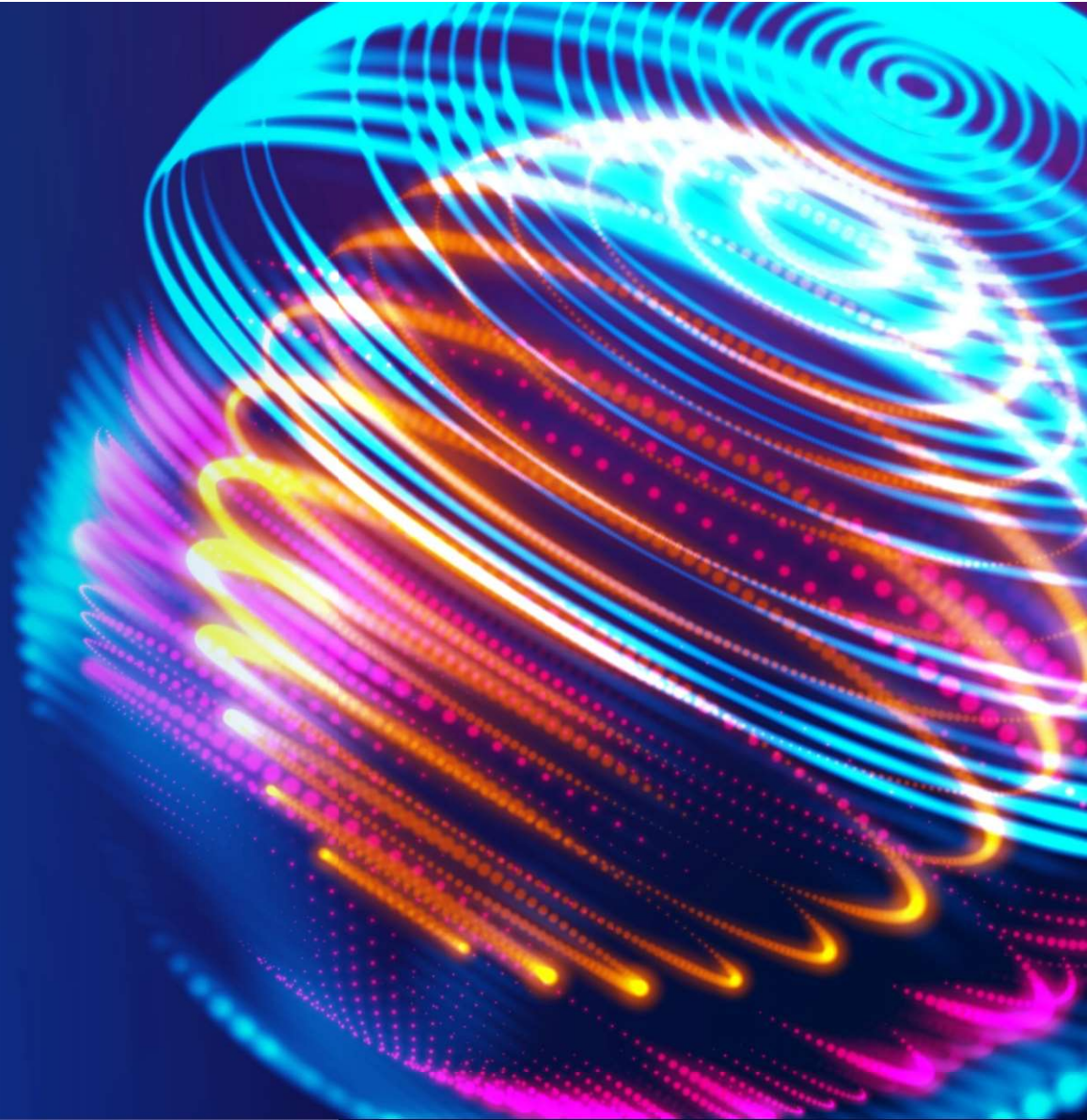
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# Customer's Protections and Remedies

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# Remedies for Missed Milestones

Cure period?

Excuse of Integrator? (e.g.time extension for breach of dependency)

Credit Against Fees

No payment of Fees tied to Milestone

Percentage of payments held back by Customer pending Final Milestone Completion

Credits and hold-backs not a limit on Customer's right to pursue additional damages

Termination if Critical Milestone missed

Cross-Termination of Other related Agreements or Commitments

Release of Customer from exclusivity or other restrictive covenants

Step-in

# Integration Milestone Credits



- Integration Milestone Credits
  - Key incentive to perform
  - Typically payable by Supplier to Customer if any of the Integration Milestones are not achieved by the scheduled completion date
- % of Integration Fees at risk for late milestones
  - Percentage points for weighting across milestones (allocated in Customer's discretion)
  - To calculate credit, multiply Integration At Risk Amount by the percentage points allocated to the particular Integration Milestone
- Extended Integration Milestone Defaults
  - Credits escalate when milestone has not been completed within certain period of time (e.g., 30 days) after the scheduled completion date, or any subsequent period
  - E.g., 1.5X for second failure and 2X for each subsequent failure

# Warranty Considerations - What needs to be covered?

Key is properly defining the "System"

Must be inclusive

No integrator will agree to take responsibility for third party elements



But cannot be overreaching

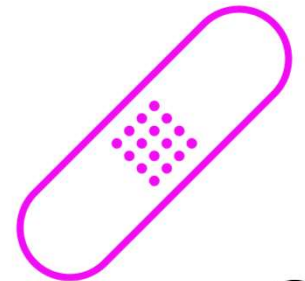
But customers need to have assurances that they will have fully integrated and functioning "System"

# Warranty Considerations

- Clearly Detail Responsibilities
  - What if the defects relate to the third-party product?
  - What if the defects related to the interfaces/integrations?
  - Answers may be different depending on when defects are detected
    - Integrator should be required to obtain fixes from third party for defects in third party products detected during testing
    - Need to require Integrator to use efforts to detect defects during testing
    - Challenge really is what happens after Acceptance



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# Indemnification Considerations

- Watch out for typical indemnification exclusions
  - Combination Use
  - Alterations or Modifications
  - Any claims resulting from or relating to third party technology
- Similar to scope of proper warranties, need to carefully define the scope of indemnification
  - While integrators will not assume responsibility for the specific underlying third party elements, should acknowledge the integrator's products and services directly relate to third party elements
  - The System necessarily includes combination use with third party technology, and often altering and modifying certain technology

# Disclaimers and Limitations of Liability

## Ensure proper scope of any disclaimers of responsibility or claims related to third party technology

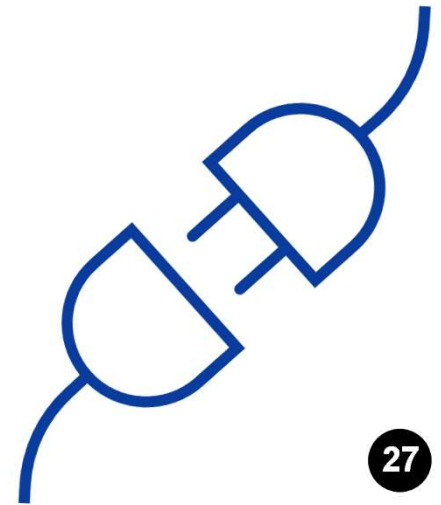
- Supplier can disclaim responsibility for the underlying third-party technology compliance and performance issues
- Disclaimers should **not** be drafted in a manner to disclaim all claims in any way relating to components or technology not provided by Supplier

## Updates and upgrades; Changes to features and functionality

- Notice requirements
- Change management and responsibility for additional costs

# Disclaimers and Limitations of Liability

- Consider additional damages or remedies for specified breaches, e.g. where measurable additional costs to the third party technology suppliers or otherwise
- For third party components or technology that are not provided by Supplier, does Customer assume responsibility for performance issues?
  - Limitations of Liability
  - Force Majeure



## Other Remedy Considerations

Bifurcation of service and technology components provided by Supplier. Where Supplier is providing both service and software/technology components, preference is for a consolidated agreement. If multiple agreements are used, consider:

Interrelated warranties and dependencies

Cross-termination

Effects on Limitations of Liability

# Other Remedy Considerations

**1**

## **Other relief for third party materials, suppliers or technology:**

- Force Majeure
- Service Level Exclusions

**2**

## **Coordination with and issue management for third party providers**

**3**

## **Service Level Termination Events**



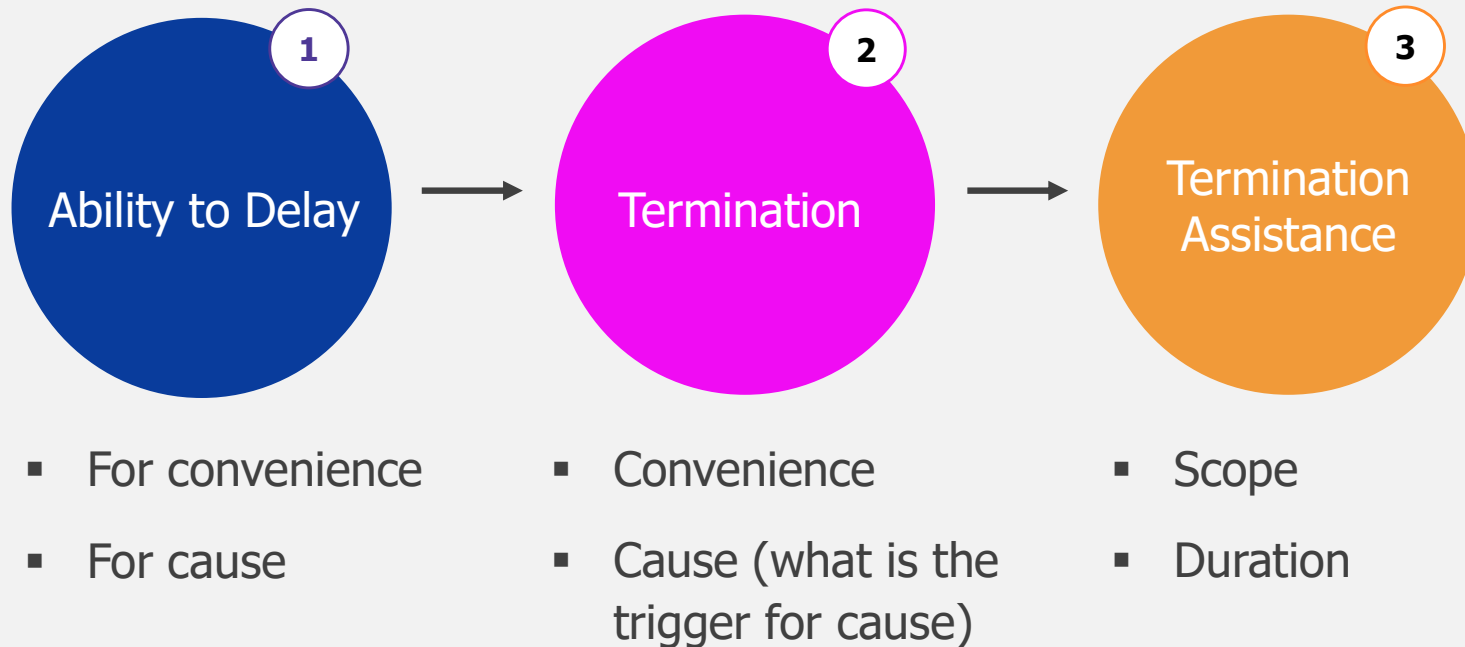
## If Things Don't Go As Planned...

- Integration projects can be complex and go sideways for a number of reasons – from poor provider performance and missed deadlines to changes in company's internal requirements.
- When this happens, the company may be a good way into a project and then need to switch gears with respect to the provider.
- It will be important to lay out a clear transition plan for the replacement provider (which will be smoother if the IP rights referenced above are in good order!).

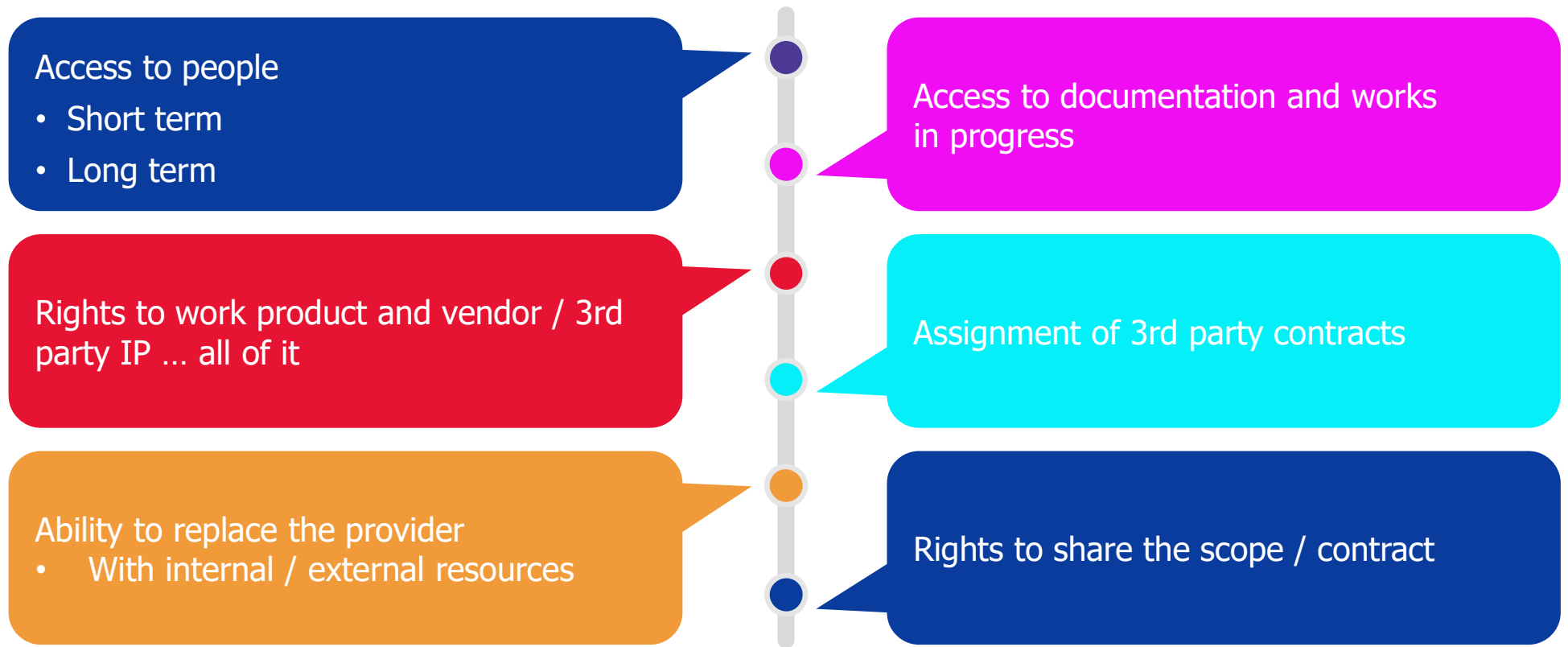


- Access to cloud environment
- Access to code
- Good documentation
- What does the contract say?

# Planning for the Worst (Hoping for the Best)



# Planning for the Worst (Hoping for the Best)



# Upcoming Webinars

## Clear Skies: Terminating Cloud Relationships

May 10, 2023 | 12:00 – 1:00 PM ET

Speakers: Christopher Archer, Emily Lowe and Jonathan Traub

## Digital Health Transactions

June 14, 2023 | 12:00 – 1:00 PM ET

Speakers: Doneld G. Shelkey and A. Benjamin Klaber



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# Biography



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Anastasia Dergacheva counsels major international companies in the telecommunications, media and entertainment, and technology industries. Anastasia's practice focuses on mergers and acquisitions and technology transfer transactions, as well as licensing, outsourcing, and professional services deals. Anastasia also advises clients on various regulatory aspects of telecommunications, IT business, and ecommerce, as well as data transfers.

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Eric J. Pennesi represents clients in technology transactions and other strategic commercial contract matters. Eric brings a practical, business-oriented approach to providing deal strategy, drafting, negotiation, risk analysis and related guidance for transactions involving software licensing; cloud computing; technology transfer and commercialization; development, marketing and other professional services; manufacturing, sale and procurement of goods; and business process and information technology outsourcing.

As part of his practice, Eric regularly provides counsel regarding structuring and documenting complex commercial relationships for a broad client base, which ranges from startup and growth-stage technology companies to global e-commerce and traditional retailers, manufacturers, financial Integrators and life sciences companies. He also works with our clients on legal issues that arise in connection with the design, implementation, maintenance, and operation of their online presence, including issues related to advertising; payment processing; terms of use, service or membership; third-party license compliance; and data collection, security and analytics.

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# Biography



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Vito Petretti's practice focus is technology and outsourcing matters. Clients regularly turn to him to draft and negotiate domestic and international outsourcing service agreements for a variety of business processes, such as information technology, finance and accounting, human resources, and procurement. Within the realm of information technology, Vito drafts and negotiates agreements for software licensing, hardware purchases and leases, data licensing and subscriptions, website hosting and development, and other technology-related agreements, including system implementation, joint venture, and strategic alliance agreements. He is admitted in New Jersey, New York, and Pennsylvania only, and his practice is supervised by TX Bar members.

Vito also works on a range of commercial matters such as supply and distribution agreements, manufacturing agreements, consulting and service agreements, marketing and advertising agreements, confidentiality agreements, and other documents and agreements in support of sourcing and supply chain operations.

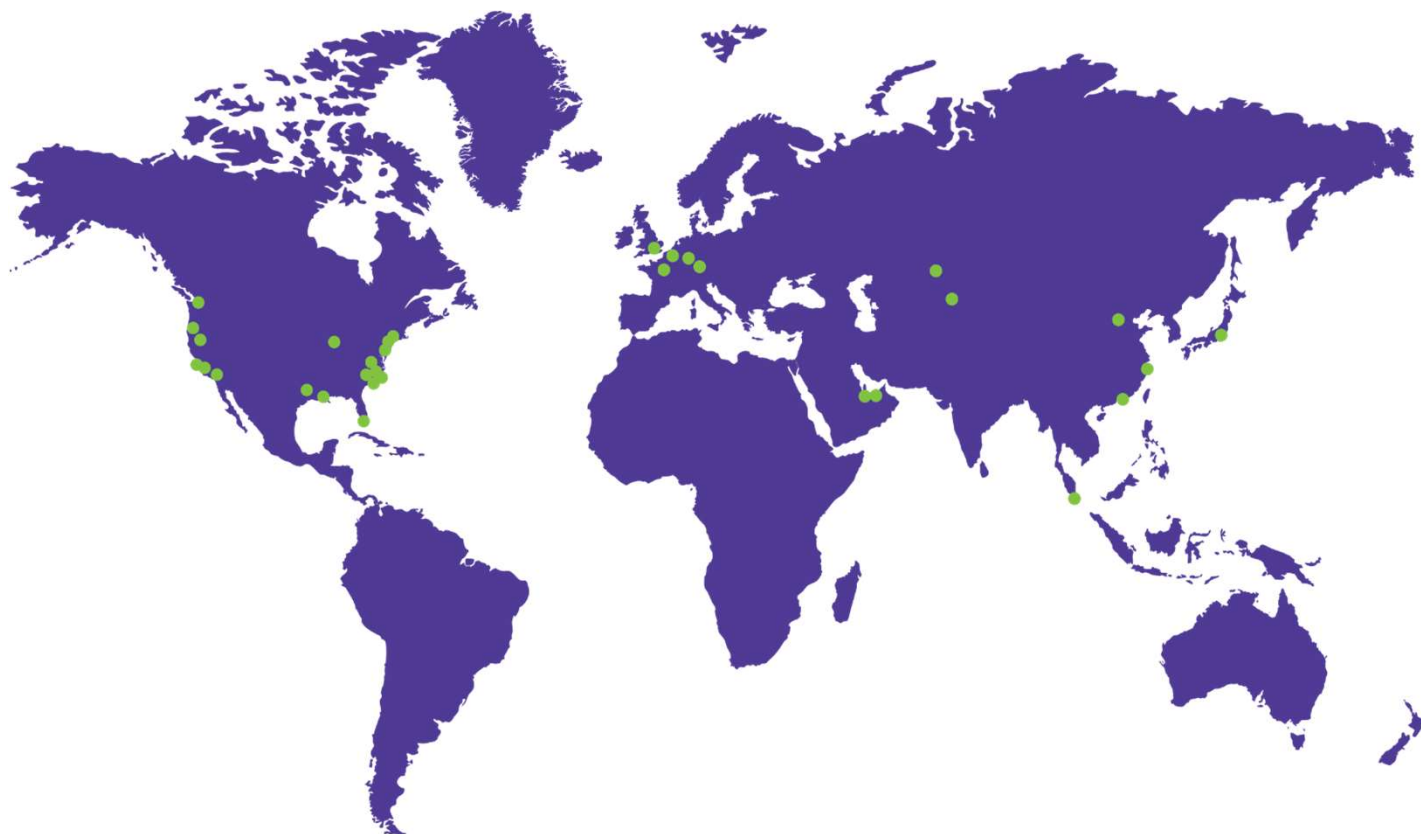
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