

Selected reseller agreement provisions (annotated)

Excerpted from the TATE™ Compendium, version ADELE,
a community library of technology-company contract clauses

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Commentary has pale-yellow background, like this.

Variable text is concentrated in the clause titles in <angle brackets>.

Some clauses are marked with daggers † to indicate that some drafters might view them (i) as entailing potentially-troublesome business- or legal commitments, or (ii) as otherwise inappropriate for their particular situations. **NOTE:** NOT ALL SUCH CLAUSES are necessarily so marked.

1. **Reseller is authorized to purchase, and to resell**, on <a non-exclusive> basis, in <the United States> (the **Territory**), the Provider <products and services listed in Schedule X> (the <**Products and Services**>).

LIKELY CONTENTIOUSNESS: *Low.*

TENDS TO FAVOR: *Depends on negotiation.*

2. **If Reseller does not purchase** at least an aggregate of <\$XX of Product and \$YY of Services> from Provider per <six-month period>, beginning the effective date of this Agreement, then <Provider may terminate this Agreement>. †

LIKELY CONTENTIOUSNESS: *Medium.*

TENDS TO FAVOR: *Provider.*

COMMENT: *Other possibilities for Provider action: Reseller will lose eligibility for discounted pricing, and/or lose its exclusivity (if any).*

ALERT: *If Provider were not allowed to terminate the Agreement in response to Reseller failing to make quota, that could seriously hamper Provider's efforts to recruit a stronger reseller for the Territory.*

3. **The term of Reseller's authorization** is <one year from the date of this Agreement>.

LIKELY CONTENTIOUSNESS: *Medium.*

TENDS TO FAVOR: *N/A.*

4. **Reseller <may> purchase <Products and Services> from other resellers** and/or through other Provider distribution channels.

LIKELY CONTENTIOUSNESS: *Medium.*

TENDS TO FAVOR: *Reseller.*

5. **Reseller <may> sell <Products and Services> to other resellers and/or into other Provider distribution channels.**

LIKELY CONTENTIOUSNESS: Medium.

TENDS TO FAVOR: Reseller.

6. **Reseller <may> offer and/or sell products and/or services that compete with the <Products and Services>. †**

LIKELY CONTENTIOUSNESS: Medium.

TENDS TO FAVOR: Reseller.

7. **Provider may offer and/or sell <Products and Services> directly to customers, in any customer or industry segment and any geographic territory <other than the Territory>. †**

(1) For example, Provider may enter into agreements with other resellers and other distribution channels, and/or engage in direct marketing and -sales.

(2) For the avoidance of doubt, Provider need not give Reseller notice, nor compensation, nor any right of first refusal, for any such business.

LIKELY CONTENTIOUSNESS: Medium.

TENDS TO FAVOR: Provider.

8. **Reseller will ensure that its customers for Services agree to terms of service furnished, presented, or approved in writing by Provider, as a condition of and prerequisite to their purchase of Services. <Provider's current approved terms of service are attached as Exhibit X.> †**

LIKELY CONTENTIOUSNESS: Low.

TENDS TO FAVOR: Provider.

COMMENT: For Web-based services, Provider might want to require Reseller's customers to click on an "I agree" button somewhere on Provider's own Web site.

9. **Reseller will ensure that its customers for Provider's software agree to an end-user license agreement presented, furnished, or approved in writing by Provider, as a condition of and prerequisite to using the software. <Provider's current approved EULA is attached as Exhibit X.>.**

LIKELY CONTENTIOUSNESS: Low.

TENDS TO FAVOR: Provider.

10. **Reseller will send sales-pipeline reports to Provider approximately <10 days before the end of each calendar month>, in such form as Provider may reasonably prescribe from time to time. †**

LIKELY CONTENTIOUSNESS: Medium.

TENDS TO FAVOR: Provider, slightly.

COMMENT: Sales-pipeline reports can be valuable business-forecasting tools, but some resellers might not want to do the work required, especially if Provider's product line didn't represent a large portion of their business.

11. **<Each party> retains authority** to set its own pricing to its customers.

For the avoidance of doubt:

(1) As between the parties, each specified party has exclusive authority to set the prices that it charges to its own customers.

(2) Such authority, however, is subject to any pricing commitments that may be set forth herein for transactions contemplated by this Agreement.

LIKELY CONTENTIOUSNESS: Low.

COMMENT: This clause seeks to make it clear that the parties are not engaging in "resale price maintenance," which can raise antitrust issues. See generally, e.g., Leegin Creative Leather Products, Inc. v. PSKS, Inc., [551 U.S. 807](#), 127 S. Ct. 2705 (2007) (U.S. Supreme Court opinion overruling per se rule under Dr. Miles case and holding that vertical price restraints must be judged under the rule of reason).

12. **Reseller will comply with all reasonable marketing guidance** by Provider in relation to the promotion and advertisement of the <Products and Services>.
13. **Provider will furnish Reseller with copies of its marketing materials**, of such type(s) as Provider may determine in its discretion, at Reseller's request. <Provider will invoice Reseller for such materials at Provider's standard rates.> <Reseller may, at its own expense, make and/or have made duplicates of such materials, of the same quality as the originals or as otherwise specified in writing by Provider.> Such marketing materials may include, for example, instruction books, catalogues, circulars, and other promotional or technical material.
14. **Reseller's authorization will be automatically renewed** for successive <one-year periods> unless <either party> gives notice of non-renewal <no more than two months> before expiration. †

LIKELY CONTENTIOUSNESS: Medium.

TENDS TO FAVOR: N/A.

15. **Reseller may** use Products, at no charge, <solely for demos and Reseller's internal training>.

Otherwise, Reseller will not use any Products in any manner unless Reseller has obtained the appropriate license(s) from Provider. Uses prohibited (if unlicensed) include, for example, production use for Reseller's own benefit and service-bureau use for the benefit of any Reseller customer.

LIKELY CONTENTIOUSNESS: Low.

TENDS TO FAVOR: Provider, slightly.

COMMENT: This sort of clause comes into play in software-reseller agreements. In those deals, it's in both Provider's and Reseller's interest for Reseller to be authorized to use Provider's software for demos and internal training. (Of course, Reseller might want to negotiate for the right to use Provider's software in Reseller's own production use.)

16. **Reseller has no authority to, and will not,** (i) make any representation on behalf of Provider, nor (ii) offer any warranty or modification of a warranty on behalf of Provider, without Provider's express written authorization in either case. <Reseller will defend and indemnify Provider against any third-party claims arising out of breach of this clause.> †

(1) For the avoidance of doubt, Reseller may furnish prospective customers with written and/or graphic materials that are either (i) furnished by Provider, or (ii) authorized in writing by Provider for use by Reseller in promoting sales.

(2) See also the independent-contractor provisions in the "General provisions" section of this Agreement.

LIKELY CONTENTIOUSNESS: Medium.

TENDS TO FAVOR: Provider.

COMMENT: This clause reminds Reseller that it does not have the authority to expose Provider to possible additional legal liability without prior approval.

COMMENT: The indemnity subclause is what makes this clause of medium potential contentiousness.

17. **Provider may change its list pricing** from time to time, in its sole discretion, by giving <30 days> prior notice to <Reseller>.

For the avoidance of doubt, pricing changes will not apply to fully-completed transactions, but will apply to pending transactions except as otherwise agreed.

LIKELY CONTENTIOUSNESS: Medium.

TENDS TO FAVOR: Provider.

18. **<Reseller> will not disparage <Provider>** or its products or services to customers, potential customers, or the public. †

LIKELY CONTENTIOUSNESS: High.

TENDS TO FAVOR: Provider.

COMMENT: Provider probably doesn't want its resellers bad-mouthing it. On the other hand, a reseller, valuing its customers perhaps more than its relationship with Provider, might well want the freedom to give its customers an unvarnished assessment of Provider's products and services.