

## **Maintenance contracts in industry: As a contractor/client make sure not to underestimate termination conditions in your agreement<sup>1</sup>**

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### **ABSTRACT**

In order to deliver needed resources, or in order to maintain functionality of some material, some companies or institutions need to outsource their maintenance tasks. Sometimes these companies don't have the skills or sometimes the maintenance needs some special skills. These are the reason why Maintenance contracts exist.

But when maintenance is not needed anymore for any reason or can't be performed, client or contractor deserves the right to terminate the contract. Termination clauses take all their importance in this case, but what kind of clauses need to be incorporated in this section of a maintenance contract?

By using compensatory method of the Multi-Attribute Decision Making method, we compared different termination clauses in maintenance contracts. By making this analysis, one contract has been eliminated and two contracts catch our attention. Finally, Siemens' maintenance contract appears to be the best choice for us.

**Key words:** Termination clauses, Industry, Maintenance, Contract, Agreement, Safety, Negotiation, Equity, Fairness, Dispute resolution, Force Majeure

### **INTRODUCTION**

According to a study published in 2017 by the National Institute of Statistics and Economic Studies (INSEE), the Manufacturing industry will represent in France: any 84% of the total industry added value, 85% of the turnover and 89% of employees.

Repeated or occasional malfunctions occurring in a company in this sector can have serious consequences.

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This can have an impact on the company's productivity, its financial results or even threaten the safety of its employees.

It then becomes important for the organization to think about actions for insuring the proper operating conditions of the equipment; to ensure the proper conduct and optimization of equipment operation. These actions can be implemented through a curative and preventive maintenance policy and process. The company, to carry out these actions, can call on an internal or external servicing.

In the case of external maintenance, the establishment of a contract is necessary between both parties and very important. Before signing the contract, the company and the service provider negotiate and put in place the clauses that will be part of it. These arrangements allow protecting the mutual interest.

It is important to define and regulate the termination rules in the event that one of the parties wishes to terminate the contract. The establishment of a maintenance contract between the two co-contractors must therefore be part of a thoughtful process and follow a proper methodology.

Through this study, we intend to define the relevant terms of a maintenance contract and highlight how critical the termination clauses can be in such an agreement.

We will intend to address the following questions:

- What are the mandatory and necessary termination clauses in a maintenance contract?
- How to assess the quality of a termination clause, so that the contract is fair to all parties involved?
- When a cancellation occurs, but the reason for it is not mentioned in the termination clauses, can the revocation take place? If so, what would be the risks for both parties?

## **METHODOLOGY**

### a. Feasible Alternatives

In order to answer the previously raised problematic, I will first give a definition of a maintenance contract. For that, I will go through different meanings given by the providers of these services and I will propose the best one. Then, I will focus on the Termination clauses that are part of this kind of contract.

Once the context will be established, I will select different breach clauses in maintenance contracts.

The five clauses I choose will help us to identify and define the main elements to be included.

Here are the contracts that contain the five clauses we will study:

- 1) No written contract
- 2) Kelway beyond technology; For the Supply of Maintenance Support Services
- 3) Bottomline Technologies; Equipment Maintenance Agreement
- 4) VX services, LLC.; VX 4000 premium maintenance contract
- 5) Siemens; Service & Maintenance Agreement
- 6) Abbey liftcare; Comprehensive lift maintenance agreement

All these contracts come from different companies, different providers of maintenance service.

I tried to choose various contracts coming from different fields of the industry like IT maintenance service, industrial equipment maintenance service or plant equipment maintenance service.

The first alternative is a particular case and it was necessary to include it in our study. In certain cases, no formal written contracts are made between the different parties. Generally, in these cases, companies agree verbally the principle terms of the agreement.

Now that we have our different ALTERNATIVES, in order to make a rigorous comparison between their different Termination clauses, we will have to select some ATTRIBUTES.

A termination clause has to be considered by different views; is the clause Fair and balanced for each party concerned? Or is the contract more in favour of one or another of the parties? How is the payment aspect managed when a termination occurs? In case of dispute, is there a method or some rule to find a solution? When the contract has to be cancelled because of an extraordinary reason (i.e. Force Majeure), what happens?

Here are the different attributes we will be considering through this study:

- 1) Fair and Balanced
- 2) Biased towards the Contractor
- 3) Biased towards the Client
- 4) Partial Payment for work completed
- 5) Payment for Work in Progress but not completed
- 6) Is there a dispute resolution clause?
- 7) Is there a Force Majeure clause?

We will analyse our different termination clauses by assessing answers provided by the contract. When an answer is present, we will assess this answer by saying if it's poor, fair, good or excellent.

When there is no answer, we will simply say “no”.

We will use the Multi Attribute Decision Making (MADM) analysis with the **non-compensatory method of Dominance**. So, with this method, we will be able to rank each attribute.

Here is the result after using the Dominance method:

Attributes	No written contract	Kelway beyond technology	Bottomline Technologies	VX services, LLC.	Siemens	Abbeyiftcare
Fair and Balanced	poor	Excellent	poor	Fair	Excellent	Fair
Biased towards the Contractor	poor	No	yes	Yes	No	no
Biased towards the Client	poor	No	no	no	No	yes
Partial Payment for work completed	poor	Payment due in advance and no indication when termination occurs	Payment due in advance and no indication when termination occurs	Payment due in advance and no indication when a termination occurs	client have choice between the two option	Payment due in advance and no indication when termination occurs
Payment for Work in Progress but not completed	poor					
Is there a dispute resolution clause?	poor	yes, but directly go to the court	No	No	Excellent	No
Is there a Force Majeure clause?	poor	Good	No	No	Excellent	No

For our study, we decided to reject alternatives that have no green box. As a result, the first alternative, “No written contract”, has no green box.

We will not consider this option for the rest of our study.

## FINDINGS

We must first define a maintenance contract:

According to the website USLegal, a maintenance contract is a contract between a contractor that agrees to perform maintenance task such as periodic maintenance of an equipment at a fixed price to another company. In this type of contract, contractor and client have to agree on what sort of task the contractor will perform for his client. They also have to agree what won't be covered by the contract. A maintenance contract is distinct from a service contract.

Now that we know what a maintenance contract is, we will decide which alternative is the best one in a termination clause for a maintenance contract. Remember, after using the non-compensatory method of Dominance, we decided not to consider one of our feasible alternative because it didn't reach our acceptance criteria.

Attributes	No written contract	Kelway beyond technology	Bottomline Technologies	VX Services, LLC.	Siemens	Abbey liftcare
Fair and Balanced	0,00	1	0	0,33	1	0,33
Biased towards the Contractor	0,00	1	0	0	1	1
Biased towards the Client	0,00	1	1	1	1	0
Partial Payment for work completed	0,00	0	0	0	1	0
Payment for Work in Progress but not completed	0,00	0	0	0	1	0
Is there a dispute resolution clause?	0,00	0,67	0	0	1	0
Is there a Force Majeure clause?	0,00	1	0	0	1	0
<b>TOTAL</b>	<b>0,00</b>	<b>4,67</b>	<b>1,00</b>	<b>1,33</b>	<b>7,00</b>	<b>1,33</b>

Multi-attribute decision making method (Compensatory method) Additive weighting method								
Attributes	Step one	Step two	No written contract	Kelway beyond technology	Bottomline Technologies	VX Services, LLC.	Siemens	Abbey liftcare
	Relative rank	Normalized weight						
Fair and Balanced	1	0,04	0,00	0,04	0,00	0,01	0,04	0,01
Biased towards the Contractor	7	0,25	0,00	0,25	0,00	0,00	0,25	0,25
Biased towards the Client	6	0,21	0,00	0,21	0,21	0,21	0,21	0,00
Partial Payment for work completed	5	0,18	0,00	0,00	0,00	0,00	0,18	0,00
Payment for Work in Progress but not completed	4	0,14	0,00	0,00	0,00	0,00	0,14	0,00
Is there a dispute resolution clause?	2	0,07	0,00	0,05	0,00	0,00	0,07	0,00
Is there a Force Majeure clause?	3	0,11	0,00	0,11	0,00	0,00	0,11	0,00
<b>TOTAL</b>	<b>28</b>	<b>1,00</b>	<b>0,00</b>	<b>0,66</b>	<b>0,21</b>	<b>0,23</b>	<b>1,00</b>	<b>0,26</b>

According to the **Additive Weighting technique of Multi-attribute decision making method** (see result in table above), we can say **the best alternative is the termination clauses of Siemens.**

Siemens' termination clauses are **526% better** than VX services or Abbey liftcare. ( $7/1.33 * 100 = 526\%$ ). We also have to consider the best second option, Kelway beyond technology, that is **351% better** than VX Services and Abbey liftcare. ( $4.67 / 1.33 * 100 = 351\%$ ).

What is important to notice here is that a termination clause has to cover all aspect of a contract (Financial and non-financial).

It also has to be fair and equal for all engaged parties and not be more in favor of another one. The philosophy must be: the one that can handle the best the risk takes it but if they don't know, they have to share the risk.

In case of force Majeure or Dispute, the contract has also to describe the procedure to follow.

In many contracts, there was not any mention to what has to be done concerning the payment when one of the actors wants to cancel the contract.

Many contracts that we studied were based on forfeit that must be paid in advance by the client.

Now that we clearly identify two good alternatives, we must determine which one is the best.

In the case of Siemens, Force majeure and dispute resolution are very well defined and the responsibility of each actor clearly described.

Moreover, when a termination is called by one of the parties, the contract establishes a clear rule on the payment topic. When the contract is first signed by the client, he must say how he wants to pay the contractor. He can choose between a payment in advance and choose the frequency, or he can choose to pay when installations are made.

I would recommend a termination clause like Siemens', because of its fairness towards the client and the contractor. It covers the topics of dispute and Force Majeure compare to other alternative. The client can choose his method of payment. In the case of payment by act, in case of cancelation, the client won't have pay in advance and the contractor will have his payment for completed work. The contract also say that any fees is due for all work completed.

In order to follow up if my recommendation is right for any organization, I would recommend a **Pareto analysis**. Do a Pareto before in order to record the problem faced with the previous termination clause and compare with the Pareto analysis of the new termination clause. This way you will be sure of which termination clause is better for your company.

## **CONCLUSIONS**

This study was designed to define the relevant terms of a maintenance contract and highlight how critical the termination clauses can be in such an agreement.

In the introduction, we promised to address the following questions:

- What are the mandatory and necessary termination clauses in a maintenance contract?

**Dispute resolution** is one of the mandatory clause of a maintenance contract. When we talk about cancelation of a contract, either it comes from the contractor or the client, there is a risk of dispute. With this clause, the two actors could discuss before going to the court.

The case of **Force Majeure** must also be considered. In case of extraordinary event, maybe the contract will have to be cancel. The contract must clearly establish the rules to follow when an event like this happen.

The **Financial** aspect must be clearly defined to avoid any dispute. When the client has paid in advance for the maintenance service, if the decision to terminate the contract comes before the anniversary date of the contract, we need to know if the money will be retained or reimbursed by the contractor. In the case of working non-completed work, the contractor must be paid for what have been done so far.

- How to assess the quality of a termination clause, so that the contract is fair to all parties involved?

The quality of termination clause must take in consideration the fairness and the balance between all parties engaged.

If a clause is totally biased towards the contractor or the client, one actors will not be covered in case of termination and will be disadvantaged.

In case of termination, different risks arise, in contract management, there is a rule that says who can best manage the risk take it and when nobody can manage it, share the risks.

- When a cancellation occurs, but the reason for it is not mentioned in the termination clauses, can the revocation take place? If so, what would be the risks for both parties?

A contract and all the clauses that compose it are there to guaranty the wright of each actor engaged. When no contract is written, it becomes difficult to arbitrate a termination because there is no proof of what has been negotiated when the contract starts.

When the contract is written, all rules are there. So, if a new reason of termination arises and is not covered by the contract I would say Dispute resolution will be a solution.

All parties will have to sit around a table and discuss the reason why one wants to cancel the contract and the best solution need to be find in order to guaranty all financial aspect of the termination and also the condition of termination.

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## About the Author



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**Hassan Coulibaly** is a Project and Program Management & Business Development Master of Science student with an Industrial Engineering Degree from ESIGELEC (France, Rouen). He graduated in 2017 from engineering school after 3 years' experience in an apprenticeship at CEMOI chocolate processing site of Tinchebray in France. Cemoi is a big French company that produces industrial chocolate for distributor brands and for chocolate specialists.

He has successfully conducted process automation and supervision upgrading projects. The main project he conducted as an apprentice was the designing and building a monitoring system to track a production line performance. With this tool, managers could follow performance in real time (Quantity of production, Number and duration of stops). He also had the opportunity to follow different technicians during their day to day activity. Within the Maintenance service, he discovered the maintenance environment and all tasks that belongs to it: Preventive maintenance and curative maintenance.

He is highly motivated and attracted by automation and industrial robotics coupled with competency in projects management and Business development. He decided to attend in January 2017 Skema business school and its Master of Science program for a dual degree. He is also proficient in all computers tools he can get, such as Microsoft office but he is also proficient in apple software.

His aim was to acquire more knowledge in project management and business development, also to learn more about management skills which are important skill to develop as a future project manager. Also, study in a multicultural environment and improve his English. He holds AgilePM certification and Prince2 certification. He also knows MS Project and Gantt Project, that are project management software.

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