

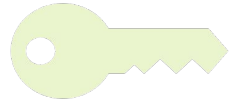
Payment Terms: Elements, Pitfalls, and Contingencies

 **Law Insider**

December 17, 2020



Active not passive



Clarity is key



Format varies:

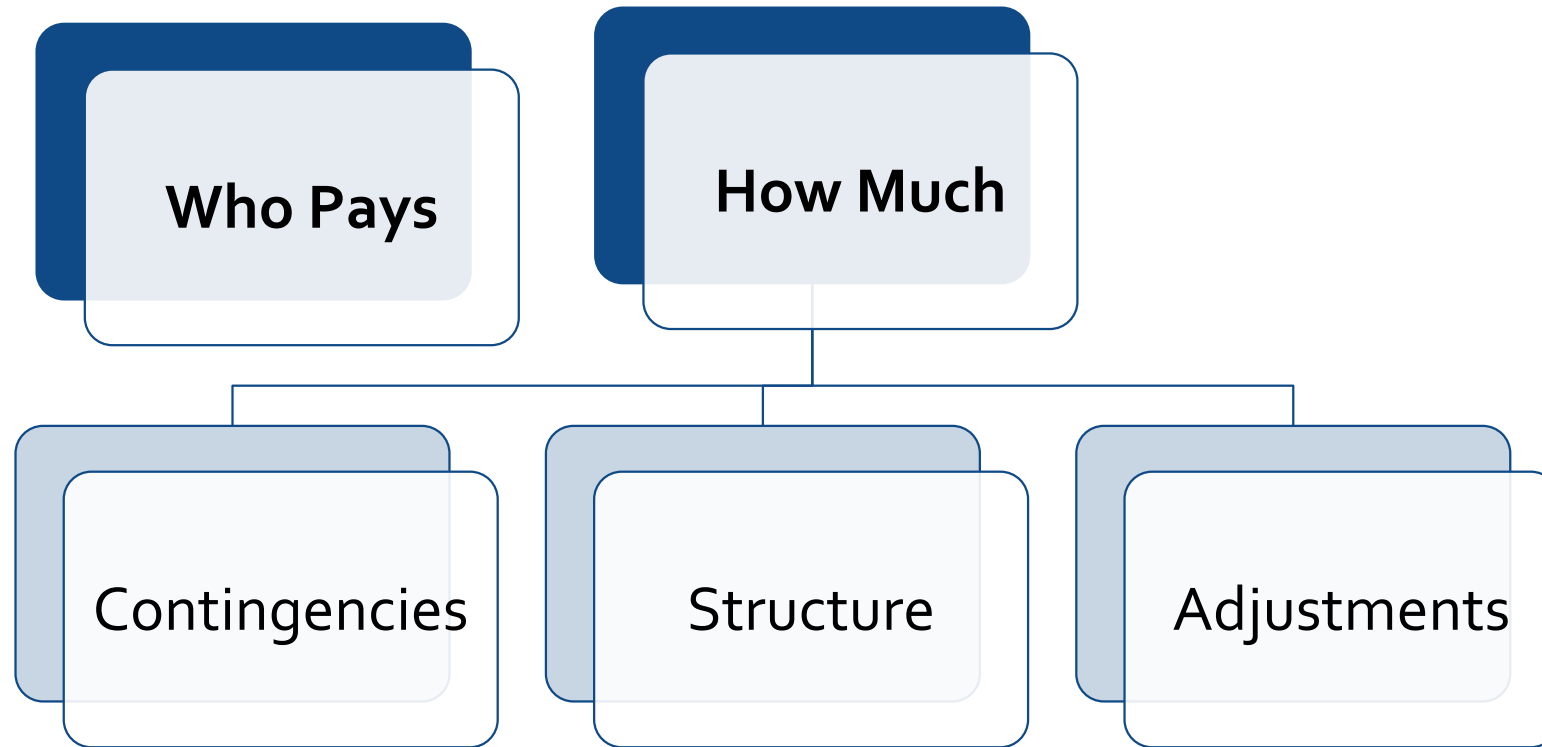
Fees

Fees and payment

Invoicing

Fee increases/renewals

Pricing and Payments Basics



Pricing & Fee Elements

Fees

Who pays – straightforward unless there is a third party paying. If a third party, be clear on 3rd party's rights and what happens if 3rd party fails to pay

How much – if in a master agreement this will reference the fees agreed in an ordering document (order form, statement of work, etc); for a one-time transaction, this will be in the transaction document itself. Taxes included or excluded? Expenses additional?

Contingencies: Subject to or exceptions – are there any contingencies on payment or other exceptions to this agreement? Are there minimums that must be met?

Who Pays

How Much

Contingencies

5.1 Fees. **Customer** will pay **all fees specified in Order Forms** **Except as otherwise specified herein or in an Order Form**, (i) fees are based on Services and Content subscriptions purchased and not actual usage, (ii) payment obligations are non-cancelable and fees paid are non-refundable, and (iii) quantities purchased cannot be decreased during the relevant subscription term.

Structure

Not addressed in this fees section:

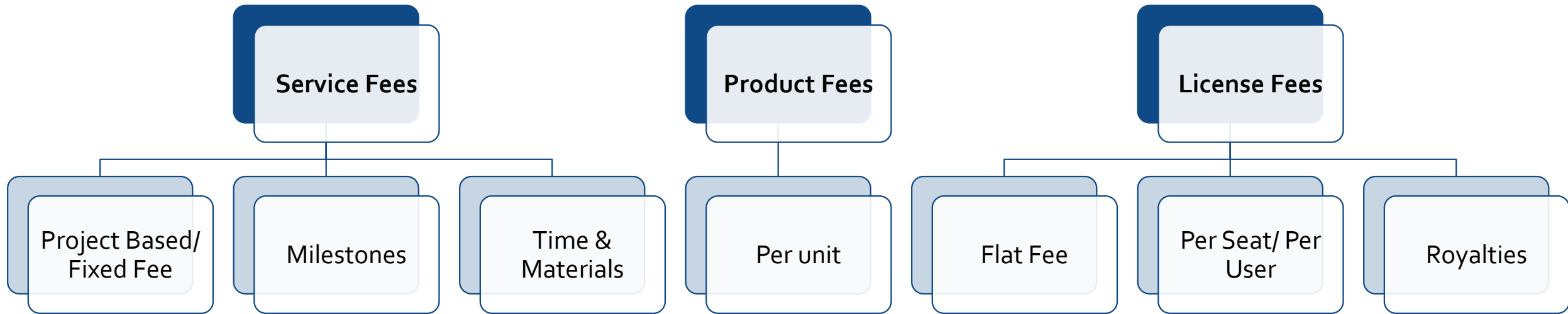
- **When/how frequently billed**
- **Adjustments/renewal pricing**

Fees Clause Example

Fees

Structure of fees: flat per unit, per seat, time & materials, etc.

Price Adjustments – if you have a master agreement OR a subscription service that automatically renews (look for this!), the seller will provide for future fee increases or additional fees.



Common Fee Structures

Product or Professional Services Fees

Simple per unit – ex: 50,000 units of Mr. Coffee, 32 oz container at \$7.00 per unit. Look for guaranteed minimums or tiers (first 5,000 units are \$10.00 per unit, then the subsequent 10,000 units are \$9.00/unit, etc). For tiers, make sure client has a mechanism for tracking the units ordered so that they validate when the price changes.

Simple T&M – Common in Professional Services – parties agree on scope and buyer pays for hours incurred by seller. Look for: rates, clarity on when and how rates can change, scope, assumptions and expenses. Is there a provision for not to exceed? This is a good protection if you are the buyer but it could limit the amount of work that is accomplished if the NTE amount is hit and the work is not completed

Fixed Fee professional services. Review scope and assumptions carefully – these are what give the vendor the right to modify the fee. Be sure to understand your (customer's) obligations because these could relieve vendor from performance

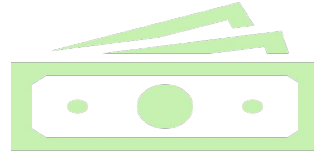
License or Subscription Fees

Seats – flat total users, adjustable (sometimes up only during a term, not down)

Term Length Discounts – usually lower annual fee for multiyear commitment but cannot cancel during term.

Royalties or volume dependent—basis for the fee should be clear (sales volume or invoices processed): this could be a flat fee for a number of transactions {like envelopes in DocuSign} – or a per transaction fee, a combo of per transaction plus some % of a transaction or volume, or some other measure.

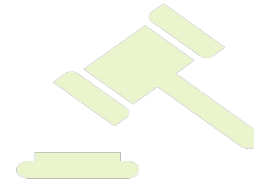
Pitfalls



Seller's right to change fees or the basis for fees in the future



Ambiguity in any elements



Seller's rights if you have a dispute over fees (especially the right to suspend services)

Drafting Tips

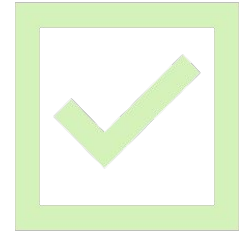


Caps on Increases

hourly rates, % increase on annual fees for subscriptions; can be tied to inflation rate.

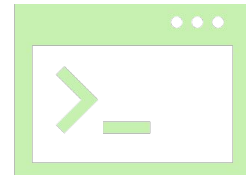


Use your leverage before contact is signed to negotiate fees or discounts/rates for out of scope service if possible



Expenses

Require approval for reimbursed expenses



Renewal – automatic?
How to prevent if desired? Pricing on renewal?

Dissecting the Pricing Terms

How Much

Who Pays

Pricing. Customer shall pay Supplier the price for each Product set forth on Exhibit B. In the event that the Term of this Agreement is renewed pursuant to this Agreement (either as an initial renewal or a subsequent renewal), Supplier may, upon ninety (90) calendar days written notice to Customer, adjust the price of any Product set forth on Exhibit B upon the effective date of the applicable renewal Term. The price for each Product shall not increase more than X% over the pricing in the prior Term unless otherwise agreed by the Parties in writing.

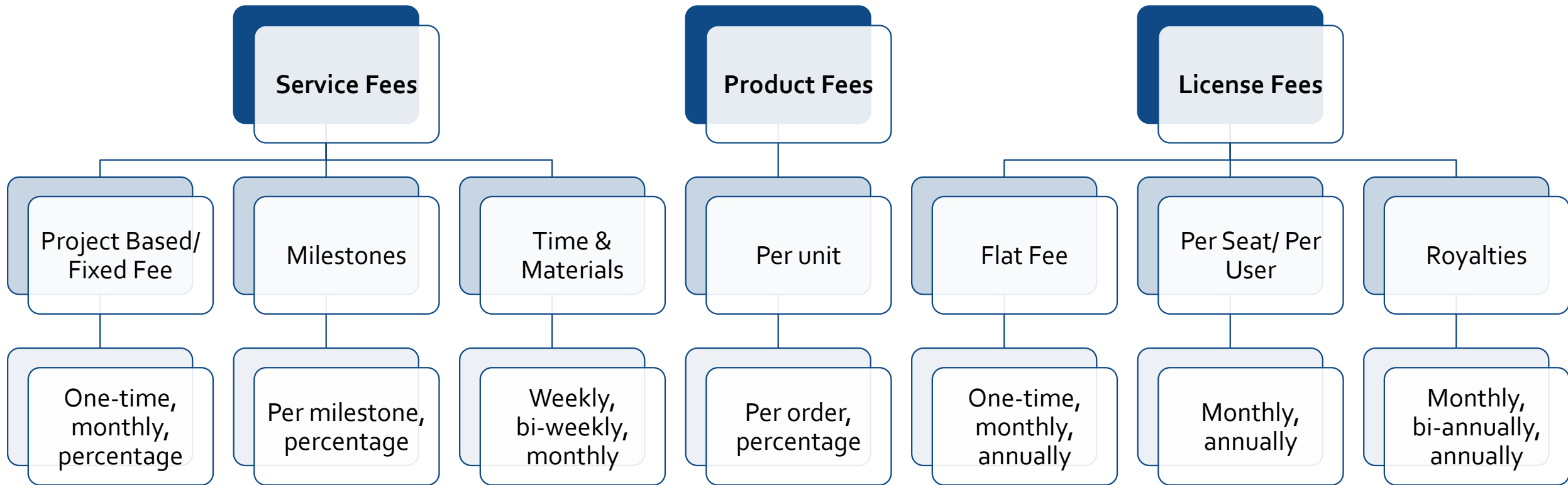
Price Adjustment

Adding a Cap on Increases



Payment Terms

Show me the money!



Common Payment Structures

Invoicing & Payment Questions

Is an invoice required? For some transactions, an online order or Purchase Order is sufficient.

How often will the seller issue an invoice? Weekly? Monthly? Annually?

What are the payment terms? Paid on receipt? 30/60/90 days after sent/received?

What is the payment method? Check? Credit card? Wire transfer? Other?

What is the payment currency? US Dollars? Bitcoin? Local currency if outside the US?

What if a payment is late? Does a late fee apply? Does interest apply? If so, how much?

What if there's a dispute? Can buyer withhold the entire invoice amount or only the disputed portion? Must the disputed portion go into escrow? What is the resolution process?

How are taxes handled? What taxes are the responsibility of buyer? Who pays them? How are they collected?

Sample Payment Provision

- **4.1 Payment Terms.** All payments must be received by SELLER within thirty (30) days. Payments must be made in the currency designated by SELLER. Any amount not paid when due will incur (a) a late fee of \$500 plus (b) interest until paid at the rate of one and one-half percent (1.5%) per month (eighteen percent (18%) per annum).
- **4.2 Disputes; Set-off.** Customer must notify SELLER in writing of any disputed amount within ten (10) days after receipt of invoice, or the invoice is deemed accurate and complete. The parties will work together in good faith to promptly resolve any such dispute. Customer is not entitled to set off any amount owing by SELLER against payments due under this Agreement.
- **4.3 Taxes.** Customer shall be responsible for all taxes related to the Fees.

Sample Payment Provision

- **4.1 Payment Terms.** SELLER will issue invoices monthly and email each invoice in PDF format to Accounts Payable@customer.email no later than the fifth (5th) day of each month. Customer will pay the undisputed portion of each invoice within thirty (30) days after receipt. Customer will make payments in US dollars via check or wire transfer, and the parties agree that those payments are made and received in New York County, state of New York, USA. Any undisputed amount not paid when due will incur ~~(a) a late fee of \$500 plus (b)~~ interest until paid at the rate of one and one-half percent (1.5%) per month (eighteen percent (18%) per annum) or the maximum rate allowed by law, whichever is less.
- **4.2 Disputes; Set-off.** Customer must notify SELLER in writing of any disputed amount within thirty (30) days after receipt of invoice, ~~or the invoice is deemed accurate and complete.~~ The parties will follow the dispute resolution procedures in Section XX to promptly resolve any such dispute, and Customer is not obligated to pay any disputed amount until the applicable dispute is resolved. Customer may set off any undisputed amount owing by SELLER against payments due under this Agreement by providing written notice to SELLER, and SELLER shall credit such set-off as a payment against amounts Customer owes to SELLER.
- **4.3 Taxes.** Customer shall be responsible for all taxes related to the Fees, with the exception of income or franchise taxes imposed on SELLER's net income. SELLER shall invoice Customer for all such taxes as a separate line item on such invoices and Customer shall promptly pay such invoice upon receipt.

Invoicing

Is an invoice required? For some transactions, an online order or Purchase Order is sufficient.

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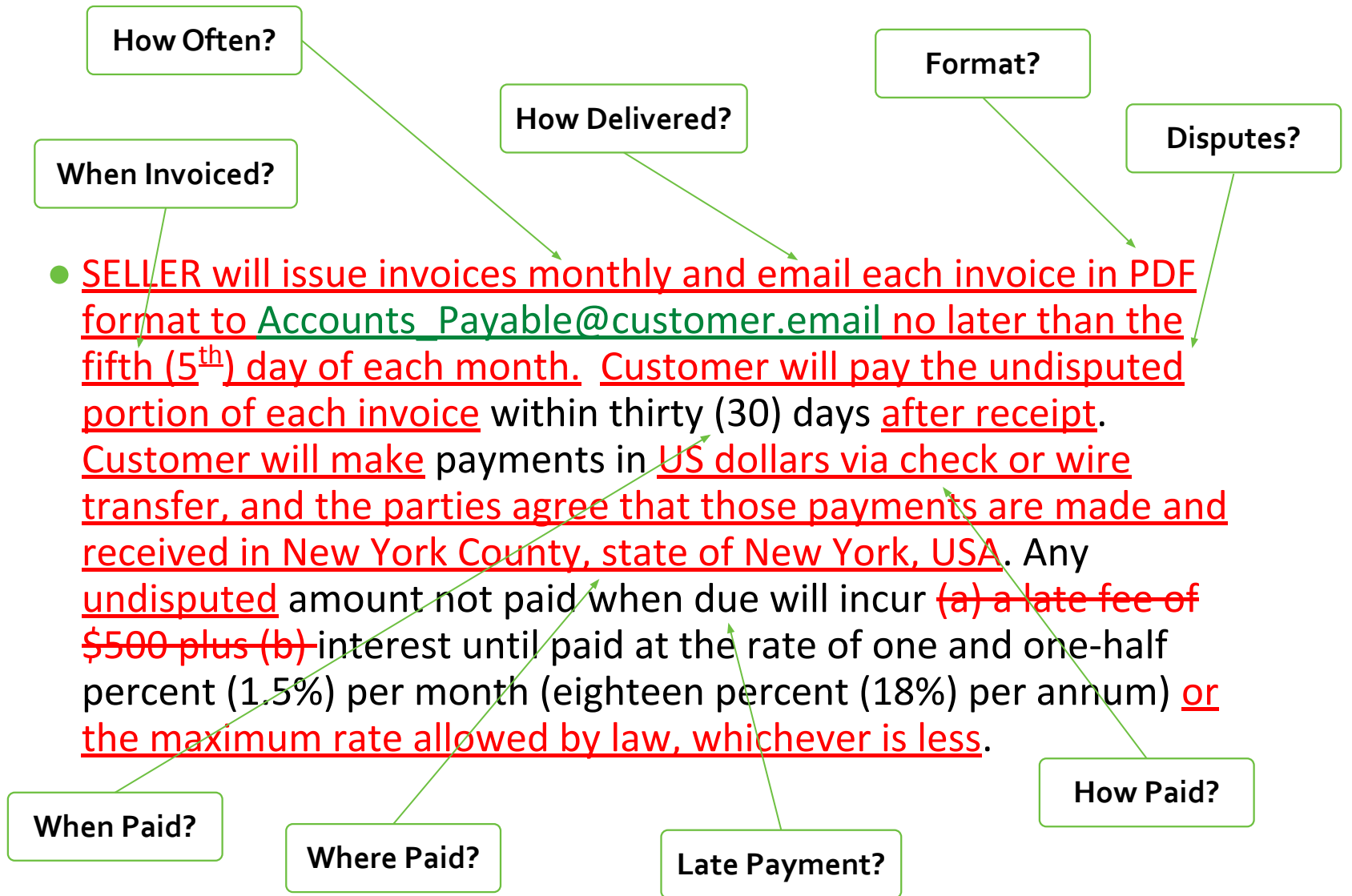
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Dissecting the Payment Terms



Dissecting the Dispute Terms

Dispute Timing?

Resolution Process?

Pre-Resolution
Status?

- **Disputes; Set-off.** Customer must notify SELLER in writing of any disputed amount within thirty (30) days after receipt of invoice, ~~or the invoice is deemed accurate and complete~~. The parties will follow the dispute resolution procedures in Section XX to promptly resolve any such dispute, and Customer is not obligated to pay any disputed amount until the applicable dispute is resolved. Customer may set off any undisputed amount owing by SELLER against payments due under this Agreement by providing written notice to SELLER, and SELLER shall credit such set-off as a payment against amounts Customer owes to SELLER.

Set-Off Process?

Broken Chairs and Set-Off



Dissecting the Tax Terms

- **Taxes.** Customer shall be responsible for all taxes related to the Fees, with the exception of income or franchise taxes imposed on SELLER's net income. SELLER shall invoice Customer for all such taxes as a separate line item on such invoices and Customer shall promptly pay such invoice upon receipt.

What taxes?

Process?

Additional Payment Considerations

Is the payment assignable? Can the payee assign the right to receive payment to a new payee, such as a creditor?

Payment contingencies? Has seller delivered? Has the seller met the required milestones? Has the buyer granted all required acceptance and approvals?

Collections? What is the process if the buyer never pays and the seller uses a third-party lawyer or collections agency? Buyer often pays collection costs.

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