IT Contracting
Law and Practice
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Event starts at 11.00am
Today's Speakers

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Topics for Discussion

Law
• IT contracts: when are they needed?
• Most common classes of IT-related agreements
• Fundamental clauses across IT-related agreements generally
• Particular matters to consider for specific IT sector agreements, and priorities for the procurer of the IT service

Practice
What will your IT department be looking for from IT agreements? Priorities and pitfalls...
Classes of IT Contracting

High value IT procurements and outsourcing
• Managed IT service provision includes a vast array of options – cloud service provision, security services, service desk and maintenance, platform solutions, systems integration, etc.

Specific project management
• Transition/digital transformation project, organisational software/hardware upgrades

Software licensing
• All types - CRM, security, specific applications

Service provision
• SaaS/PaaS/IaaS

Development projects
• Software development, website development
Classes of IT Contracts

Master Services/Service Management Agreement
- Can cover any/all of the options identified in previous slide

Software Licensing Agreement
- Packaged or bespoke
- OS, utility or application

Software-as-a-Service Agreement
- Usually 'off the shelf'

Support and Maintenance Agreement

Development Agreements
- Software development
- Website development (and design)
Fundamental Elements of an IT Agreement

Intellectual property

• Depends on the nature of the product or service – see more later

• Rights granted need to reflect parties’ intention

• What about beyond the agreement (e.g. provision of source code)?

• Rights of the supplier to provide product or service - IP indemnity very common

• Your business’s own data (‘Customer Data’)
  o To remain in the ownership of the customer. What rights are being given to the supplier over this data? What about data derived from that data?
  o Protection of customer data
Fundamental Elements of an IT Agreement

Exclusion and limitation of liability
- Always heavily negotiated
- Often will depend on parties' respective strength and bargaining power
- Some provisions are standard: exclusion of implied terms, software provided 'as is'
- Exclusion of consequential, indirect or incidental loss (including loss of profits, but this should be express) arising from a defect/breach of the agreement
  - Consider in light of purpose of product or service – are there heads of loss which shouldn't be excluded?
  - Consider specifying particular heads of loss which are recoverable, such as loss of data if supplier is supposed to be protecting data
- Financial cap
  - Multiple of fees paid (supplier) v fixed amount (customer)?
  - Insurance requirements?
Fundamental Elements of an IT Agreement

Delivery
Core questions
- When is the product/element deemed to be delivered?
- What are the remedies for failure to deliver on time?

Development agreements
- Acceptance testing procedure and performance criteria – usually agreed later
- Failure to meet tests? Agreement may provide for ‘liquidated damages’ (particularly if non-Irish) – be careful with enforceability
- Supplier will prefer reasonable costs of customer

IT services
- service levels (and service credits) – more later
- outage management – part of supplier’s obligations

Licensing (‘on premises’)
- Think about method of delivery: installation (complex or bespoke) or download
- Should time to be of the essence? Other remedies?
Fundamental Elements of an IT Agreement

Change control

• Consider your business needs:
  o Will the need for the services vary over time? Usage increases/decreases
  o What if a new service will be needed down the line? Perhaps separate mechanism rather than CC
• Change control unlikely to be simple!
• Supplier may seek their costs – should only be where customer initiates
• Changes to services/goods only, or changes to agreement generally? If the latter, should not conflict with variation clause
Fundamental Elements of an IT Agreement

Transition/exit management

- Need to plan for your business’s exit immediately
- Full details will not be possible – oblige supplier to provide an exit plan **within 6 months** of effective date – however, principles and commercial matters should be set out in main agreement
- Ensure supplier is obliged to keep this under constant review
- Supplier must be obliged to co-operate with the customer and/or the replacement supplier as reasonably required to facilitate the smooth migration of services
**Specifics**

**Master Services Agreements**

- Implementation and transition
- ‘Services’ – customer to identify, detail fully in agreement (no gaps)
- Service levels – service credits avoid breach of contract claim, but retain option to terminate
  - Be careful of penalty clauses (again)
- Fees – often complex as long-term
  - Seek certainty in pricing model
  - Implementation costs? Supplier will want to recoup at outset, but resist
- TUPE
- Exit management
- Data protection – likely to be controller-processor
- Important obligations on an IT service provider
  - Reporting and meetings, disaster recovery/business continuity, step-in rights, audit rights
Specifics
Software Licensing Agreement

• Packaged or bespoke (latter often more of a development and assignment)
• Developer or agent/distributor?
• Key parts of IP licence:
  o Purpose of licence, annual v perpetual, maintenance (free or at additional charge) restrictions (users/uses/territory)
  o Is it sub-licensable? Is it revocable?
• Definition of ‘software’ – to match customer’s expectations
• Warranties and indemnities
  o Performance warranty – supplier very reluctant
  o IP warranty and indemnity
• Liability – when ‘off the shelf’, liability will be very limited
Requirements

• For example, standalone or wholesale integration of software and hardware
• Describe in general terms, but also functional and technical specifications. What takes precedence? Client should seek functional

Stages of delivery

• Proof of concept
• Clear and comprehensive project plan
• Acceptance testing

Copyright (and other IP)

• Default should be assignment to client (CRRA – owned by developer)
• At a minimum, exclusive licence – protect from competitors – and seek source code
• Licence of other software
Specifics
Software Development Agreement

Fees – don’t pay all up-front!
• Payment plan and milestones

Warranties and indemnity
• Performance – provide services with reasonable care

Agile delivery
• Delivery in sequential phases
• Only overall project scope and goals agreed at outset
• Be careful – may not suit, and fewer remedies available
Specifics Website Development/Design Agreement

- **Large range of matters** - design, hosting, licensing of content
- **Specifications** – functional, but also visible content
- **Database rights**
- **Web pages**
  - Look for a full set of the web pages in electronic form – portable
  - Ownership of IP and physical possession
- **Cookies (and compliance)** – up to customer
- **Hosting**
  - Agreement may provide for this too
  - Responsibility for content on website and removal of material
  - Maintenance and support of website
- **Domain name**
  - Registrar will only deal with entity named as having right to use domain name
  - Service providers often do this, but can be problematic
    - Giving up control and could end up in hands of third party (competitor)
Specifics

SaaS Agreement

• Content licensing

• Form of services agreement, so many similar issues

• Often standard and non-negotiable

• Main terms:
  • Fees – more like a utility, so no up-front costs
  • Restrictions on use by client
  • Availability
    o 24/7/365 versus ‘reasonable endeavours’
  • Standard of service
  • Security
    o Ensure that minimum level of security is implemented (supplier unlikely to warrant security standards)
    o Seek to include data security standards in agreement
  • Client data – as above, but also complying with customer policies as necessary
Specifics
Support and Maintenance Agreement

- **Standalone or as a schedule**

- **Warranty versus maintenance agreement**
  - Interaction here – customer should not pay for maintenance when supplier is required to fix product/service under warranty anyway

- **Key considerations:**
  - Include provision of new versions/releases of software?
  - What is a ‘fault’ that supplier is required to fix (e.g. failure to conform substantially to specification?)
  - Limitations to services
  - Does level of support match your needs?
  - Is there a guaranteed minimum time for maintenance?
Outsourcing of IT functions and service provision

Due diligence carried out

Criticality to the business
Pre Covid-19

- Penalty clause
- SLA on critical assets
- Deep understanding
- Ongoing costs
- Escrow
- Tech start up
- Mature and safe culture
- Support and change control
Post Covid-19

• Business Continuity ready
• Rising stars
• Strong supplier arrangements
ISO 27001 Certification

- Certify or align
- Supplier management
- Hints at outcomes
Questions?

Read more of what we’re discussing at www.rdj.ie