



Whose Contract Is It Anyway?

Jagvinder Kang, Director, Technology Law Alliance

Introduction

We have discussed various legal issues in these Technology Columns, however, an issue which arises at the outset of all of these transactions, is that of whose document is to be used as the basis for the contractual arrangements.

There tends to all too often, be a knee jerk reaction from a customer's legal team, for the customer's contract to be used. Usually, this is the wrong way to approach things, as we will consider in this edition of the Technology Column.

Legal and Business Considerations

One must first ask, why does it matter to a party as to which party's contract is used as the starting point?

The simple answer, is that the respective party's starting contract is likely to be skewed more in favour of their preferred positions, and therefore at least at the outset, represents (as far as the party is concerned) a better starting position.

However, the above tends to ignore the very important point, that most high value or complex contracts are likely to be negotiated, and therefore it does not really matter what the starting point is, at it will be changed as the discussions between the parties progress. In fact, the greater the misalignment between the parties, the greater and more protracted the negotiations, and therefore the longer the time and cost of getting to contract signature.

Now there are circumstances where a customer's contract can be validly used as starting point, such as:

- Where the supplier's terms and conditions have no bearing to the arrangements being contemplated by the parties (this is often the case where the supplier is lacking legal support, or is relying upon an old set of terms and conditions which have not been reviewed and updated in quite some time);
- Where the supplier's terms and conditions have been drafted in a convoluted or inappropriate manner, because a 'dabbler' in technology contracts has been used to create the terms and conditions, and again the positions do not reflect industry practice; or
- A tender situation, where the customer wishes to obtain an objective comparison between multiple parties in a relatively streamlined manner.

Now in all of the above circumstances, the customer's terms and conditions can only be used where they do not fall foul of the same issues complained about in respect of the supplier's terms and conditions, in the first two bullet points above.

This neatly leads us on to the point therefore, of alignment between the commercial arrangements and the contractual documentation. More often than not, a competent supplier that has been legally advised, will have had proper legal advice in the preparation of their contracts. The contract will therefore be aligned with the supplier's practice of performing the respective services. This may involve alignment of the contract with the supplier's internal processes and bespoke methodologies. In such circumstances, a customer's initial contract will not be taking any of this into account, and therefore not be reflecting such arrangements – in fact, the proposal from the customer may be contrary to the usual working practices of the supplier.

By way of example, we have recently advised on the supplier side, where the customer required an acceptance process and methodology which did not reflect the reality of the manner in which the supplier was operating. The lawyers on the customer side thought that they were helping the arrangements by having an overly complex acceptance testing arrangement, but when challenged as to the requirements for such an arrangement, it was quite clear that the customer itself, had no requirement for such elaborate processes which hindered the commercial and practical arrangements between the parties. In fact, the customer knew of the reputation of the supplier and wanted to make sure that the acceptance testing was undertaken using the processes which the supplier was accustomed to use, as that provided sufficient safeguards for the customer.

So if a customer accepts the supplier's contract as a starting point, it will at least be a contract which is aligned with the supplier's business – yes it may not be aligned with the customer's business, but there is nothing preventing the customer to build this into the model of the supplier's offering – usually such changes will be with regard to areas such as: security safeguards, auditing, industry specific laws or regulations, additional warranty and liability arrangements, rather than requiring wholesale replacement of methodologies which the supplier is using to provide the respective services.

Final Thoughts

Parties can therefore save a lot of time and cost (both management and legal time and cost), and have a more amicable relationship if the contracting arrangements are started on the right footing. This is clearly a better proposition than a customer seeking to unnecessarily seek to impose their entire terms and conditions on the supplier, with the parties then spending weeks or months moving those terms and conditions to look more like the supplier's starting terms and conditions !

If the customer is particularly concerned about the supplier's starting terms and conditions, then there is again nothing to stop the parties to agree the principles with regard to the various sections, to at least ensure that there is commonality of approach, when it comes to drafting, rather than lawyers drafting in a vacuum (which usually results in an endless cycle of mark-ups - together with the associated delays and costs !).

The key therefore, is a considered approach, rather than a knee-jerk reaction.