



Want to sell software?

Far too often we meet clients in the process of developing and selling software and support services to customers who continue to take no account of the risks and issues involved. This article will hopefully highlight the key steps to success when selling software and support services to customers.

1. Know your customer

We recently received a software licence and support agreement from a client company, asking us to review and comment on the terms. The client had read the document and, in their view, everything seemed “normal”. On page 1, it was made clear that the support services would be supplied to the customer company, and that the cost for providing this service would be fixed in accordance with the relevant schedule. So far so good you might think. However, the contract was structured in such a way so that references to the customer meant the customer itself and all of its Affiliates. The definition of ‘Affiliates’ revealed that our client was effectively agreeing to provide onsite support services to the customer and to all of the customer’s group companies (now or at any time in the future) across the world – and all for a fixed price!

Darren Curtis: “Ensure that you are clear as to who is entitled to benefit from your services, and if it must extend to such affiliates or group companies, make sure these are either clearly identified within the contract or that the contract provides for an appropriate adjustment to price if this cannot be sufficiently ascertained.”

2. What are you actually providing?

During a recent negotiation between a software supplier and its customer, the customer made a comment about receiving the software upgrades. At this point, the client made it clear that the customer would not be getting any upgrades as part of the proposed deal. The deal nearly ended there and then.

Darren Curtis: “It is vital that the precise detail of what is being supplied and, just as importantly, anything that is expressly not being provided, be made clear within the contract documents. Ensure the specification details are clear and thorough. If the intention is to attach the specification to the contract as a schedule/appendix, make sure it is done. If there are certain elements of the product/service that is only provided if additional costs are paid, make this clear.”

3. What are you warranting?

A client was proposing to warrant that the software they produced would not have any defects and would comply in all respects with the customer's specifications and requirements for that piece of kit. Even if your software is the best piece of technology on the market, it is unlikely that it would have no defects whatsoever, nor that it could ever meet the customer's specifications and requirements at all times, which we know have the habit of shifting.

Darren Curtis: "Only warrant those issues that are within your control. A good compromise with customers is to warrant that the software will do what it says it will do in your product documentation (ensuring of course that the documentation is carefully prepared to avoid inadvertently providing warranties that go beyond what can be provided). Ensure the contract deals with certain exceptions and restrictions to the warranties being given. For example, why should you be liable for breach of warranty if the failure arises from something the customer did/did not do? Similarly, make sure the warranties are subject to reasonable limitations in terms of the period during which the customer may come after you for breach, and the imposition of appropriate financial caps in relation to those claims."

4. Don't assume you will own the software

Clients regularly assume that intellectual property clauses within contracts are standard and, without having properly checked the wording, wrongly assume they will own all intellectual property rights in any software they develop. Time and time again we see software licence and support agreements being prepared so that the customer retains increasing levels of intellectual property in the product. If a piece of software has been specifically written for a customer, the customer will often seek to own that software outright – often with no provision for the supplier to retain any interest in it whatsoever. However, if your intention is to supply the software to other parties, or to develop it further and produce new pieces of kit, or even to use it as an underlying element in another product, your plans will be severely hampered unless you retain adequate rights in the software.

Darren Curtis: "Consider what rights you need to retain, both in the software itself and any underlying element of that software - the 'background software'. For example, if you are contractually required to support the software it is important that the contract does not prevent you accessing and using the software as appropriate to provide those services. Make sure that you reserve adequate rights to use and exploit the software as appropriate. Does the customer really need to own the software to use it, or should they not simply have a perpetual licence to use it? Never assume that the contract is standard when it comes to intellectual property."

5. You need to get paid

The need to get paid might sound obvious, but again it is something that clients fail to appreciate the importance of – wrongly assuming that if they have delivered the software and the customer starts using it they can get paid. You need to be wary

of vaguely drafted acceptance provisions, which effectively enable the customer to decide themselves when the software is accepted. Until it is accepted by them, the price does not become payable. Suppliers can often find themselves having supplied software many months ago, but because the customer has still not managed to get on with it, they are not contractually required to pay for the software.

Darren Curtis: "If there has to be acceptance provisions within the contract, make sure they are sufficiently objective and do not require the customer to say "we're happy with it" before you can get paid – something that might not happen for some time! Put in place reasonable acceptance provisions setting out appropriate tests that the software has to pass, include a longstop date by when payment must be made regardless of whether the software has been accepted, and make it clear that if the customer uses the software in a live (as opposed to a test) environment that acceptance is deemed to have occurred. An even better approach is to try and avoid the inclusion of such acceptance provisions altogether and instead insist that the customer simply relies upon the warranties being given in relation to the product."

6. Limit your liability, and do it well

The issue of limiting liability against claims from customers is so important to the contract that it is regularly missed – the assumption often being that it is covered. Ensuring that your liability to the customer is properly limited is vital to any transaction, regardless of the size of the deal and level of anticipated financial risk involved. Without such a provision, suppliers risk signing blank cheques when it comes to breach of contract claims from customers.

Darren Curtis: "Always, without exception, include a well drafted limitation of liability clause. Make sure that financial caps are reasonable and have been reached with due consideration – in other words, avoid simply plucking figures out of the air, the risk of which is that provisions become unenforceable. Ensure that the provisions do not apply on a 'per incident' basis – the effect of which could be just as catastrophic as not having a limitation of liability clause at all. Include appropriate limitation periods during which customers can pursue you for breach of contract – you don't want to be left looking over your shoulder for years to come! Exclude liability for indirect and what lawyers often term 'consequential' losses – should you really be liable for a customer's loss of profits in the event that the software fails?"

By following these six steps in any proposed licence of software to customers, you will be well on the way to a successful and stress free agreement.

For further details contact Darren Curtis.



Darren Curtis
Associate

e: darren.curtis
@morgan-cole.com
t: 0118 9553054