



Buying an IT system

You have been in discussions with an IT supplier about implementing a major new IT system for your business. The IT supplier has given you a quotation and his standard terms and conditions to sign and return. Should you just sign on the dotted line?

Think first!

In practice, most IT projects experience problems (77%, according to research done by Templeton College, Oxford) and nearly half exceed their budget or timeline. Even if you are confident in your IT supplier's abilities, it is statistically unlikely that everything will go precisely according to plan.

Beware of standard terms

Most standard terms are not especially favourable to customers – so if something does go wrong, the standard terms could seriously undermine your ability to put pressure on the supplier to rectify the problem at no extra cost.

“77% of IT projects experience problems. A badly drafted contract means these are your problems, not the supplier’s.”

For example, standard terms will often try to make the customer responsible for ensuring that any new software or hardware will work with its existing systems. But in many cases the IT supplier is much better placed than the customer to advise on this question - and it is important to ensure that the contract reflects this (otherwise your chances of obtaining redress if systems prove incompatible are likely to be limited).

The specification

Most IT suppliers will provide a project document setting out what they are proposing to implement. This is generally referred to as the “specification”.

Specification: points to watch

- Does it reflect your priorities as customer?
- Does it set out what the system should be capable of e.g. minimum processing speeds etc?
- Does it form part of the contract?

Often, the specification will be contained in a separate document which may not be referred to clearly in the supplier's standard terms. If so, it may not form part of the contract at all - in which case it will not be binding on the supplier.

Timetable for delivery

Most IT suppliers will also provide a project document setting out a timetable for implementation. Unless this timetable is clearly linked to the provisions of the contract, the dates are unlikely to be binding on the supplier (whose only legal obligation will be to deliver the system "within a reasonable time"). You should also consider the following:

- Include sanctions for late implementation (such as liquidated damages - see below)
- Make payments to the supplier conditional on achievement of specific milestones
- Reserve a significant percentage of the price until final acceptance.

Liquidated damages

Where the supplier has failed to deliver on time or failed to meet other contractual obligations, a liquidated damages clause may allow you to claim an agreed amount of compensation without having to go to court. Such provisions can be worth including but the courts will only enforce them if the amount of compensation corresponds to the customer's likely loss i.e. they must not be excessive.



Personnel issues

It may be that you have formed a positive opinion of a particular individual or team from the IT supplier and you are keen for them to work on the delivery of the project. But suppliers' standard terms will rarely give you any right to insist on their involvement.

People: points to consider

- Specify key staff and restrict supplier's ability to remove them
- Require supplier to ensure adequate levels of suitably qualified staff
- Include right to remove certain staff e.g. if they have fallen out with your own IT manager

Acceptance testing

It is essential to ensure that your new IT system fits your requirements before you accept and pay for it. Acceptance testing should enable you to satisfy yourself, through a series of technical tests set out in the contract, that the new system operates in accordance with the specification prior to its launch.

“Check what the contract says before going live; you may be deemed to have accepted the system, warts and all.”

IT suppliers' standard terms often deem acceptance to have occurred automatically on “live” usage of the system by the customer. Your staff need to be made aware that the consequence of going live is to accept the system, warts and all. Ideally, the contract should also spell out what happens in the event of non-acceptance; for example, it should state that the supplier is required to remedy any defects within an agreed timescale.

Support and maintenance obligations

Standard terms often don't give precise response times for maintenance/support work. If you don't want to find yourself waiting days or even weeks for an engineer to turn up, it is important to agree in advance exactly what the IT supplier will be providing in terms of support and maintenance, upgrades and new issues for your software product. These are often described as “service levels”. Their scope must be documented and sanctions (e.g. service credits) should apply if they are not met.

Service credits

If the supplier's performance fails to meet the standards set in the service levels, then an agreed sum (or service credit) is deducted from the amounts which the customer would otherwise be obliged to pay. The level of the service credit needs to be proportionate to the customer's likely loss, otherwise the courts may regard them as unenforceable “penalties” (see “Liquidated damages” above).

Anticipating problems

Given the high risk of at least some problems arising, it is usually worth building procedures into the contract which are designed to prevent those problems leading to a complete breakdown in the relationship. It is therefore well worth considering the mechanisms discussed below.

Escalation procedure

This is when appointed managers from both sides review the disputed matter and take all possible steps to avoid a legal dispute. If they cannot agree the issue, the contract could provide for it be escalated to each party's senior executives.

“Litigation is rarely an ideal solution; ADR or escalation procedures can help you avoid it.”

Alternative Dispute Resolution

This refers to various “alternative” dispute resolution methods, of which there are several types e.g. expert determination, mediation etc. They are designed to avoid going to court and to provide a cheaper and faster alternative to binding arbitration (which is often just as expensive as going to court).



Step-in rights

Step-in rights allow you to take over management of the project if the supplier is failing to implement it in accordance with the contract. Even if you do not have the necessary in-house expertise to take over an IT project in this way, step-in rights are still worth considering because you may be able to appoint a firm of IT consultants to act on your behalf.

Not just an insurance policy

Above all, remember that time invested in negotiating a contract with your IT supplier amounts to more than just a useful insurance policy in case things go wrong. It should also improve the chances of success, because it encourages both sides to focus on whether the project is deliverable in practice.

“Vague service levels could leave you waiting days or even weeks for problems to be fixed.”

IT systems: Frequently Asked Questions

Buying an IT system can be a daunting task, both in terms of the number of issues which need to be considered and the technical or legal jargon involved. These are some of the questions we most frequently get asked about the legal aspects of buying IT systems.

Can I stop an IT supplier working for my competitors?

Where software has been written specially for your business, you may be concerned that competitors should not benefit from the work that you have paid for. The best way to achieve this is to get the supplier to assign the rights in the software to you – if you own it, you can control who else gets to use it.

But in most cases suppliers will only be prepared to give you a licence. You may be able to negotiate a degree of exclusivity i.e. a restriction which prevents the supplier licensing the software to other firms which compete with yours. However, it is important not to draft the restriction too widely or it may not be enforceable.

What is an “IPR indemnity” and do I need one?

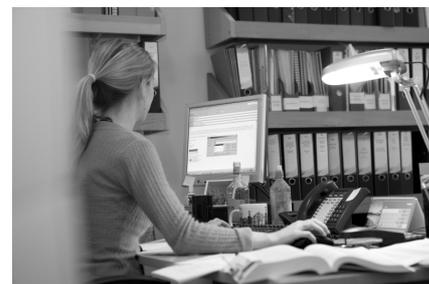
In relation to software, if the software supplied was based on code developed by another software firm rather than your supplier, your business could face claims for infringement of intellectual property rights (IPR) owned by a third party (i.e. the other software firm). An IPR indemnity would oblige your own supplier to meet the costs of dealing with the claim – so it is usually worth having.

Many software suppliers will provide IPR indemnities as a matter of course and if they don't, it is worth asking for one. But always check the wording to ensure that the indemnity will give you a meaningful level of protection.

What is an escrow agreement and do I need one?

Escrow agreements are worth considering whenever you take a licence of software, particularly bespoke software (i.e. software written specially for your business). An escrow agreement requires the software supplier to deposit a copy of the source code with an escrow agent (i.e. a “trusted third party” such as the National Computing Centre). The agent will only release the code in certain circumstances, such as the supplier's insolvency.

The source code is important because it can be understood by other programmers (unlike the machine code, which is the copy of the software used to actually run the programme on your computers). For example, if the supplier were to become insolvent, access to the source code would give you the option of bringing in another software firm to take over maintenance and upgrades.



“Losing access to source code can be disastrous. This is where escrow agreements come into their own.”

How we can help

If you are weighing up options, we are always happy to talk informally about IT projects generally and to act as a “sounding board”, even before being formally instructed. We have recently advised:

East Balt Guenther Bakery

(exclusive supplier of bread to McDonald’s) on the implementation of a SAP ERP system and the outsourcing of its core IT function.

STA Travel Group

On the implementation of a global point-of-sale system for its international branches

Shepherd Neame brewery

On the implementation of a SAP ERP system

Carpentryright

Europe’s leading specialist carpet and floor covering retailer, on the implementation of key in-store and central systems.

“...this consistent, high-calibre firm commands a loyal following due to its winning combination of in-depth specialist skills and overarching understanding of the market-place.”

Chambers Guide to the UK Legal Profession (2006)

“A good straight-talking team [that] “doesn’t over-lawyer things...”

Chambers Guide to the UK Legal Profession (2005)

“Alistair Wilson has ‘excellent knowledge ... backed up with solid commercial acumen’.”

The Legal 500 (2007)

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