Key Considerations for Technology Suppliers

Published 13 January 2020

DACB's technology solicitors support their clients with complex deals in a wide range of sectors. In this second post in a two part series (see also Key Considerations for Technology Customers) Aneeqa Kisil advises on two of the major issues faced by suppliers.

Committing to time and costs

There is increasing pressure on suppliers, particularly in competitive tender processes, to provide estimates that outstrip their competitors' both in terms of price and delivery timescale. However, it is always advisable to set out a realistic evaluation of costs, time period and personnel as a customer is highly likely to insist on holding a provider to these within the contract, drafting in milestones and agreeing charges schedules accordingly. An over-confident, or indeed misleading, estimate can later form the subject of a significant dispute.

The leading case on this is the well-known case of *(1) BSkyB Limited (2) Sky Subscribers Services Limited v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd)* [2010] EWHC 86 (TCC). Following a competitive tender procedure, BSkyB selected EDS (later acquired by HP) to design, build, implement and manage a business-critical customer relationship management (CRM) system. Their choice of supplier was based on EDS' representations that a model system would be up and running within nine months and that this would be delivered in accordance with BSkyB's financial targets. Ramsay J. observed that "the relationship was not a success" at the commencement of his colossal 2,350 paragraph(!) judgment: this was quite the understatement, given that the CRM system took approximately six years to deliver with a costs overrun of £217m and BSkyB subsequently brought successful claims for both fraudulent and negligent misrepresentation.

Whilst the failings of EDS were largely attributed to one recklessly dishonest individual, the BSkyB case has multiple lessons for suppliers: to begin with, proposals should be prepared in consultation with relevant colleagues from the sales and project teams to ensure that they stand up to scrutiny. Further, costs and time representations should be clear as to whether they are estimates only and need to outline clearly assumptions made as well as what customer dependencies there are. Ideally, the proposal should consider the impact on timescales and charges if the assumptions/dependencies are not met or if the customer (or its contractors) fail to collaborate throughout the project.

Indemnity Issues

An indemnity is an amplified assurance that one party will meet another party's legal liability in certain circumstances.

In technology and other commercial contracts, suppliers have traditionally given indemnities in respect of intellectual property claims. These protect a customer against third party claims brought about by the customer's use of a supplier's product and demonstrates the supplier's faith in its own intellectual property rights. A supplier might also ask for a reciprocal indemnity from its customer; however, customers commonly rely on the argument that they are merely purchasing goods and/or services and therefore suppliers should accept responsibility for anything going wrong during the course of the contract. This may be the case but, where the supplier is incorporating customer intellectual property into a solution, such an indemnity may be legitimately sought or alternatively the risk managed through a customer dependency and / or warranty.

Indemnity discussions often lead to a proliferation of other requested indemnities: these tend to be particularly in relation to confidentiality, data protection breach and cyber security, but is it really justified to have an indemnity?

There is an extensive body of case law around indemnities and it varies internationally more than most contractual areas. In the UK the position is still not 100% clear but, put simply, where an indemnity identifies a trigger event as well as a clear way of calculating the amount due at the point the event happens (a so-called 'true' indemnity), there are generally two key benefits: the claimant does not have to prove their loss and the fact it resulted from the other party's actions and the claimant has no duty to mitigate their loss (i.e. take steps to manage down the costs incurred).

This uncertainty and the potential high financial downside mean there is real nervousness around the acceptance of liability wording phrased as an indemnity as this implies definite acceptance of significant legal risk. This means that negotiations over the drafting of indemnity clauses can be protracted.

In advising our supplier clients, the DACB team explains that it may not be feasible to exclude all indemnities as for IPR infringement they are 'de rigueur' and for areas where there are substantial major costs they may be justified, especially where subject to the contractual liability limits (i.e. a capped indemnity). We assist with quantifying the risk by exploring

the extent to which our client genuinely has the ability to prevent contractual breach and also by assessing the likely consequences in the event that a breach was to occur. Such consideration also needs to include the value of the deal and the terms on offer by other competitors. If indemnity wording is acceptable, it needs to be carefully drafted so as to be able to reassure a customer and simultaneously allow the supplier to feel able comfortably to provide it – certainly, uncapped indemnities should not always be required.

If you have any queries on this article, or technology contracts more generally, please feel free to contact Aneeqa and the team.

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