

GUIDELINE FOR DRAFTING IT CONTRACTS

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Various types of IT contracts and its preparation methods exist in practice. To all IT contracts are applicable general contract law rules. However, alongside the provisions common to all the contracts, certain particularity and nuance are common to IT contracts, for which IT contracts are sometimes attributed to a different type of contracts group. Choice of specific IT contract is usually determined by the following factors:

- Contents of IT project;
- Implementation method of IT project;
- Importance of IT project to the company;
- Budget designed for IT project.

The more valuable and technically complicated IT project, the more carefully parties discuss its rights, functions, terms and liability in the contracts. The party, which during the negotiations delivers the primary version of the contract, gets an advantage allowing to negotiate better conditions. By this paper Sorainen starts regularly to publish articles about different IT contracts commonly used in practice and their most important legal aspects. More information about Sorainen IT law practice group is available under: www.it-contracts.lt

Non-standard software developing and sale contracts

Individual non-standard IT software development and sales contract is used when standard IT solutions offered in the market do not meet the needs of the company, therefore, the company orders the individual software to solve its specific tasks. Individual non-standard IT solutions are very important for the company's, which orders such IT solutions, day-to-day activities, therefore, this kind of contract needs to be thoroughly prepared because the later maintenance and service of software depends on that contract.

In practice this type of contracts are usually called service purchase and sale contracts, because such title is more useful for the developer of software. Evaluating this sort of contracts in a legal aspect it should be considered more as a contract of work, under which the contractor (the software developer) obligates to perform a particular work in one's own risk under the customers instructions and to present the results of work to the customer, and the customer obligates to accept the work done and to pay for it. If there is no obligation to attain certain result foreseen in the service contract, it is considered that the service provider commits to the customer to attain the result on its own efforts, however, the service provider is not obliged to attain it.

In these contracts, it is important to look in the parts where the scope of transfer of copyright rights in the created software is foreseen. The developers of software are interested in maintaining the rights necessary for the distribution of software, because the individual software once created for a particular company may be easily applied elsewhere and later may be marketed as standard software. While the customer, by financing the software development, very often does not want to leave such rights to the developers of software. Therefore, it is very important to exactly specify in the contract what ownership rights (right in further distribution, modification, improvement, transfer, licensing, etc.) in software are given to the developer and the customer.

One of the most important parts of such contract – the conditions (licence) for use of software. Here one must pay attention to what kind of licence is granted for the ordered individual software:

exclusive or ordinary, for definite period and for indefinite period; as well as in which territory it is granted; how many users will be able to use software at the same time; on what conditions the customer will be able to transfer software to third parties; to evaluate whether the licence gives the right to the customer to modify software independently etc.. In this part of the contract, it is important to agree on the source code of software, i.e. to indicate whether the source code is a part of the contract or not, because further development of software depends on it.

While implementing the individual IT software projects the conflicts usually arise because of non-compliance with the deadlines of order execution (when it is unclear who is at fault) and higher than planned project price. It happens because usually to determine the exact price of the ordered software in advance is impossible. In this case, clear regulation of the parties liability in the contract saves a lot of time for the parties and allows to avoid unnecessary disputes.

It is important to provide clear in the contract the quality requirements for software, warranties and liability, the duties of the parties in the process of software implementation, the way of the projects management and testing, methods of dispute resolution, payment conditions, the conditions for terminating the contract, agreement on software further maintenance, as well as the method of acceptance and transfer of final and interim work results. When accepting final version of software the customer should confirm that software corresponds to the technical specification provided in the contract and functions without substantial defects. Upon signing acceptance-transfer act, it should be not allowed to refuse software because of minor defects, which normally always exist in software. Before accepting the final works of IT software, it is advisable to agree on a certain time period during which the operation of final version of software would be tested.

Upon entering in this type of contracts, it is useful for the customer to have an opportunity under certain limits to change the subject of the contract before signing the acceptance-transfer act, because it usually happens that the customer realizes what software he exactly wants only after seeing the first versions of software in developing process.

The relevant problem concerning large and long lasting projects is the rotation of people, who participate in such projects, because when the important participants of the project change, the work may not continue as smoothly as it was expected.

Standard software sale contracts (licence contracts)

Standard software – this is a software intended for unlimited group of users (e.g. accounting, document management, customer relations management etc.), which is created not under the order of a particular customer. Before starting to use such software, it may be configured or its functionality may be applied for the particular case, however, the core of the software does not need to be reprogrammed.

When planning to buy the standard software, it is important to ascertain, what user rights are acquired. User rights may be as follows: exclusive or non-exclusive, for definite period and for indefinite period, revocable or irrevocable, limited usage or unlimited usage and transferable or non-transferable. If the buyer has the right to modify and develop software, it is essential that the buyer is provided with software source code.

Standard software is acquired with its adjustment to the customer or without it. When buying software, the seller obliges not only to give it to the buyer, but also to adjust software to the needs of the buyer, it is necessary to take note of how the sellers obligations are described in the contract. For the seller it is useful to conclude two separate contracts: one for the purchase of software, the other one for its adjustment. In this case the seller, if software adjustment fails, performs at least one obligation out of two and has the right to demand the payment for software. However, it is useful for the buyer to relate the purchase of software with the adjustment obligation, because without the relevant software adjustment software loses its value. Sometimes it happens that software and its adjustment to certain solutions is being bought from different suppliers.

A clearly defined list of seller's works, definitions of aimed results, designation of terms and method of price calculation are very important parts of the contract. Because the list of works is not static, but dynamic (it may change during the project), therefore, it is important to indicate in the contract the possibilities and procedures of changes to the list of works. In this case it is essential to establish the

roles of the project managers and their rights to adopt technical decisions without changing the contract itself.

Upon the purchase of standard software adjustment service, it would be useful for the buyer to establish the limits of the service price in the contract and to divide the payment, which would be paid after performance of certain stages of the project. It would be important for the buyer to agree that, if the seller does not perform its obligations, the buyer has the possibility to withhold the payment not paid yet, which will not depend on the amount of the work done, because the partial implementation of the project is usually irrelevant for the customer.

The parts of the contract, that indicate the method of bugs announcement, reaction to it, its correction methods, renewal of versions, especially when further maintenance and service of software is negotiated with the seller, are relevant. In Lithuania it is common to pay the annual subscription payment for the support of software. A separate software service support / maintenance contract is considered in another chapter.

When discussing the rights, which emerge because of software defects, the buyer should know, what he can require from the seller during the warranty period, if software does not operate in the way as it is promised. Normally, in this case the buyer may give to the seller a reasonable term to eliminate defects, given a special condition, that if these defects are not eliminated the buyer may require to terminate the contract and to compensate the damage, to reduce the price or to compensate the incurred damage by rectifying the defects using its own costs.

For the seller it is useful to narrow its liability insofar as the law allows. Generally, liability is limited by a certain monetary amount and loss, which occur only because of certain events. In the part which determines the liability, a laconic wording that the damage is compensated in accordance to the law, could be more useful to the buyer.