

beneficiaries by value of their interests are ordinarily resident in the UK; but there is no reason to interfere with an express choice of (say) Jersey or Isle of Man law for what would otherwise be an English trust, run here wholly or in part, for beneficiaries in China and Peru (or places between). *A fortiori* it would be wrong to apply any reforms to a settlement constituted by a Ruritanian settlor under Ruritanian law in favour of beneficiaries then all resident in Ruritania, even if one of the beneficiaries later came to England and the trustees, operating the Ruritanian equivalent of the English Trustee Act 1925 s 37(1)(b), (but not a power to change the proper law if Ruritanian law allows that,) appointed separate trustees here to administer a share of the fund appropriated to that beneficiary.

5.15/4.101 **Include post-commencement breaches of existing trusts?** In my view this suggestion is wrong and misconceived, for reasons already

given: it would require trustees to take on liabilities which the settlor/testator had told them would not be imposed, and which might be or become uninsurable. At the very least, any such reform should be accompanied by an unqualified right for trustees of existing trusts to resign, even if all the trustees of a particular trust wanted to do so; and if the position were that serious, it would I suggest be impossible to say confidently that the interests of future beneficiaries would always be best served by appointing the existing beneficiaries as trustees (assuming there would in fact be adult beneficiaries capable and willing to act).

5.16/4.104 **Economic and regulatory consequences?**

I am not competent to express views on these issues and do not do so. 

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# Matching expectations in computer contracts – what expectations?

by Ruth Atkins

The task of identifying the requirements of the customer is a pivotal stage in the procurement process.

The supply of a custom-made computer system which satisfies the requirements of the customer is unquestionably dependent upon an accurate identification of those requirements. Various approaches to identifying the customer's requirements may be adopted, ranging from the completion of a basic questionnaire, to lengthy and detailed discussions between the parties. Whichever methods are used to ascertain the customer's requirements, it is sound commercial practice to record them in written form.

The extent of that written information, which may be both technical and legal in nature, will vary considerably given the multitude of different transactions which may be undertaken by different suppliers. Nevertheless, it is to be hoped that the documentation will represent an accurate

and adequate reflection of the requirements of the customer, upon which basis the project may proceed. This may appear to be a relatively straightforward task. However, the failure to adequately identify the customer's requirements and therefore to have produced an accurate project specification, is a prevalent cause for disputes arising from the supply of computer systems.

## NEED FOR ACCURATE IDENTIFICATION

This article begins from the viewpoint that the task of identifying the requirements of the customer is a pivotal stage in the procurement process. Only through an accurate identification of the customer's requirements will the supplier be in a position to provide a system that meets those requirements. Equally, only through an accurate identification of the requirements will it be possible for the

supplier to evaluate the project price and supply a system at an agreeable fee, thereby ensuring both parties are satisfied with the outcome.

It is a crucial part of the contract life cycle that in order to facilitate the successful implementation of a project it is imperative to ensure that the customer's requirements are accurately identified. It is from this identification of requirements that the parties will be placed in the position that they may proceed to ensure their expectations are clearly recognised and reflected in the supplied system. Thus the focus of this article is to illustrate that a failure to accurately identify the parties' requirements will invariably lead to a failure to achieve a match between the parties' expectations.

During my own time of working for a software company, I experienced at first hand how matching the expectations of the parties can be a difficult task to achieve. The company supplies software for use in the banking and financial services industry and my role was to assist in drafting the initial project proposal and ensuing contractual documentation which accompanied each transaction. This required co-ordination between a number of interested parties – technical staff, sales and marketing staff, accountants, lawyers and many others. I learnt at an early stage how it is often the case that different people may perceive the same problem in a variety of ways and equally how they may identify diverse solutions to that problem.

An example, although not directly related to IT, may be used to illustrate this point. A colleague was on a business trip in Hong Kong and decided to take advantage of the high quality but reasonably priced tailoring facilities the city had to offer, in order to purchase some pyjamas. He was measured up for his garments and asked for six pairs to be made. Wishing for three pairs to be made in a blue cotton fabric and for three pairs to be made in a fine yellow silk, he selected two appropriate rolls of material. When asked by the tailor how he would like the fabrics to be allocated between the six pairs, he replied, "Half and half, thank you".

The pyjamas were tailored, packaged and transported to the UK. Upon receiving and opening the parcel, a classic example of failure to match the expectations of the parties was revealed: all six of the pyjama tops were made in blue cotton and all six of the pyjama bottoms were made in yellow silk! Clearly, the supplier had interpreted the phrase "half and half" quite differently to how the customer had intended it to be interpreted.

This memorable example illustrates how it can be so very easy for there to be a mismatch between what the customer requires and that which the supplier ultimately supplies. In an IT system supply context the potential for such a mismatch of expectations is considerable. It is widely accepted that the development, delivery and installation of a computer system that has been specifically

created to meet and subsequently satisfies a customer's requirements can be a highly complex task to achieve. As has been seen, the difficulty in matching the parties' expectations may be further exacerbated by the parties' individual construction and use of language.

In the "pyjamas" example, the customer's understanding of "half and half" was obviously quite different to the tailor's interpretation of the phrase. At face value, both versions of the expression "half and half" are understandable and yet as they are not identical to each other, the result is a failure to match that which the customer wishes to purchase with that which the supplier ultimately provides.

As an additional comment, it is interesting to note that from describing this tale to others, alternative interpretations of the phrase "half and half" have been reached, with portrayals of the resultant pyjamas not matching the view of either that of the customer or of the tailor. It would appear that the possibilities of interpretation are many but the outcome is the same – the customer does not acquire that which he hoped to.

## EFFECTIVE INFORMATION EXCHANGE

It is apparent that an accurate identification of requirements, required to facilitate a matching of expectations, is dependent upon an effective process of information exchange between the parties. This view may be supported by the fact that the customer has knowledge of its own business and its requirements: the supplier has knowledge of its product's capabilities; only by sharing such information can the eventual system possibly hope to achieve a match between the parties' expectations. Effective information exchange is required to bridge the information gap.

Accordingly, the inference may be drawn that only as a result of effective communication can the installed system possibly hope to reflect both what the customer wished to obtain and what the supplier intended to supply. Alternatively, a failure to communicate clearly and accurately the requirements and the corresponding capabilities of the system, will inevitably lead to a failure to match the expectations of the parties.

### *The MacKenzie Patten and Micron Computers cases*

Litigation arising from situations where a computing system has failed to do what the purchaser expected it to do may be drawn upon to lend support for the proposition being made. One of the earliest computing cases to be examined by the courts was *MacKenzie Patten & Co v British Olivetti Ltd* (11 January 1984, unreported) and concerned a small solicitors' practice. The customer had agreed to buy a system from British Olivetti for accountancy and time recording purposes. They understood that the system would be capable of keeping appointments, of providing a

record of time spent, and would have the facility to record current and past cases and to diarise future ones.

However, the supplied system proved to be completely unsuitable for the firm's needs with the result that it was not even used. The defendants contended that this was not due to any fault on their part but rather resulted from a loss of enthusiasm and lack of co-operation on the part of the plaintiffs. In consideration of the issues, the court found that the purchasers had relied upon the claims of the sellers as to the system's suitability and performance capabilities. For this reason the court held that these statements had become terms of the contract and the law firm successfully sued for damages.

Factors leading to this dispute can be identified as being a failure to accurately identify the customer's requirements, exposing a failure to ensure that the parties' expectations matched. There are clear indications in this case that the dispute may have been avoided had both the customer and the supplier more effectively communicated their respective expectations of the system.

The case of *MacKenzie Patten* is illustrative of an instance where the parties' expectations failed to match largely because of the fault of the supplier. The later case of *Micron Computers v Wang (UK) Ltd* (9 May 1990, unreported) illustrates how the mismatch was chiefly attributable to the customer. In this case, the customer required the system to perform "transaction logging" but failed to inform the supplier of that particular requirement. As this requirement had not been communicated to Wang, the court held that the supplier could not be in breach of an implied term requiring the system to be reasonably fit for this particular purpose and accordingly Micron's claim failed in this respect.

As the *Micron* case demonstrates, in the absence of an accurate identification of the customer's requirements, problems will inevitably arise, as the system may not perform the functions for which it was intended. In this event, it will be for the court to determine, on the basis that pre-contractual statements may become terms of a contract, whether the supplier is to be held liable.

It can be seen in the above case examples that the failure to accurately match the expectations of the contracting parties has been attributable, in one case to the customer, and in the other case, to the supplier. In *MacKenzie Patten* the supplier's (incorrect) claims of the system's capabilities meant that the system did not do what the customer expected it to do. In *Micron*, failure on the part of the customer to clearly state a particular requirement of the system was recognised by the court as a significant factor in determining the ultimate suitability of the supplied system.

## CO-OPERATION BETWEEN CUSTOMER AND SUPPLIER

In the more recent case of *Anglo Group plc v Winther Browne & Co* [2000] I.T.C.L.R. 559 (QBD (T&CC)), the

court openly recognised how co-operation between the customer and the supplier is pivotal to developing and installing a system considered to be satisfactory by both parties. The case concerned the supply of a computer system which, in very broad terms, the customer claimed failed to match their expectations and which the supplier maintained met the list of requirements it had to work from. In considering the case, the judge emphasised the need for active co-operation of both parties, prior to and after the installation of a system.

The judge presented a list of terms to be implied at law, in relation to a contract for the supply of a standard computer system. Of the terms to be implied, those particularly relevant to the current analysis are those that require: first, that the purchaser communicates clearly any special needs to the supplier; second, that the purchaser takes reasonable steps to ensure that the supplier understands those needs; and third, that the supplier communicates to the purchaser whether or not those precise needs can be met – if so how they can be met and if not, what appropriate options are available.

The legal reasoning in this case strongly supports the proposition that to achieve the supply of a satisfactory system the identification of the customer's requirements is a process to which both customer and supplier must contribute. As the judgment in *Anglo Group* related to the supply of a standard software system, the concept of a duty to actively co-operate can be seen to extend beyond being a duty in respect of the supply of custom-made, bespoke computer systems. The duty to co-operate, which in turn will facilitate a greater likelihood of a match between the expectations of the parties, is seen to have a far-reaching application.

The case of *Anglo Group* may be used to support the proposition that judicial thinking increasingly recognises that responsibility for identifying an IT customer's requirements is a responsibility to be shared between the parties. The extent to which that responsibility is, or indeed, should be allocated, is a matter for future consideration. For present purposes the cases reviewed may be used to illustrate how accurately identifying the customer's requirements will inevitably encourage a greater likelihood of a match between the parties' expectations. Conversely, failure on the part of the customer to clearly express their requirements or failure of the supplier to accurately reflect those requirements will surely only exacerbate the potential for a failure to achieve a match between the parties' expectations. As has been demonstrated, failing to match the expectations of the parties can result in the supply of a system which does not accurately reflect that which the customer wanted, or even worse still... the production of six ridiculous looking pairs of pyjamas! 

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