

What's the Point of a Software Purchase Contract?

EACH YEAR SEVERAL HUNDRED PRIVATE CLUBS PURCHASE NEW COMPUTER SOFTWARE TO RUN THEIR OPERATIONS.

These purchases include software, training, support, maintenance and maybe some custom development. The products and services are sold by companies specializing in software solutions for private clubs, and with every purchase comes the dreaded contract. Sometimes a single contract covering everything – sometimes separate contracts for software and service.

Over the years we have reviewed and negotiated such contracts for more than 300 private clubs across the nation. Every one contracts was heavily weighted in favor of the software vendor. Here are some examples of clauses designed to protect the vendor's interests:

The *suitability* clause – states that the software is not guaranteed to satisfy any particular needs of the customer (club). In essence, it's a “buyer beware” clause, which makes club management responsible for determining the capability of the software to meet the club's needs.

The *reasonable effort* clause – states that the vendor does not guarantee that the software will be bug-free, but will make a “reasonable effort” to fix bugs that are reported by the club.

The *reasonable response* clause – states that the vendor's support team will make a “reasonable effort” to respond to customer support calls, and resolve reported issues.

The *home state litigation* clause – states that if things go so badly that the vendor and club end up in litigation, the suit will be prosecuted in the vendor's home state.

And lots more. Although we might negotiate in favor of the club in certain areas of the contract, the major clauses generally remain untouched. So you might ask, if the deck is stacked in favor of the vendor, what recourse does the club have if things go really wrong? Not much – *if you intend to litigate*. But we think that perspective misses the point of contracts in general, because the best use of a contract is to *help make sure that litigation never happens*.

In the old days (before attorneys took over most negotiations between parties) contracts were pretty simple. They stated what



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was expected by both parties – period. The assumption was that the parties would be honest, and would deliver on their promises. A contract was simply a written record of what the parties had agreed to with a handshake.

Today however, contracts are all about enforcement. The assumption is that one or both parties will not deliver as promised, and must be held accountable by the threat of a legal action. In fact, most contemporary software contracts have more text devoted to how the agreement will be enforced than to what is actually agreed upon!

But that doesn't mean we should lose faith in contracts. They can still serve a valuable communications purpose between the parties. Here are some tools we use to improve *communications* and reduce the reliance on contracts.

SOFTWARE CONTRACT ADDENDUMS

When we negotiate purchase contracts for our club

clients, we always insist that the vendor add a software contract addendum to their standard contract(s). This addendum is a detailed listing of the key features and functionality that the club is expecting (usually 20-25 pages with about 500 items). The list includes notations from the vendor about any items that cannot be satisfied with their standard release, or will require custom development to satisfy. The president of the vendor corporation and the general manager of the club sign the addendum.

You might be thinking “So what. How can that be enforced?” Well, you may be surprised to know that these addenda are taken very seriously by the vendors. That’s because they want to avoid any misunderstandings, by documenting what their software can and cannot do for the club. Vendors don’t want litigation. That’s bad for business.

But many clubs are unable to articulate their needs clearly enough for vendors to honestly tell if their software can meet all of the club’s particular requirements. So the vendors have become defensive with their contracts, and include the “suitability” clause to protect themselves from unsophisticated buyers. (By the way, the “suitability” clause is standard with all software purchase contracts in all industries – with the exception of custom software written expressly to meet the needs of a particular customer.)

Let’s think about this a moment. Vendors want to avoid serious misunderstandings, and so do clubs.

What better way to achieve the desired level of understanding than to write down and agree on the club’s specific needs, along with the ability of the software to meet those needs?

Enter the addendum – a simple communication tool. We have found all of the software vendors serving the private club industry to be extremely supportive of this concept.

REFERENCE CHECKS

In speaking with clubs of all types and sizes, it seems that many could do a better job of checking vendor references before purchasing their software. We hear lots of stories from clubs that skipped the reference checks at purchase time, only to be disappointed later with poor vendor performance.

With little success, they then try to use the contract to leverage the vendor into providing promised functionality and/or service levels. That’s unfortunate. Because simply put, if a company has a wide reputation for good products and services, you probably won’t need a legal document to get the desired result. (And conversely, if a vendor has a lousy reputation, a contract won’t be of much help.)

Working with our club clients on evaluating vendors, we insist that they contact at least six club references for each vendor under consideration, and at least three people at each reference club. That’s a lot of calls.

Each call is structured with a list of questions specific to the individual called (controller, F&B manager, golf professional, reservations manager, etc).

PROFESSIONAL IMPLEMENTATION

It’s common knowledge that lots of clubs do a relatively poor job of managing the transition from their old system to the new solutions. Internal confusion makes things tough for any vendor, even the very best. Chaos inevitably leads to misunderstandings, delays, unmet expectations and eventually, dissatisfaction.

The solution? A professional project manager. That could be the club’s controller, or IT manager, or anyone else at the club (or an outside consultant) who has managed a software transition in the past, and has the time available to devote to this enormous task. A well-managed software transition identifies issues early and supports communications between all parties – a major key to avoiding contract disputes.

We’ve participated in major software transitions at more than 300 private clubs, and the standard contracts never really played a significant role in any of those projects. Clear and concise contract addendums, due diligence with reference checks, and well-organized implementations made the difference, virtually eliminating the need for enforcement of the standard contracts.

That’s not to say we ignore the contracts – of course we don’t. We just do what we can to stack the deck in the club’s favor, by positioning the club so that the standard contracts never have to come into play. **BR**

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