Information Technology: The Dark Side of Sunsetting

Information technology ("IT") plays a key role in the day-to-day operations of most organizations. Purchasers annually invest trillions of dollars in hardware, software, and consulting services, and expect to utilize such IT products and services for many years after the date of purchase. However, unless the purchaser has negotiated adequate protections into a written contract, its investment and future use of its IT products and services are at risk.

A standard IT contract requires the vendor to maintain and support the IT product. Such maintenance and support ("support") may consist of telephone support during certain hours of the day, infrequent on-site visits, or even stationing a vendor's employee(s) full time on-site during business hours. In addition, support usually entitles a purchaser to receive, at no additional charge, minor updates to the IT products that contain fixes or minor enhancements to the IT product. When critical issues arise, the vendor may be required to modify the source code of the IT product as part of its support obligations; the source code is considered the 'DNA' of an IT product and is proprietary to the vendor.

Unfortunately for purchasers, most vendors want to retain the option to discontinue support of an IT product, commonly known as "sunsetting." With luck, vendors will provide advance notice of such planned sunsetting to the purchaser. A vendor may sunset support for a number of reasons, but its reasoning usually boils down to the fact that the vendor desires to redirect its internal resources to another, more lucrative, IT product line or service. Most recently, the trend has been for vendors to sunset support for software installed in the purchaser's environment, replacing such software with an application hosted remotely at the vendor's site and accessed by the purchaser via a direct link or the Internet (Application Service Provider models).

Whatever the reason, sunsetting support can prove disastrous for purchasers who have not negotiated adequate contractual protections.

Dark Side of Sunsetting

When a vendor elects to sunset support, it means the IT product in question has been targeted for extinction. Purchasers who have negotiated a perpetual license to use the IT product are legally entitled to continue using it. However, sunsetting support will likely make a purchaser's continued use of the IT product, practically speaking, impossible. This is so because problems arise in the use of IT products that often require maintenance or minor updates to the IT products. Simply put, a purchaser cannot run the risk of using an IT product after it has been targeted for extinction because the IT product cannot be fixed once it breaks. Accordingly, a purchaser is forced to begin the IT acquisition process all over again when a vendor sunsets support of an IT product.

Not surprisingly, the vendor that sunsets support is likely anxious to sell its "new and improved," and costly, IT product that the vendor claims will solve all of the purchaser's problems. Adding to this cost is the fact that a purchaser's present IT environment may have to be reconfigured, at great expense, to utilize a replacement IT product. In addition, most standard contracts do not allow the purchaser to receive a refund of the monies spent on the IT product that is targeted for extinction. As a result, , that multi-million dollar IT system purchased two years ago that vendor will no longer support is of no value, and the purchaser is forced to spend additional millions to replace the IT product.

While costly, purchasing the vendor's "new and improved" IT product may appear to be a purchaser's best option to ensure a smooth transition from the product targeted for extinction.

Unfortunately, a purchaser may have become reliant on certain features of the product, but risks losing these features when it is forced to migrate to the "new and improved" IT product (i.e., something that worked before is not included as a feature in the new product). Such a material degradation of the functionality of the software may be unacceptable to the purchaser. However, a purchaser may not possess a viable alternative if a vendor elects to sunset support and the purchaser failed to negotiate certain protections into the written contract.

Protecting your Investment: **Damages, Injunctive Relief, and Source Code**

A purchaser can take several steps to ensure that it is adequately protected in the event a vendor desires to sunset support. Such steps include the following contractual protections: (i) setting forth in the contract that the vendor does not have the right to terminate the offering of support services for a certain number of years; (ii) setting forth appropriate refund language in the contract that is tied to the vendor's obligation to provide support; and (iii) setting forth appropriate language in the contract concerning the source code of the IT product.

Support services are usually offered for a one-year term, with renewals for successive years at both parties' option. A purchaser should insist that the vendor guarantee support for a certain number of years after acceptance of the product (e.g., seven to ten years), and that renewal for successive one-year terms is only at the option of the purchaser. Accordingly, if the vendor breaches its obligation to provide adequate support, the purchaser may be entitled to remedies for breach of contract, including, when appropriate, monetary damages, injunctive relief, specific performance, rescission, and/or restitution.

It is standard in the IT industry for purchasers to agree that vendors shall not be liable for indirect or consequential damages. In addition, vendors attempt to limit their potential exposure

regarding direct damages (e.g., by limiting damages for breach of support to recovery of unused support fees, which are generally fifteen percent of the IT product purchase price). To combat these vendor-oriented industry standards, a purchaser should tie a breach of a vendor's support obligations to the cost of the IT product by getting a pro rata refund based on the IT product's useful life. For example, the purchaser of an IT product with an initial price of $2,000,000 and an agreed-upon ten-year useful life should receive a refund of $1,600,000, plus the annual support fee, if the vendor sunsets support two years after initial acceptance of the IT product by the purchaser. The unique facts of a case may entitle a purchaser to additional damages, but setting forth proper language in the contract should clearly demonstrate that a purchaser is entitled to monetary relief related to the initial cost and useful life of the IT product.

If the IT product serves a critical function and the purchaser is not able to obtain a replacement IT product before the support is discontinued, injunctive relief may be an appropriate remedy for a vendor's breach of its obligation to provide support. In one case, a Massachusetts bank successfully sought a preliminary injunction against a software vendor that was terminating maintenance support services provided to the bank.[1] The court found that the bank would have suffered irreparable injury if the injunction were not allowed, and that it was in the public interest for the software to continue to be supported (the bank's software maintained records for billions of dollars of assets in customers' mutual funds).[2] The downside to seeking injunctive relief is that, even if the purchaser is successful, it strains the relationship of the parties and the quality of the support will likely diminish.

An alternative to seeking injunctive relief or specific performance is to include an adequate source code provision in the contract. Such a provision should allow the purchaser to obtain the

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[1] Computer Associates v. State Street Bank & Trust, 789 F. Supp. 470 (D. Mass. 1992).
[2] Computer Associates at 471 – 472.

current and complete source code and documentation ("source code materials") if a 'triggering event' occurs. Vendors will attempt to limit the triggering event to bankruptcy, but the purchaser should advocate that inadequate maintenance over a certain period of time will also trigger the release of the source code materials. The source code provision should also allow for the purchaser or a third party to utilize the source code materials solely to support the IT product, and strict confidentiality requirements should apply to such utilization. The source code should be escrowed with an escrow agent and the agent should have the ability to verify the accuracy and completeness of the deposited source code and documentation. If the IT product in question is an ASP model, provisions pertaining to the purchase and transfer of the servers hosting the application should be included.

Conclusion

The only winning scenario for a purchaser of an IT product is for the vendor to provide adequate support for the useful life of the IT product. However, if a vendor sunsets support, the strategies set forth above will serve to minimize the damages that arise when a vendor targets an IT product for extinction by sunsetting support.

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