Stuart van Rij

Fine-print **finesse**

"OUR ERP SOLUTION is the best thing since sliced bread" was CIO Steve Smith's lingering impression after reading the vendor's proposal for the $2 million ERP system that was to be rolled out in his company's hardware retail stores. However, when Steve looked at the warranty in the licence agreement he couldn't help but wonder whether the vendor would actually stand behind their software. There seemed to be a disconnect between the sales pitch and the fine print for this mission critical system.

Although Steve was signing up to a support contract, he still wanted to make sure he wasn't going to pay support fees for any problems that should be fixed for free under the warranty.

With this in mind, there are some helpful questions that Steve can ask as he reviews this typical ERP software warranty:

"Licensor warrants that the Software will perform substantially in accordance with its accompanying documentation for a warranty period of 90 days from the date of this Agreement ... Licensee's sole remedy for any breach of this warranty is for Licensor to, at its option, repair or replace the Software or provide Licensee with a refund of the fees paid for the affected Software."

1. What's the benchmark for performance?

Steve could be on shaky ground as the current benchmark for the performance of the software is the "accompanying documentation". He should consider the following:

■ What is in the documentation? Does it actually promise any particular functionality or performance, or is it just operating instructions? Does Steve even have a copy of it?

■ Can the Licensor change the documentation at its discretion? If so, what's to stop it from diluting its commitments?

■ What in practice is "substantial performance"? Does that mean that only 80 per cent of key functionality needs to be delivered?

Ideally, Steve should refer to a particular document (such as "the Software Specifications") that sets out the requirements and specifications for the software. Steve should also consider what other warranties could be added (e.g. in relation to the documentation, integration, and infringement of third-party rights).

2. Does the warranty period make sense?

Steve opted to avoid the big-bang implementation. He's rolling out the ERP modules (such as financials and CRM) over a period of 10 months. It will be five months until the go-live date for the first module. However, if Steve sticks with the current 90-day period, the software may not even have been delivered before the warranty has expired (because the 90 days runs from the date of signing the agreement, not the go-live date). He

should aim to adjust the length and/or start date of the warranty period so the warranty applies when the software is actually being used and problems are more likely to be revealed.

As the software is being delivered in modules, Steve would ideally negotiate a warranty period for each module or a period long enough to have the same effect. He should also check the warranty covers all of the modules working together and any corrections or updates to any modules

3. Are the remedies meaningful?

As with most ERP licences, the Licensor has promised the three R's for a breach of the warranty — repair, replace or refund. However, these remedies are stated to be Steve's only remedies. This may result in a remedy that is inadequate — a partial refund of the licence fee is paltry in comparison to the actual losses that could be suffered by Steve's business. Steve should aim to clarify that he can pursue other remedies.

The Licensor also gets to choose which remedy applies. Ideally, Steve would choose. However, if he can't negotiate this he may be able to agree that the Licensor will exercise its choice in a reasonable manner and will at least do what it can to resolve the problem by repairing or replacing the software before handing over a refund.

Finally, the warranty is silent

as to how quickly the Licensor is expected to fix a breach of warranty. Within five days? In the next release? Steve should try to set some expectations as to how quickly a problem is to be resolved. He could also consider referring to the service levels in the support contract.

By addressing the issues above, Steve got a deal that was closer to the vendor's pitch. He also felt confident that he was in a better position if things did turn to custard.

*This is a fictitious example of a typical scenario in practice.

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