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No schedule is an island

EVERY NOW AND then a case comes along that is a timely reminder of the dangers of preparing statements of work and schedules in isolation from the rest of the agreement.

Earlier this year in the UK, retail chain Marks & Spencer was caught out when a slip up in a schedule cost the company a year's worth of maintenance fees.

Marks & Spencer had an agreement with Data Direct that was based around a set of general terms and conditions, with the specific details around maintenance and licensing covered in separate schedules.

This type of agreement structure is both helpful and common (just think of all your "master" types of agreement). Using this structure means that the general terms don't need to be renegotiated each time new products or services are supplied. However, problems arise when those schedules or statements of work (SOWs) are prepared in isolation and don't mesh with the rest of the agreement.

For Marks & Spencer, it all started to unravel when it got to Product Schedule number 8.

The company had entered into a Maintenance Schedule that required 30-days' written notice of any intention to cancel maintenance. Without such notice, the maintenance services rolled over for another year.

However, when Product Schedule number 8 was signed up to extend the scope of the

licence, it provided that the maintenance fee for that extension was "at the Customer's option". This did not fit particularly well with the Maintenance Schedule.

Marks & Spencer was late in providing notice that it did not want to renew maintenance. So,

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the issue was what the phrase "at the Customer's option" was intended to mean.

Marks & Spencer claimed that this meant it only signed up to maintenance if it decided to exercise the option to purchase the service (ie the company hadn't told Data Direct it wanted maintenance and so it didn't apply).

On the other hand, Data Direct was of the view that "at the Customer's option" was a reference to the existing right of Marks & Spencer to cancel maintenance by providing 30 days' notice under the Maintenance Schedule (which it failed to do).

Unfortunately for Marks & Spencer, the judge agreed with Data Direct.

The dangers of isolation

A key issue in this case was that the two Schedules did not work hand-in-glove. Marks & Spencer might well have avoided the result by clearly capturing its

intent in the Product Schedule and addressing how this related to the Maintenance Schedule.

The type of problem encountered by the company is not unusual. It's too easy to prepare a SOW or schedule in isolation from the rest of the agreement, and then

document was to take priority in the event of a conflict. In fact, they did. The Product Schedule expressly provided that it took priority over the rest of the agreement. However, it didn't help in this case, as the judge decided that in the circumstances there was in fact no conflict between the two schedules.

This is a valuable warning to those drafting contracts out there, as it can be too easy to just rely on a priority clause without considering that there may be some way that the two provisions in question could be considered to be consistent and not in conflict. So, if there is a conflict on a key clause it pays to deal with it directly.

However, these types of conflicts won't register on the radar until one is familiar with the wider agreement and how it may impact on the particular SOW or schedule. Do this and you may well avoid the sort of costly dispute encountered by Marks & Spencer. ■

inadvertently contradict key provisions, fail to exclude other provisions or omit important details that were supposed to be covered.

The solution, of course, is obvious: When preparing a schedule or SOW to an agreement, one must be familiar with the rest of the agreement. To do otherwise, is akin to constructing an extension to a house while offsite and without any reference to the existing structure: There's going to be problems.

At a practical level, it can be helpful to prepare template schedules or SOWs with background notes that set out a "shopping list" of all the things that the document needs to address. However, this is not a silver bullet, and does not remove the need to be familiar with the agreement as a whole.

At this stage you may be asking why the parties didn't include the usual priority clause to make it clear which

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