

Practitioner's Perspective

by Alan S. Wernick

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Computer Contracts – The Four Corners

By Alan S. Wernick, Esq.

Computer contracts are different from most other types of contracts. Often they include a mix of tangible and intangible property, technologies, concepts, and terms not found in many other contracts. A recent U.S. District court case points out some of the difficulties that can arise in a computer contract. In *Rockland Trust Co. v. Computer Associates International, Inc.* (USDC, MA, 2007), the court had to interpret a software licensing agreement and addenda executed in late 1990 and early 1991 between a large bank (Rockland Trust Company ["Rockland"], the plaintiff) and a large computer vendor (Computer Associates International, Inc. ["CAI"], the defendant).

To put this in perspective, this computer contract dispute involved a business critical software acquisition. The contracts were executed in 1991, with an addendum in 1993, and a complaint filed July 28, 1995, initiating a lawsuit that was finally resolved by the court August 31, 2007 — some *twelve years* later. A review of the court's docket indicates a number of reasons for the delay, including numerous requests for extensions filed by both parties in the dispute, discovery issues, multiple motions filed, and a voluminous amount of evidence that the court had to review after trial. In the *Rockland* case, the defendant, CAI, asserted \$1,160,586 in attorneys fees and costs — an amount slightly in excess of the unpaid invoices in CAI's counterclaim!

The original computer contract provided, among other things, a limited warranty and an integration clause. One key focus of the dispute was the interpretation of this integration clause. The contract "integration clause" says in essence that what the parties intend is set forth within the "four corners" of the contract document; and if not stated therein, it's not part of the deal.

Several disputes arose, including one over the adequacy of the functional integration (not to be confused with the legal integration clause!) of the various modules in the banking software delivered by CAI to Rockland. In reviewing the facts, the court noted that the agreement did not define the term "integration" (in the functional sense). The plaintiff, Rockland, argued that the brochures presented by defendant, CAI, described the system's functional integration, and were part of the contract. The court disagreed, pointing instead to the integration clause of the contract and noting that the brochures were not made a part of the contract. The court stated:

“In short, Rockland Trust received the Integrated Commercial Loans software it evaluated and purchased, and there is no evidence that Computer Associates failed to use its best efforts to correct problems, after having been informed that the product failed to meet the published specification. There is also no persuasive evidence that Computer Associates’ upgrade efforts were inadequate or below industry standards, even though they were ultimately unsuccessful.”

An SEC Form 8-K, filed September 5, 2007, by Independent Bank Corp. (the parent company of Rockland Trust Company) states that on September 5, 2007, Rockland “... paid the amount due [CAI] in the amount of \$1,089,113.73 together with prejudgment interest in the amount of \$272,278.43 for a total of \$1,361,392.16” in accordance with the court’s award to CAI.

To date, the computer system acquisition contracts that I have personally negotiated and drafted have all gone to “system works,” and none of them have resulted in any litigation. Thus, my involvement in computer system contract disputes has come about when someone else has drafted the computer contracts and a problem has arisen, or when I am reviewing the computer contract in my role as an arbitrator/mediator. I have encountered in my role as an arbitrator/mediator numerous other examples of issues relating to the integration clause, including performance failures due to data conversion problems (the contract failed to define the

conversion process); inadequate response time (the contract failed to define response time); or scope of use problems (the contract failed to define how or where the software was to be used). Given that the integration clause states that the terms of the agreement are completely contained within the four corners of the document, whenever the contract fails to properly address a particular issue, conflicting interpretations can arise that can lead to legal disputes.

Acquisition of any reasonably sophisticated computer system embodies unique aspects, and each should be examined through the lens of the contract’s integration clause. The *Rockland* court highlights this perspective when it states: “[Functional] Integration is not defined in the License Agreement, and is mentioned only in the title of the three software components ... I find [Rockland] has failed to meet its burden of demonstrating that the [CAI] software package lacked contractually mandated ‘integration,’ even if the term is construed broadly.”

The bottom line is that the contract’s integration clause is a very important provision in the agreement. Often when speaking with a client about the computer contract provided by the other party, I will focus the client’s attention to the integration clause first, and then discuss the remainder of the contract. In discussions about a computer system acquisition—particularly a business critical acquisition—when something is identified as important, then it should be properly included within the four corners of the agreement.