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## Software Development Contracts: Danger of Sleeping on Your Rights

A software contract differs from your regular sale and purchase agreement in that it often imposes an obligation on the software developer to continue monitoring and improving commissioned software even after its completion and prior to its final delivery to the customer. During this intermediate phase, the software developer is usually required to perform a variety of tests including, for example, integration tests, system tests and user acceptance tests (**UAT**). These tests are conducted to ensure that the software is fit for the purpose contemplated by the customer as well as to enable the software developer to pinpoint and rectify any issues and bugs found in the software.

It goes without saying that if a software developer fails to perform his contractual obligations under the software contract — for example, if he fails to complete the UAT — he will very likely be committing a breach of contract. What happens if, however, the customer discovers said breach, but chooses not to act on it immediately? We shall examine this scenario in greater detail below.

### The danger of sleeping on your rights

As a general principle, when a contracting party is found to have committed a breach of contract, the burden is on the innocent party to act promptly to enforce his contractual rights. A failure by the innocent party to act promptly against the defaulting party, or an insistence by the innocent party on the continuation of the contract (either by words or by conduct), could ultimately be construed as a waiver of the innocent party's right to sue in respect of the breach.<sup>[1]</sup> This may ultimately result in the innocent party losing his rights to seek relief and obtain redress against the defaulting party.

In the context of software contracts, the customer should,

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<sup>[1]</sup> Contracts Act 1950, s 40

therefore, act promptly on his rights upon, for instance, the discovery of any defects in the software, if the software is not fit for purpose or if the supplier has failed to perform his obligations under the contract. To better understand why acting promptly is so important, we shall analyse some case law which will shed light on this issue.

*(a) Failure to complete UAT*

UAT is an integral part of the software development process. Its purpose is to allow the customer to test the software and determine if it fulfils the software requirements as agreed by the parties. That being said, it is not uncommon for software developers to default in the performance of UAT. For instance, in *Metronic Global Bhd v CWorks System Bhd*,<sup>[2]</sup> a software developer had delivered and installed the software programs in the customer's server. The customer claimed that the software developer had committed a breach of contract as it had failed to deliver the UAT test plan under the terms of the contract. The software developer however argued that the UAT test plan was substituted with a checklist. The court held that there was no breach of contract as the customer did not object to the checklist, and had instead allowed the software developer to directly proceed to install the software in its server. This case exemplifies the situation in which the customer, by not objecting to the checklist, has inadvertently waived his right to insist on the performance of UAT. In hindsight, what the customer should have done was to demand that the software developer provide the UAT test plan before accepting delivery and installation of the software.

*(b) Non-delivery of UAT documents*

It is an industry practice for the software developer to hand over all UAT documents to the customer. However, oftentimes, due to the fast-paced and agile nature of software development, the submission of these documents may have been inadvertently omitted in the course of the project. This occurred in the case of *Newszapped Media (M) Sdn Bhd v Mo-od Technologies Sdn Bhd*,<sup>[3]</sup> wherein the customer terminated an agreement for the reason (among other things) that the UAT documents had not been delivered by the plaintiff. However, when the IT system was delivered, the customer did not raise any objection to the non-delivery of the UAT documents. An objection was only raised one month after the delivery of the IT system. The court accordingly held that the customer's delay of an entire month in raising an objection clearly evinced a want of bona fides on its part. This case thus reinforces the fact that a failure to act promptly will have a detrimental effect on the availability of one's legal rights.

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<sup>[2]</sup> [2012] 1 LNS 1234

<sup>[3]</sup> [2012] 1 LNS 613

## Conclusion

All in all, customers should remain vigilant during the software development process. They must ensure that the software developer strictly complies with the terms of the software contract and act promptly in the event that this is not done. They must also closely monitor the works and tests that have been mutually agreed. In doing so, customers will be able to avert the risk of inadvertently affirming a software developer's breach of contract.

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