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Negligent Misrepresentation in IT Agreements: Action Points for IT Service Providers and Customers

In IT-related agreements, the terms of the agreement are self-explanatory. When a written term in an agreement has been breached by the IT service provider / supplier, the remedy for the customer is straightforward – to sue for breach of contract and claim damages.

However, statements made during pre-contractual negotiations (either in writing or verbally) that are not incorporated into the agreement may not create binding contractual obligations. These statements are often described in law as ‘representations’.¹ Representations given by IT service providers at the pre-contractual stage can be wide-ranging and may include statements as to the: (a) timeframe for the delivery of the IT software / solutions; (b) functions and capabilities of the IT software / solutions; and (c) compatibility of the IT software / solutions with the customer’s existing infrastructure.

When such representations are not fulfilled, the customer’s recourse is to sue for misrepresentation and seek damages.² Misrepresentation arises when an IT service provider makes false pre-contractual statements that induce the customer to enter into a contract.³

There are several forms of misrepresentation, with the most common form in the context of IT Agreements being negligent misrepresentation. For instance, where an IT service provider negligently represents to the customer that they are able to deliver an IT software / solution within a

¹ Though not all statements of fact made during pre-contractual negotiations will qualify as ‘representations’ within the meaning of misrepresentation.

² Customer may also choose to rescind the contract.

³ **Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim (COA) [2003] 3 MLJ 460**; see also: **section 18 of the Contracts Act 1950**.

particular timeframe but subsequently fails to do so, they may be liable to the customer for negligent misrepresentation.⁴

As misrepresentation is a cause of action that may give rise to substantial damages, it is imperative for both IT service providers and customers to take practical steps to safeguard their rights in this context.

Practical Steps for IT Service Providers

1. To prudently assess the service provider's own capabilities of delivering the IT project in terms of time, resources, and costs, in order to avoid overpromising and underdelivering;
2. To record all information and analysis relied upon by the service provider in making its representations. This may assist in substantiating the service provider's defence that it was not negligent in making the said representations; and
3. To incorporate all prudently-made representations into the agreement through a 'Representations and Warranties' clause, and include an 'Entire Agreement Clause' to exclude the effect of any representations that are not contained in the agreement. Below is an example of an Entire Agreement Clause:

"This Agreement sets out the entire agreement between [the IT Service Provider] and [the Customer] on the provision of Services, and supersedes any other agreement or representations (whether oral or in writing) made between parties prior to this Agreement. No representations or understanding made by parties prior to the execution of this Agreement, which are not expressly set out in this Agreement, shall be binding on parties."

An Entire Agreement Clause operates to prevent parties to the agreement from relying on any pre-contractual representations, statements, warranties, promises, or assurances that are not contained in the agreement. It essentially stipulates that the full contractual terms are to be found in the agreement itself, and not anywhere else.⁵ Such a clause is an effective tool against claims for misrepresentation.⁶

Practical Steps for Customers

1. To put in writing or record comprehensively all representations made by the service provider. Prudent customers should also seek written confirmation from the service provider on any key representations made by the latter; and

⁴ *BSkyB Ltd and another v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd) and another*, (Eng HC) 129 ConLR 147.

⁵ *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd (COA) [2005] 3 MLJ 585*.

⁶ *Bank Perusahaan Kecil & Sederhana Malaysia v Iskandar Zulkarnain Zainal Abidin (COA) [2013] 1 LNS 308*.

2. To ensure that all key representations made by the service provider are incorporated into the agreement.

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