DRAFTING AND NEGOTIATING COMPUTER CONTRACTS BY PAUL KLINGER & RACHEL BURNETT [London: Butterworths. 1994. xviii + 407 pp (including index). Hardcover: S$125.15]

IN their Introduction to this book, the authors state that their aim in writing this book is to provide a "practical guide to drafting and constructing a computer contract and to the principles of computer contract negotiation." Its target readership "includes

members of the sales and purchasing departments respectively of the [computer] industry and its customers, information technology ... and information systems directors in user companies, and directors of computer suppliers and service organisations." Even so, the authors express a hope that the book would also be useful for lawyers, accountants and other professional advisers. The focus of this book appears to be contracts governed by English Law, though there is a brief description of the legal system in the United States of America and a reference to some rules of law from that jurisdiction. Much of what is discussed in this book would be relevant to computer contracts governed by the laws of Singapore and Malaysia.

To cater to the non-legally trained reader, the book begins with chapters headed Principles of Contract Negotiation, The Legal Environment (which explains briefly the sources of law affecting the United Kingdom (UK)), Contract Law and Construction of a Computer Contract. The chapters following discuss specific types of computer contracts, namely, agreements relating to the supply of hardware and software (the latter involving software "licences"), source code deposit, hardware and software maintenance and support, distribution, consultancy, software development, turnkey contracts, disaster recovery, facilities management and outsourcing, and confidentiality. There is also a chapter discussing standard provisions to be found in most of these types of agreements (what are often called "boilerplate" provisions), another describing administrative steps which are desirable in the making and performance of contracts and finally a series of checklists for each of the types of contracts discussed.

The chapters devoted to discussing a particular type of contract in detail begin with a general description of that type of contract, the commercial reasons why and when such contracts are desirable and an overview of major terms of the contract. Specific clauses are then discussed with an illustration of the clause followed by explanation and discussion of commercial considerations relevant to negotiation of its terms. The clause-by-clause explanation and discussion of the contents of typical computer contracts in simple and relatively clear language represents this book's major virtue for both its primary intended audience and for legal practitioners; its alternative title may well have been "Everything You Wanted to Know About Computer Contract Clauses (But Were Too Embarrassed to Ask)". Of particular value to persons preparing to negotiate such a contract are the authors' assessments of contractual terms that are essential for one party or another, and their opinion as to what would represent a reasonable compromise where the positions of the parties are likely to be in conflict. Both non-legally trained readers desirous of a relatively jargon-free introduction to contract law as well as legal (and other) advisers with limited experience of practice in this area could benefit from reading this book from cover to cover.

It is this reviewer's opinion, however, that the usefulness of this book to both the primary audience for which this book was intended and to its potential professional audience is limited. This is by no means a book to which one may have reference when a legal or commercial point requires quick research; it is most valuable when read as a whole because useful information is dispersed throughout the book without much attempt to cross-reference that information. Discussion of the basic rules of law in the introductory chapters is extremely brief, and may not be sufficient to permit a reader who lacks a legal background to understand all the drafting points that are made later in the book. That brief introductory discussion sometimes supplements the commentary on clauses in later chapters but readers are not always directed to the relevant part of the introductory chapters. So, for instance, the explanation of a sample *force majeure* clause at p 100 does not describe how the

law typically deals with difficulties that arise in the performance of contracts by requiring strict performance, and is not cross-referenced to the (also very brief) discussion of the relevant law as to performance and discharge of contracts at pp 75 to 79. That presents no problem to the legally-trained reader, but lay readers may require more express guidance on the relationship between parts of the book.

Throughout the book, no reference is made to other sources of information so the lay reader who seeks clarification of statements in the book, or who wishes to pursue a deeper understanding of the law will find no assistance. This lack of citation of authority is also likely to prove a source of some irritation to the Singapore practitioner since its usefulness as a research aid is much compromised. The lack of references to authority could also make it difficult for Singapore practitioners to determine whether statements in the book can be applied locally. For instance, when discussing the effect of the UK Unfair Contract Terms Act 1977 (which applies in Singapore by virtue of the Application of English Law Act, Act 35 of 1993), the authors state that a contract clause in a consumer contract attempting to exclude all liability for loss or damage of any kind might, besides possibly being unenforceable, also "give[s] rise to criminal liability" (at p 172). The impression generated by this statement and its context is that criminal liability is created by the UK Unfair Contract Terms Act. In fact, the criminal liability referred to is provided for by the UK Consumer Transactions (Restriction on Statements) Order 1976 (SI 1976, No 1813), enacted under section 22 of the UK Fair Trading Act 1973. Unlike the Unfair Contract Terms Act 1977, this Order is not part of the law of Singapore. No assistance is given in the book to help the reader track down the source of this legal proposition.

The book also contains some overly broad statements of law that could prove misleading to the uninitiated. An example of this may be found in a discussion of source code deposit agreements (sometimes called "source code escrow") where the authors state that "[i]n general, under the law of insolvency, as set out in the [UK] Insolvency Act 1986, liquidators are not bound by a company's existing contracts" (at p 189). Although many legal assertions in this book are not supported by authority, this particular proposition is justified by reference to section 178 of the UK Insolvency Act 1986. That provision deals with a liquidator's power to disclaim onerous contracts. The law on disclaimer of onerous contracts by a liquidator is then briefly and correctly discussed, but a lay reader may gloss over this (which would be understandable since that explanation of the law on disclaimer by a liquidator is technical and calls for some knowledge of the law of insolvency). He may thus be misled by the initial unqualified assertion that liquidation of a company results in its contractual obligations ceasing to bind.

Also potentially misleading is the authors' preoccupation with the idea that software licences may only be contractual. This leads them to discuss at p 68 the "problem" of establishing a contractual relationship between licensors and licensees of high-volume, low-value software that is distributed through a retail or mail-order network (such licences often take the form of "shrink-wrap licences" – terms printed on the exterior of the packaging purporting to be a contractual offer which is accepted by tearing open the clear plastic wrapper surrounding the package). This discussion, which proceeds from the premise that licensors of software would desire a contractual relationship with licensees, mirrors concerns of academic writers on this point, but is misconceived since finding a contractual relationship between the licensor and licensees of mass-market software is neither necessary, nor will it always be in the licensor's interests. Intellectual property law does not require that a licence to run computer software be contractual in nature. If a licence to use mass-marketed software is appropriately worded, there is no need for the licensor to have a contractual

relationship with the licensee. Breach of an appropriately worded licence could amount to infringement of the licensor's intellectual property rights and remedies would be available to him under the general law of copyright rather than contract.

The lack of citation of authority in this book means that footnotes are few; where footnotes are to be found, their use is uneven. For instance, at p 71, when discussing the major contract terms implied by the UK Supply of Goods and Services Act 1982, each implied term mentioned is accompanied by a footnote citing the relevant section of that Act, yet on the preceding page, the descriptions of the terms implied by that Act are not similarly footnoted!

Lawyers in practice may feel some temptation to use this book as a source of precedents, and such a use is facilitated by the helpful layout which presents the sample clauses of contracts under discussion on a shaded background. It would thus be very easy to put together useful precedents with the assistance of this book, but users contemplating this should note that this volume contains little that is not already found in other established sources of precedents such as Morgan & Stedman, *Computer Contracts* (4th ed, 1991), and the books by Rennie, *Computer Contracts Handbook* (1985) and *Further Computer Contracts* (1989).

As stated earlier, the advantage which this book has over other sources of precedents is that each clause is immediately followed by an explanation of the clause and some of the commercial considerations that would impact on negotiation of that clause. The useful insights in that commentary are best gleaned by reading the book from cover to cover. Points made early in the book which may be relevant to later sections are often not repeated in those later sections, or even referred to in cross-references. This is a book which must be taken as a whole. The commentary, valuable as it is, does occasionally omit important commercial considerations. For instance, at p 150, when discussing a contract clause that allows a supplier of a computer hardware and software to increase prices to reflect increased costs by reference to the supplier's costs, the authors fail to point out that such a clause would necessarily involve some mechanism for the customer to verify the supplier's cost increases; this would likely give the customer information about the supplier's margins and the supplier's sub-contractors. That would allow the customer an advantage when negotiating new terms of supply or worse, to cut out the middleman supplier if and when the customer next requires such products.

In summary, the book may not quite serve its target audience as well as the authors have intended. Unless a non-legal reader has some legal background, the explanation of the law is not sufficiently complete to allow him to properly understand the full implications of the contract terms considered in the book. The lack of reference to more detailed sources also means that the book is of little use to a lawyer who wishes to have a useful reference on points of law raised by computer-related contracts. Where it is useful is as an introduction to the basic terms and forms of computer-related contracts, and in furnishing a clear explanation of the special commercial considerations raised by these contracts. The book allows a legally-trained reader to understand better the concerns of clients in the industry, but not much more.

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