



## **Maintenance and Support Agreements “By the Way – Sign Here”**

By

[Valerie C. Mann](#)

*May 2002  
IT Can Spring Training Course*

*This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.  
For specific legal advice on the information provided and related topics,  
please contact the author or any member of the Technology Law Group.*

*Copyright © 2002, Lawson Lundell LLP  
All Rights Reserved*

# Maintenance and Support Agreements “By the Way – Sign Here”

IT-Can Spring Training Course  
May, 2002  
Valerie C. Mann, Lawson Lundell<sup>1</sup>

## Introduction

The software license agreement or the hardware purchase agreement has been signed and installation is complete - now who is going to maintain that hardware/software, fix the bugs, help your staff? How is the organization going to ensure, most importantly, that the hardware and/or software you have just purchased continues to be a viable, prudent, and economic business choice for the corporation?

Costs of software maintenance have been reported to be, depending upon the application, anywhere from 7% to 89% of the software's list price (Network World, February 18, 2002). In other words, a significant portion of the information technology budget can be spent on maintenance and support. Hardware maintenance costs can also be high. In some cases, where systems are maintained for extensive periods of time, maintenance charges can exceed the original purchase price.

If a purchaser is not able to maintain and service the purchased hardware or software after acquiring it, either because of the level of expertise or because the vendor will not release or give access to the source code for that purpose, then the purchaser may not have much of a choice when it comes to accepting a vendor's 'offer' of maintenance. Not purchasing a maintenance contract in those circumstances could result in excessive downtime (which can lead to business loss), inaccuracies in reporting, inability to perform certain functions, and inability to access or use portions of the software, all of which means the corporation paid too much for the software capabilities purchased. In a way, the maintenance contract is like an extended warranty on a car. Unfortunately, many companies purchase maintenance services using the same cursory analysis that they might in buying an extended warranty on a car - without thinking much about it. The maintenance agreement may

---

<sup>1</sup> Valerie Mann is a partner of Lawson Lundell, Barristers & Solicitors in their Vancouver office and chair of the firm's Technology Law Practice Group.

be attached as a schedule to a development or license agreement and little thought is given to its terms. Most will agree that they need to purchase maintenance services (and most do), but they do not spend a great deal of time negotiating the terms or considering the impact to the organization if the maintenance services do not cover everything they need them to.

It is somehow easier to present the issues and considerations in maintenance and support agreements from the point of view of the purchaser notwithstanding that it is the vendor and its counsel that draft the agreement. It is likely that this paper reflects that bias. A purchaser is concerned about paying for something of value and paying for continued system or software reliability which comes with outside maintenance. Maintenance, being the services provided by a vendor to fix hardware and software and, in certain cases, deliver upgrades and other similar benefits, needs to cover all fundamental requirements of a corporation to keep the purchased product operating at optimum performance. A purchaser wants to make sure that it knows what it is paying for, when the warranty commences, how long it will last, what actions will invalidate it, and how quickly the vendor will fix a problem.

Notwithstanding a purchaser's bias in reviewing the fundamental terms of a maintenance and support agreement, there are certainly protections and issues which a vendor should consider when drafting and also when negotiating and agreeing to changes requested by a purchaser. This paper will review some of the issues that you should consider when commencing drafting or review of a maintenance and support agreement and the questions that you should ask. Most of the discussion will focus on the 'maintenance' rather than the 'support' portions of the agreements, and, in fact, an organization can purchase these services separately and from different vendors. In my view, the maintenance portions are the more contentious and more fundamental to both purchaser and vendor. This paper does not cover all elements of a maintenance agreement, but attempts to canvass the primary issues that should be considered by a person drafting or reviewing such agreements.

## **Where to Start**

The goal of any purchaser of maintenance services is to obtain system reliability. Purchasers of hardware and software can invest significant sums not only in the product itself, but in hardware and other systems to support the application and in the dedication of corporate resources to manage,

implement and track the resource. There is also a 'leap of faith' for corporations implementing information technology solutions in place of legacy systems with the goals of reducing their overall costs. Therefore, particularly for those purchasers who are committing extensive resources and taking that leap of faith, reliability of the system is paramount. Once the software is purchased and installed, it is the maintenance and support agreement which will govern the extent of the ongoing system protection and servicing to maintain that very necessary reliability.

If you keep the goal of system reliability in mind, then the first questions in reviewing a maintenance contract are simple:

1. what is covered and what is excluded from coverage?
2. how quickly will problems be dealt with?
3. how will problems be resolved?
4. how long will the services last?

There are other important questions that are related to the implementation of a maintenance and support agreement, most notably: "how much do the services cost and are such costs fixed over the term of the maintenance agreement or the expected life of the system?". Cost will be part of the negotiations of a maintenance and support agreement, and will undoubtedly affect the level of service provided. A common refrain from vendors faced with re-negotiating scope and service levels in an agreement is "well, we might be able to do that, but it will be expensive". In addition to assessing its own requirements for reliability and, conversely, tolerance for non-reliability, a purchaser has to inform itself about the appropriate range of costs for maintenance services of the type proposed by the vendor and in connection with the type of application purchased. The purchaser is then armed with the necessary tools to: (i) know its own requirements for reliability; (ii) assess the appropriateness of what is offered by the vendor; and (iii) have a better understanding of the vendor's flexibility in altering scope or imposing service standards without resulting in an increase in costs.

A purchaser conducting a tender for a new system should ensure that it takes into consideration in its review of bids the total cost of operation of the hardware, software *and* maintenance and support costs. Scrutiny of the terms of the maintenance and support agreement terms should be as careful as the scrutiny of the development and license portions of a proposal. In fact, the purchaser should

be in a better position in terms of overall bargaining strength if all product and services costs are considered together. The vendor will price the bid on the basis of the overall profitability of the project, including the maintenance portion and the exposure that the vendor faces in view of the maintenance services offered. If the purchaser buys only the system and then turns to maintenance, the vendor may extract more for the services on the basis that the purchaser has already committed to a system that either it is the only party capable of providing services for, or that it will not grant access or cooperation to a third party service provider.

## **Types of Maintenance**

There are different types of maintenance arrangements that a purchaser can enter into: hardware maintenance, software maintenance and third-party maintenance including, at its most sophisticated, certain types of outsourcing arrangements. Outsourcing agreements are beyond the scope of this paper and will otherwise be addressed in this course.

With hardware, the maintenance agreement is often entered into with the manufacturer (as opposed to a reseller, distributor or lessor of the hardware). The manufacturer maintenance agreement is typically entered into at the time of the purchase, and the commencement date of maintenance services is at the date of expiry of the manufacturer's warranties under the purchase contract.

The focus of software maintenance agreements is on 'bug fixes'. Even new versions of software designed by the most experienced of software companies, can have a number of errors. Often this arises from the use by the purchaser of the software on a platform that is slightly different from the standard used by the developer/vendor, or the software is used in conjunction with other software that gives rise to unintended results. As a result, insignificant (and non-critical) bug fixes are often dealt with in software maintenance agreements by way of generally released upgrades that aggregate and address problems identified by various customers. Upgrades can also include software improvements as well, both those identified or suggested by purchasers and those implemented by the developer from its own development activities.

Third-party maintenance ranges from value-added resellers providing 'authorized maintenance services' to its customers to large service-providers selling integrated service packages to customers with different hardware and software systems. Where a purchaser has a multi-faceted information technology infrastructure, a third-party comprehensive maintenance service may be advantageous.

Corporations often grow into these arrangements when they are faced with different maintenance agreements with different vendors. When an organization's systems become interdependent, the administration of such maintenance and the risk that one or another of the maintenance agreements will exclude services based on 'externalities' often leads to a desire by the organization to coordinate such services in an experienced third party service vendor. Such an arrangement can be more cost-efficient and less risky, however, for such an arrangement to be successful the manufacturer and/or software vendor must cooperate with the maintenance service provider. Absent complete cooperation, problem resolution may be delayed.

### **Contract Provisions**

*Scope.* The first step for a purchaser is to determine the services that it needs from a vendor or maintenance services provider. This can sometimes be a difficult assessment in technical terms as the software or hardware may be relatively unique or new and/or the purchaser may be unsophisticated in its technology knowledge. To address the latter point, purchasers of significant systems might consider engaging the services of a technical advisor to assist with a review of the corporation's needs including with respect to its ongoing maintenance requirements.

A maintenance and support agreement must contain a complete and clear description of the services that the vendor will provide to the purchaser. The agreement should also be clear as to those matters that are excluded from the services provided. Services fall into various categories:

(a) *Included Services:*

1. Remedial Maintenance (Critical and non-critical 'fixes'). Remedial services to fix critical and non-critical errors and non-functioning parts of the hardware or software need to be spelled out. Those services which are designated as critical to the organization and those which are non-critical need to be identified and are often determined in conjunction with the service level response requirements of a corporation, discussed below. Critical remedial services in particular, must be clearly defined. They need not be limited solely to a 'complete failure' of the system. Whether services are provided around the clock or only during specified hours is also of concern to a purchaser. While critical services may require "24/7" response availability, it is unlikely that a vendor will commit to such accessibility without extra charge on non-critical items.

It is common to find error correction provisions which require that the vendor is able to duplicate the error identified by the purchaser. If the vendor cannot reproduce the error it will often mean that the requirement for error-rectification is eliminated. Occasionally, vendors also provide that costs associated with a vendor's failed attempts to reproduce the error are to be reimbursed by the purchaser. Obviously, a purchaser will want to, at the very least, modify or limit the application of such costs, if not eliminate such requirement entirely.

2. Upgrades or Updates: In the software context, a vendor will typically make provision in a maintenance and support agreement for 'free' upgrades to the software. These upgrades can include bug-fixes identified and corrected since the last release and/or certain enhancements.

Software "update" services might include notification of difficulties identified (but not yet experienced by the purchaser) in the software and information regarding the impact of third party software changes where such third party software interfaces with the vendor's software. Update information can also include notification of new releases of the software which the supplier makes generally available. A vendor should be motivated to contact its customer base to sell new releases of the software but contractually, a covenant to provide such notification acts as an early warning for the possibility of 'orphaned' software support. In some cases, vendors are also willing to provide a discount on the next release if the purchaser is still purchasing maintenance services and purchases the new release within a specified period of time.

In the hardware context, updates can be driven by engineering improvements, peripheral improvements and, in some cases, safety device installments. Whether such updates are included in the maintenance services or whether there is simply a commitment to notify the purchaser of such changes will be a matter of review and negotiation. It is rare to extend hardware upgrades of significant consequence within the maintenance contract price.

In addition, a vendor will want to aggregate into upgrades, bug fixes for customer-identified problems that are not material. However, it is not unusual for a purchaser not to want to install all upgrades. If an upgrade requires hardware or other software upgrades, then the cost may become prohibitive for a particular purchaser. As a result, you should take into consideration: (i) the relative importance of the software to a purchaser's organization and

business; (ii) how many upgrades the purchaser can ‘pass’ on before the exclusion applies; and (iii) whether the purchaser will be able to gain access to the source code and be in a position to provide its own maintenance services itself.

3. Support and “Help Desk” Services: Support arrangements can be incorporated into a separate agreement from the maintenance services, even if the same party supplies both. However, such services are also often included in the maintenance and support contract and the purchaser should consider whether it is likely to need ongoing support services in the same way that it might require maintenance services. Typically, the need for support services is highest immediately after implementation of a new system, particularly one that requires extensive customer training or is used by personnel in various functional areas of a corporation. For example, software used to implement and facilitate enterprise resource planning might require extensive post-installation support. It should be clear, though, that unless the contract specifically provides for it, support services are distinct from training services, the latter of which are typically addressed separately.

Telephone support is common in maintenance and support agreements. In addition to telephone support, online support via modem connection might be provided. This is often the first line in addressing remedial action and it can also serve a ‘help desk’ function. This type of services might include explanations of functionality of the software; assistance in the operation of the software or system; error analysis and correction, to the extent that this can be done remotely; and explanation of, or assistance with, particular features. As mentioned above, a vendor, however, will usually want to avoid being a training service, at least without having a customer pay for it. Some support contracts provide that if a vendor determines that users are simply calling the help desk number to have ‘simple’ questions answered, then the vendor will notify the purchaser and if the same types of calls persist, the vendor will start charging standard ‘training’ fees in addition to support fees. Obviously there is an element of judgment required to determine whether a purchaser’s staff is taking advantage of a vendor, or whether a vendor is crying ‘foul’ too easily. Therefore, such clauses should be drafted and accepted with care.

It is important that the vendor or service supplier’s staff is capable of ‘speaking at the level’ of the purchaser’s personnel using the product on a regular basis and that the application is



such that clear instructions can be delivered via telephone. You should also review when such 'help desk' services will be available to a purchaser's personnel. Typically, vendors make such telephone support available during the vendor's regular business hours. However, with vendors based in jurisdictions several time-zones from the purchaser, the overlap in business hours is so minimal so as to make the telephone support virtually useless.

4. Regular scheduled or preventive: Hardware maintenance is often separated into remedial maintenance and 'preventive' maintenance. The latter is maintenance on a regularly scheduled basis to keep the hardware in good operating condition and is scheduled at mutually agreeable intervals with on-site inspection expected to take a maximum number of hours. The contract will need to make clear the result if, on a routine maintenance call, the service provider determines or discovers that a more fundamental issue has arisen. If the technician stays to correct the problem, the parties have to determine whether such attention is regular maintenance or remedial maintenance. If remedial maintenance, have all the proper reporting procedures taken place and what, if any, are the additional charges for such remedial maintenance.

(b) *Excluded Services:*

As mentioned above, those services that are to be excluded should be clearly stated. In some cases, maintenance and support agreements contain a long list of excluded services. These need to be carefully reviewed. Standard exclusions typically cover systems connected to, or which power hardware, un-approved interfaces such as peripherals and untested hardware or software platforms, and problems which arise as a result of modifications to the hardware/software completed by the purchaser or third party without vendor's consent. Excluded problems might also be those that arise due to the purchaser's negligence.

One particular area of caution is an exclusion of maintenance services for software which the vendor deems outdated. The vendor will continue, over the term of the maintenance and support agreement, to issue updates to purchasers. In many cases, these are simple upgrades which aggregate minor bug-fixes and contain certain non-core enhancements. However, as outlined above, purchasers are not always keen to implement upgrades.

Excluded services need not be excluded entirely, but they may be excluded from the fixed price maintenance services otherwise provided in the contract. The purchaser should also consider whether it is more economic to agree to certain exclusions, but on the understanding that the vendor will undertake such services on request of the purchaser with the vendor compensated at, e.g., on a time and materials or other similar basis.

### Service Levels

Closely tied to the review of the scope of services, is an assessment of service levels. This is a critical point for purchasers of maintenance services, as a failure by the vendor to provide prompt corrective action in the case of a fatal program flaw could result in significant lost business to the purchaser.

There are two primary benchmarks with service levels. The first is performance related – what does the purchaser expect the system to do. The second is response related - what response can a purchaser expect from the maintenance services vendor in providing remedial action if performance is not met. A maintenance agreement should state performance characteristics of a system to ensure an expected level of reliability in the system. In other words, if the system is ‘guaranteed’ to be accessible and functional 99% of the time, 24/7, then the purchaser will want the reliability comfort that maintenance services will be responsive to this overall performance goal when called upon to deal with issues. However, this does not necessarily mean that all aspects of a system will be subjected to such a high standard. Parts of the system may be more critical than others, and availability of back-up systems that alleviate critical problems should be considered when setting performance expectations.

Severity of Problem Levels. Generally, a purchaser should assess its use of the hardware/software application and determine the impact to the organization if it, or any part of it, is non-functional. It would be prohibitively expensive to label all circumstances ‘critical’ to the organization, as the response requirements from a vendor could become excessive. However, a purchaser on its own, or with the assistance of third party information technology advisors, should determine which failures or circumstances would lead to material consequences for the corporation. When a purchaser determines that certain matters are ‘critical’, then response times of the vendor or maintenance services supplier need to be exceedingly prompt.

In many cases, a vendor or services provider will be express about how quickly it will deal with severe or critical issues, but does not address how quickly they will deal with non-critical issues. My preference is to stipulate outside time-frames for this type of work as well, as it is a constant source of irritation to purchasers if they feel their problems are simply being ignored. Time-frames, and failure to meet them, also come with consequences so there is a motivation for a vendor to meet all requirements of the purchaser. However, if a purchaser has properly addressed those issues which are critical, then it should be able to demand performance for non-severe issues which are realistic, notwithstanding that this may result in some delay in response by the vendor.

Maintenance severity levels can be defined in as many increments as reasonably necessary, but not so many that the clear demarcation between one form of problem and another becomes blurred. The purpose of categorization is to determine steps to rectification and timing. As an example, three severity levels might be defined in an agreement. The first, or highest, is any failure of an application, system or part, which prevents operation. This will typically be accompanied by high levels of response. The vendor or service provider will reply promptly, will attend on site if required as soon as possible and will use “all” efforts to deal with the problem. Such efforts are often defined in these circumstances to be the ‘best efforts’ of a vendor which is a very high standard. A second level of severity might be defined as a failure of application, system or part which seriously impedes the operability of the system as a whole and has, as a result, a deleterious effect to the purchaser. As an example, the system may be operational but the purchaser cannot print a particular report which the purchaser is required to deliver to its customer or for government-required disclosure. This level of severity still requires a fairly high level of support response but not necessarily the middle of the night heroics one might expect from a ‘severity 1’ problem. A third level of severity might be defined as continued operability of a system but with an intermittent or even a continuous problem, but not one that is fundamental. In this case, remediation of the problem is still important, but the purchaser can continue its business with little interruption.

In addition to characterizing the problem, the response itself will then be defined with different response-time requirements. In other words, initial response to a critical problem might be almost immediate, measured in minutes, not hours. The diagnostic or plan of rectification for a critical issue might be measured in hours. Finally, the resolution might be measured in, for example, 24 hours increments.

The above are general definitions, and if it is possible to define very specific circumstances, particularly with respect to higher gradations of severity level, then the parties should consider stipulating these. The purchaser wants to ensure that specific circumstances are dealt with at the appropriate level and with the requisite level of urgency. At the same time, such definitions should not be exhaustive so as to exclude what might turn out to be a fundamental issue but which was not specifically referred to.

What can be fixed? A vendor or maintenance services supplier should never warrant that it can fix *all* errors. This may be simply impossible and the best resolution might be a patch or work-around until the software can be subjected to a more fundamental overhaul. In some cases the diagnostic on a problem can be extremely time-consuming and taxing and the fastest solution might be a by-pass of the problem. A patch or by-pass will give the vendor flexibility in overcoming severe problems in the least amount of time. While not optimum if such by-pass or patch eliminates certain functionality of the software to the purchaser, it may be the only feasible solution to get the purchaser operational again. However, there is always the concern that multi-layered patches and by-passes may pose their own unique set of operational concerns and maintenance challenges. At some point, the purchaser has to query the efficacy of the software purchased. A vendor might also want to make clear that it is not required to provide for bug fixes of all non-critical problems to ensure that an isolated problem for one purchaser which is not duplicated or reported by other purchasers does not have to be universally released in an upgrade.

When is the issue dealt with? Although it is obvious that a fundamental flaw that has caused inoperability has been fixed when the system is operable again, the resolution of a problem to the understanding of both parties might not be so clear. For example, on non-critical issues, it might be considered resolved when the problem has been diagnosed and an answer or plan for resolution presented. A purchaser might consider resolution to be only at the point at which a bug fix has been delivered.

Support Services – Service Levels. Although maintenance and fault rectification are typically more important to an organization's well-being, support agreements or support provisions can also be tied to service levels. Help-desk services in support agreements can come with performance requirements that non-maintenance queries will be responded to within a particular period of time. Resolution or assistance might be set out on a grid depending upon the support requested. In other

words, the service provider might commit to answering certain questions within 4 hours and others within 2. Those not answered immediately will be escalated to a higher level of review and response.

### Source Code Escrow

Source code is necessary for the purposes of conducting software maintenance and support. If the vendor provides maintenance services to the purchaser, then the primary risk to the purchaser is that the vendor will cease supporting the product for whatever reason. At that point, the purchaser must either gain access to the source code in order to assume responsibility for its own maintenance or allow a third party to continue with maintenance and support. Alternatively, it must take the risk that it will not be able to service the software and commence the search for replacement software.

It is important to canvas with a purchaser whether it has, or will have, the ability to conduct its own maintenance services. If the skill set and infrastructure of a purchaser makes such self-sustaining maintenance a viable option, then the purchaser needs to assess whether it requires the protection of a source code escrow. Typically, access to the source code will be on the bankruptcy, insolvency or other similar event affecting the vendor's ability to support the software. However, source code can also be released in circumstances where the software has been "orphaned" by the vendor, as referred to above. It could also be released in circumstances where the vendor has breached the terms of the maintenance and support agreement. In particular, consistent failure to provide services or to provide services within acceptable standards could result in a release of the source code to the purchaser. As release for reasons other than insolvency, particularly release due to breach, could prove to be particularly contentious circumstances, the contract should be clear on the trigger for release. For example, providing clear measurement standards for release based on missed service standards will minimize the risk of dispute on whether the trigger has been pulled. From the vendor's perspective, the purchaser should covenant not to use the source code for any reason other than to provide maintenance services, and not to sell or use the source code for any other purpose.

### Term and Termination

Typically, a maintenance and support agreement will commence at the end of the warranty period following installation of the hardware/software and will continue for a period of one to two years. The purchaser will often have the right to terminate the maintenance and support services on notice to the vendor, usually 60-90 days. If the maintenance services are for software, then the vendor will

make termination of the maintenance agreement coincide with termination of a software license that is the subject of the maintenance.

Maintenance service providers often require payment of the service fee in advance and if a purchaser is to exercise its rights to terminate on convenience, then, unless the contract allows for a pro rata repayment of the service fee paid in advance, then the purchaser either has to forfeit the balance of the term's fees or time its termination exactly. In a one-year contract, timing the termination becomes an academic exercise. As an aside, if a vendor demands payment in advance, a purchaser should negotiate a discount for the fees to compensate not only for the time-cost of money, but also for the risk associated with a supplier who might become insolvent, or otherwise unable to perform the service, before the expiry of the term. In the latter circumstance, the purchaser will lose whatever maintenance fees have been paid in advance and not yet 'used' in the provision of maintenance services. Obviously, the financial health of the maintenance services supplier is a point of due diligence for the purchaser and its counsel before such an arrangement is agreed to. The healthier the vendor or maintenance services supplier, the less risky payment in advance becomes.

Payment, Invoicing, Credits. Payment for maintenance services need to be clearly articulated, particularly if there are chargeable items that are in addition to a fixed fee portion. As mentioned above, vendors often require payment in advance for the next month's or year's services. This should be carefully reviewed particularly in connection with termination provisions. Additional charges for services are often based on hourly rates of service provider personnel. If this is the case, then a purchaser needs to be cautious about the appropriate rate applied for the work undertaken. Invoices should be as detailed as a purchaser reasonably requires, but at a minimum, all additional charges should be carefully documented, with details of services provided, hours applied and hourly rate of personnel completing the work. If acting for a vendor, it is important to include an interest rate applicable for late payment.

A purchaser will have to assess the expected life of the hardware/software purchase. Often a purchaser's assessment of the life of hardware and software is much longer than a vendor's assessment. If maintenance will be required over the life of the product, then the purchaser will want some assurances that maintenance and support service fees will not escalate excessively. A vendor, on the other hand, will want the ability to implement price increases for services on notice to the purchaser. While a vendor will want to preserve some right to increase its fees, particularly

for an expected service arrangement in excess of 3-5 years, the purchaser should consider negotiating price protection provisions for longer term maintenance requirements. A purchaser's leverage to negotiate these price protection provisions is really only at the time of purchase. In other words, if the maintenance and support agreement is negotiated after the purchase commitment is made, the purchaser is at a significant disadvantage. Whether a purchaser can realistically migrate the maintenance services to a third party service provider will also affect its negotiating leverage with a vendor.

Credits can form part of a maintenance and support agreement for: (i) force majeure events (see below) and (ii) for failure of a vendor or maintenance service provider to meet service levels under the agreement. If the parties do negotiate a credit system, particularly for the latter circumstance, the purchaser needs to make sure that the credit is not the only ramification for failure of a vendor or service provider to meet its obligations, particularly for critical problems. The vendor will want to ensure that not all items are subject to a credit and that there is proper documentation of service levels and failure to meet such levels to invoke credits. The vendor will also want to limit the maximum amount of credits which can be applied in any specific period.

Purchasers often also want to include a clause allowing dispute of invoices rendered by the vendor where the charges are not fixed. Such clauses are most helpful to the purchaser if, upon notifying the vendor of such dispute, the amount in dispute can be carved out of the payment requirement and resolved pursuant to the dispute resolution mechanism in the agreement. In some cases, the purchaser might also request the right to audit the records of a vendor to ensure that charges have been properly recorded and made. However, this is unlikely in any but the largest contracts and will come with limitations on the boundaries and frequency of such audits.

A purchaser and vendor should also review the tax laws in their respective jurisdictions to determine if tax is payable on such services. In certain jurisdictions, the provision of maintenance services is considered a taxable service. This may be distinct, however, from support services and if this is the case, then the agreement should be clear on the distinction of such services for billing purposes.

### Other Terms

In addition to the fundamental terms of a maintenance and support agreement outlined above, the following matters, in no particular order of importance, are also worth considering:

1. Assignment Rights. Corporations want to be able to have as much flexibility with respect to their information technology requirements as possible to allow them to expand by acquisition or contract by divestiture without paying penalties or suffering a termination of their maintenance and support services. Assignment provisions are typically in the 'boiler plate' at the end of the agreement, and are not often the subject of negotiation. However, significant information technology contracts with material dollars attached to them can be an irritant in merger negotiations where flexibility is not built into the contract.
2. Compliance with Purchaser Rules. Particularly when on-site maintenance services are to be performed, the vendor should covenant to comply with purchaser's security requirements, and general policies. In some working environments, safety indoctrination or specific safety gear (such as proper foot wear or hard hats) may be required before access to a part of the facility where the work is to be done. In addition, obviously, non-interference with the purchaser's business, or at least minimal disruption to the area, may be a specific requirement.
3. Confidentiality. The parties usually covenant to hold all information confidential to the other in confidence. As with non-disclosure clauses in any agreement, how confidential information is defined may be important. Although there are always exclusions to the definition of confidential information based on information already in the public domain or which is lawfully disclosed to the other by a third party under no obligation of confidentiality, whether such confidential information is also *only* confidential if it is marked as 'confidential' should be considered. If source code or other proprietary information is provided to the purchaser for any reason, the vendor will want to ensure that appropriate steps are taken to retain confidentiality. Such steps might include a limitation on the personnel at the purchaser's site who have access the vendor's confidential information.
4. Intellectual Property. A purchaser will typically be asked to recognize and acknowledge a vendor's proprietary rights in not only the software or hardware, but to any enhancements, bug fixes, modifications and other upgrades that are provided under the maintenance agreement. Conversely, the purchaser retains all rights in proprietary materials, including data, records and other documentation, provided to the vendor.



Intellectual property issues become particularly important to a purchaser of third party maintenance services because a purchaser does not want to get caught up in a dispute between vendor and service provider. For example, a maintenance services provider should warrant that nothing done by it, and no tool used by it, in the performance of the services will infringe any intellectual property rights of the manufacturer or any third party. On its own, a warranty of this type leaves the issue of rectification to interpretation. The contract should be specific about the purchaser's right to terminate the agreement as well as outline the service supplier's obligations to pay damages to the purchaser and take all necessary action to rectify the infringement. Necessary action taken by a vendor might include obtaining a license from the manufacturer or using a different, and non-infringing methodology in providing the services.

5. Purchaser's Covenants. A purchaser will have to, among other things:

- (a) provide access to its system so that the maintenance services can be provided, including adequate working space and a safe working environment;
- (b) agree to use the hardware or software in accordance with specification or manuals for use, including keeping equipment in the correct environment (including temperature etc.); and
- (c) agree not to modify, enhance or otherwise alter software without prior written consent of the vendor.

While cooperation and access would appear to be a relatively innocuous and obvious request, the purchaser should be wary of a vendor or services provider being in a position to claim that the purchaser is impeding progress on error correction. This type of allegation would typically be made when a vendor is pressed to meet the service level requirements for error-rectification required by the contract. If the purchaser's circumstances permit, and relatively unrestricted access to the purchaser's systems and facilities can be accommodated, then the probability of claims of interference will be diminished. As well, in reviewing such clauses, a purchaser should consider the dispute resolution mechanism in the contract which might provide less formal and therefore faster resolution of such skirmishes.

In addition, the vendor may require that the purchaser covenant to install upgrades. However, while such upgrades contain bug-fixes which should reduce maintenance requirements, this is something the purchaser should consider carefully given the possibility of incremental costs in hardware purchase, software purchase or training requirements that might accompany other aspects of an upgrade installment. If the purchaser agrees to a covenant to install upgrades, then it should at least be on the condition that the vendor first runs an acceptance test of the upgrade on the purchaser's platform. If the product does not pass the acceptance test, then the purchaser should be under no obligation to fulfill this covenant.

In some cases, particularly hardware maintenance arrangements, a purchaser may be required to keep a log of all defects or problems. If a purchaser performs its own routine maintenance, a purchaser may be required to keep a log of its own maintenance activities.

6. Representations and Warranties. A vendor should always state that it will provide the maintenance and support services in a 'professional and workmanlike' manner. Such clauses should go on to at least include an objective standard to measure against, such as "in accordance with accepted practices as established in the industry in which such services are provided" or similar benchmarking language. A vendor or services provider should also have no difficulty in representing that its personnel tasked with providing the purchaser's services will be fully qualified and trained in the specific application or system.

In many cases, the "professional and workmanlike manner" reference is the only warranty provided. There are no representations concerning the vendor's ability to provide the services or that the vendor or maintenance services supplier has the requisite authority to provide the services. If a purchaser is contracting with a third party maintenance services supplier then the purchaser should be entitled to seek comfort that the services supplier has the necessary authorization from manufacturers to perform services on all systems covered by the maintenance agreement. In many cases, manufacturers certify maintenance and support service providers in respect of their software and a service provider should also be able to provide a representation with respect to, and evidence of, such certification.

7. Remedies. If either party to a maintenance and services agreement is not meeting its respective obligations, then the obvious remedy is to terminate the contract. This may have very unfortunate consequences for a purchaser, however, particularly if the maintenance services are such that for all practical purposes only the vendor can provide them. If this is the reality of the relationship, then the purchaser will need to seek compensation for default in other ways.

Liquidated damages might be provided for as long as they can be, in fact, assessed as genuine pre-estimates of damages and are not punitive in nature, the latter of which may be unenforceable as a result. Set-off or credits on payments, as referred to in the 'payment' section above could also be provided for, particularly for failure of a vendor or service provider to meet expectations of service.

Most often, a vendor will provide that its only obligations, and the purchaser's sole remedy is the rectification of errors, replacement or by-pass or other similar resolution of the identified problem. In some cases, this is coupled with the addition of a right of the purchaser to recover actual damages to a limit established by the vendor in the contract (see below).

8. Limitation of Liability and Remedy. A vendor will want to ensure that any warranties provided are only those contained within the agreement. Therefore, an exclusion of other warranties, whether express or implied should always be included when acting for the vendor. Vendors also typically state that all of its liability, whether in contract, tort or any other cause of action will be subject to the limitations in the contract.

Maximum vendor liability might be capped to a maximum of the amount paid for the services, or some limited part thereof such as one month's prepaid fees. As well, all consequential, special, incidental or punitive damages will generally be excluded from the contract. Obviously, a purchaser needs to review these limitations carefully. With relatively small maintenance fee contracts, the potential for exposure to damage on breach may be significantly higher than the fees paid over the life of the contract.

9. Reporting. As mentioned above, in some cases a vendor may require a purchaser to keep track of reported or unreported incidents. However, a purchaser can also require, particularly of a third party maintenance services provider, a regular reporting of services and

service delivery. This may be the only way that a purchaser can properly evaluate whether a service provider is meeting the standards required of it and even whether the services are meeting 'value' expectations.

10. Force Majeure. A vendor will not always be able to provide the maintenance services due to reasons beyond its control. Such circumstances will certainly include the typical 'acts of God' reasons standard to force majeure clauses generally, but they might also include failure to provide telephone or online support when third party telecommunications lines or servers are down and they might also include labour disruptions. However, if part of the maintenance services are essentially emergency back-up (or disaster recovery) services, then the purchaser should review this boiler plate clause carefully to ensure that the force majeure clause does not negate the vendor's responsibilities to provide back-up or similar services.

A purchaser might also consider the impact to its organization if a force majeure event is enduring. Although not common in the industry, if labour disruption is a force majeure event, such event can have enduring consequences to a purchaser if it is otherwise tied to a particular service provider. Therefore, a purchaser should consider including a right to terminate the contract in such circumstances if they persist beyond a tolerable period or, at the very least, having an off-set or credit to the service payments for the period of force majeure whether it seeks maintenance services from an alternative supplier for that period or not.

11. Non-Solicitation. A vendor might be concerned that a customer will recruit its employees or offer subcontracting opportunities outside the maintenance agreement arrangement with the vendor. Particularly with large system acquisitions where employees become 'dedicated' to a particular customer, the maintenance supplier's employees develop extensive knowledge of the customer's business and information technology needs. In such cases, it may be particularly important to the maintenance service provider to obtain a non-solicitation covenant from the purchaser. In some cases, the service provider adds a liquidated damages clause to compensate for the loss of that employee on breach by the purchaser, and to further dissuade the practice. However, there is no reason why a purchaser and service provider cannot agree to the transfer of an employee and so non-solicitation clauses will reflect that the purchaser can obtain consent before approaching a prospective employee.

12. Dispute Resolution. As maintenance and support arrangements are ongoing relationships, resorting only to litigation for disputes is often inappropriate. Escalating dispute resolution mechanisms are often used, whereby each party nominates a contact person who will first deal with the issue of dispute. These nominees will be given a specific period of time to try to reach accommodation but if that is not possible, then the dispute will escalate to another level of review either within the respective organizations or to third party mediation or arbitration.

Arbitration is the last step in the process and will usually be binding upon the parties. Parties typically want to ensure that they maintain a working relationship that will not be disrupted by the dispute. However, there are certain disputes which are not appropriate for such escalation processes. Certain breaches require immediate resolution, such as breaches of confidentiality or proprietary rights for which the innocent party might seek injunctive relief. Failure of the vendor or services provider to meet its obligations can be disastrous if it is with respect to rectification of critical issues and subjecting this 'dispute' through an escalation process will only aggravate the issue. A purchaser agreeing to dispute resolution mechanisms of this type must retain the flexibility to terminate the agreement and immediately deal with their critical issues, which might include requiring the vendor to allow a third party to provide the necessary services.

As with governing law considerations referred to below, the choice of arbitrator, arbitration venue and applicable laws or rules for the conduct of such arbitration should be reviewed by a purchaser who will typically be presented with the vendor's home jurisdiction.

13. Governing Law. As hardware and software is purchased from vendors all over the world, and because maintenance and support agreements are drafted by vendors, a purchaser often finds that the governing law section is not the purchaser's preferred jurisdiction. While maintenance services may be provided at the purchaser's site, this is often a section that a vendor is very reluctant to amend. As maintenance agreements are often in 'standard' form, convincing a vendor to submit their contracts to review in a purchaser's jurisdiction is enough of a disincentive that they simply refuse to amend this section. Therefore, a purchaser and its counsel should review this section and determine what the consequences are of having, first the contract interpreted in accordance with the laws of the vendor's

jurisdiction and secondly, the costs associated with resolving disputes in the vendor's jurisdiction.

14. “Boilerplate”. As with any contract, maintenance and support agreements contain various standard ‘boilerplate’ clauses. Clauses such as governing law and assignment have been specifically referred to above, but there are others which should also not be dismissed as non-negotiable. Notice provisions have to be practical and not interfere or contradict any service level provisions otherwise in the contract, for example, by including formal notice requirements which have lengthy ‘deemed delivery’ time-frames in them. Entire agreement clauses must not unintentionally exclude or supercede other contracts between the parties that are meant to continue, such as a license agreement or non-disclosure agreement. Non-waiver clauses should be included for the benefit of the party you are drafting or reviewing the contract for so that a party shall not be deemed to have waived all default by not asserting its rights with respect to a specific incident.

## **Conclusion**

Too often, maintenance and support agreements are after-thoughts. However, they can be both costly to an organization (and, conversely, an important revenue source for a vendor) and fundamental to the reliable information technology solution sought by a purchaser. In many cases, particularly where a system is critical to an organization and/or where a failure to a system would have material consequences to that organization, as much thought should be put into the review and negotiation of the maintenance and support agreement as that put into the purchase or license document. This paper, although by no means an exhaustive review of the topic area has attempted to outline some of the provisions that should be considered both in drafting and reviewing such agreements.

**Vancouver**

1600 Cathedral Place  
925 West Georgia Street  
Vancouver, British Columbia  
Canada V6C 3L2  
Telephone 604.685.3456  
Facsimile 604.669.1620

**Calgary**

3700, 205-5<sup>th</sup> Avenue SW  
Bow Valley Square 2  
Calgary, Alberta  
Canada T2P 2V7  
Telephone 403.269.6900  
Facsimile 403.269.9494

**Yellowknife**

P.O. Box 818  
200, 4915 – 48 Street  
YK Centre East  
Yellowknife, Northwest Territories  
Canada X1A 2N6  
Telephone 867.669.5500  
Toll Free 1.888.465.7608  
Facsimile 867.920.2206

[genmail@lawsonlundell.com](mailto:genmail@lawsonlundell.com)  
[www.lawsonlundell.com](http://www.lawsonlundell.com)

