Contracts 101 - Practical Exercise - 15 minutes

Background: Our client, Billy, is looking to work with Developers to create an app for his business selling gourmet chocolate made from organic goat’s milk.

The App will function as an e-shop, with a small social forum for chocolate aficionados. Billy will pay £1 million to the Developers for the app. The Developer has sent Billy their standards terms and Billy has asked us to review the Development Agreement to see if it is acceptable to sign.

Billy has explained that:

- the layout of the App has been designed by him, and he wants to make sure the Developer will not copy the same ideas and use with another customer;
- he needs the app quite soon as he has agreed to launch on 14 February 2021; and
- he wants us to make sure the standard terms are fair to him as the customer.

Task: The below are extracts from the Development Agreement provided by the Developer to our client. Read through and discuss the types of amendments you would need to make.

Key Questions to think about:
- Who does the clause benefit? Why is it written the way it is?
- How can we make this more beneficial to our client?
- Would the Developer be happy signing the agreement with our changes?

Please nominate 1 person in your breakout room to note any questions in the chat once we return to the main group.
[DATE]

Development Agreement

Between

X, App designer for ABC (“Customer”)

and

Developer Y (“Supplier”)

A. ACCEPTANCE TESTS AND ACCEPTANCE

A.1 The Supplier shall carry out the agreed Acceptance Tests for the App within ten days of its Go-Live Date. The Supplier shall give the Customer at least 24 hours’ notice of the start of the Acceptance Tests.

A.2 If any module of the App fails to pass the Acceptance Tests, the Customer shall, within 3 days from the completion of the Acceptance Tests or any part of these tests, provide a written notice to this effect, giving details of such failure(s). The Supplier shall remedy the Defects and deficiencies, and the relevant test(s) shall be repeated within a reasonable time.

A.2 Acceptance of the App shall be deemed to have occurred on whichever is the earliest of:

(a) the signing by the Customer of an Acceptance Certificate for the final App to pass the Acceptance Tests;

(b) the expiry of five days after the completion of all the Acceptance Tests, unless the Customer has given any written notice;

(c) the expiry of ten days after delivery of the App; or

(d) the use of the App by the Customer or any of its Affiliates in the normal course of the Business.
B. SERVICES AND DELIVERY

B.1 The Supplier shall carry out the Work with reasonable diligence and despatch, and with reasonable skill and expertise, and shall use its reasonable endeavours to provide the Application, in accordance with the Technical Specification in all material aspects, by the Completion Date.

C. INTELLECTUAL PROPERTY

C.1 The Intellectual Property Rights in the App are, and shall remain, the property of the Supplier.

C.2 The Supplier reserves the right to grant a licence to use the App to other parties, and the Customer acquires no rights in or to the App other than those expressly granted by this Agreement.

C.3 The Supplier grants, subject to the terms of this Agreement, the Customer the non-exclusive, non-transferable right to use the App for any purposes related to Business."

D. WARRANTIES

“D.1 The Supplier warrants and represents that the App at the Acceptance Date, and for six months after that date, will perform in all material respects in accordance with the Technical Specification.

D.3 The sole remedy for breach of the warranty under Clause D.1 shall be correction of Defects by the Supplier within a reasonable time from notification by the Customer of the Defect that constitutes such breach.

D.4 The warranties set out in Clause D.1 are in lieu of all other express or implied warranties or conditions, including implied warranties or conditions of satisfactory quality and fitness for a particular purpose, in relation to this agreement. Without limitation, the Supplier specifically denies any implied or express representation that the App will be fit to operate uninterrupted or error-free.

D.5 The Supplier does not warrant or guarantee that it will be able to rectify all Defects.

D.7 The Supplier shall not be obliged to rectify any particular Defect if attempts to rectify such Defect other than normal recovery or diagnostic procedures have been made by the Customer's personnel or third parties without the permission of the Supplier.
E. LIMITATION OF LIABILITY

E.1 Except as expressly provided in this agreement and to the fullest extent permitted by applicable law:

(a) the Customer shall be solely responsible, as against the Supplier, for any opinions, recommendations, forecasts or other conclusions made or actions taken by the Customer, any client of the Customer or any other third party based (wholly or in part) on the results obtained from the use of the App or the Services by the Customer;
(b) the Supplier shall have no liability for any damage caused by errors or omissions in any information or instructions provided to the Supplier by the Customer in connection with the Services; and
(c) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are excluded from this agreement.

E.2 Neither party excludes or limits liability to the other party for:

(a) fraud or fraudulent misrepresentation; or
(b) death or personal injury caused by negligence.

E.3 Subject to Clause E.2, the Supplier shall not in any circumstances be liable whether in contract, tort (including for negligence and breach of statutory duty howsoever arising), misrepresentation (whether innocent or negligent), restitution or otherwise, for:

(a) any loss (whether direct or indirect) of profits, business, business opportunities, revenue, turnover, reputation or goodwill;
(b) any loss or corruption (whether direct or indirect) of data or information;
(c) loss (whether direct or indirect) of anticipated savings or wasted expenditure (including management time); or
(d) any loss or liability (whether direct or indirect) under or in relation to any other contract.

E.4 Clause E.3 shall not prevent claims, which fall within the scope of Clause E.5, for:

(a) direct financial loss that are not excluded under any of the categories set out in Clause E.3; or
(b) tangible property or physical damage.

E.5 Subject to Clause E.2, the Supplier’s total aggregate liability in contract, tort (including negligence and breach of statutory duty howsoever arising), misrepresentation (whether innocent or negligent), restitution or otherwise, arising in connection with the performance or contemplated performance of this agreement or any collateral contract shall be limited to £200,000.

E.6 The parties acknowledge and agree that any dates quoted for delivery of the Work or the Support Services are approximate only, and that the time of delivery is not of the essence. The Supplier shall not be liable for any delay in delivery of the Work or the Support Services that is
Break Out Sessions will not be recorded

caused by an event, circumstance or cause within the scope of Clause X [Force Majeure, not reproduced] or the Customer's failure to provide the Supplier with adequate delivery instructions.