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THE YEAR 2000 AND THE LIABILITY OF USERS AND SUPPLIERS OF COMPUTER PRODUCTS AND SERVICES

For the computer industry and the business community in general, January 1st, 2000 is a date that gives rise to serious apprehensions.

For the majority of the operating and application software programs, the last two numbers of each year (that is to say 55, 65, 75, 85, 95) are used. According to the experts, such a designation will not allow the recognition of year 2000. As an example, in 1999, the age of a person born in 1955 will be calculated the following way: $99 - 55 = 44$, and in year 2000, the following result will be obtained: $00 - 55 = -55$, whereas the right answer is $2000 - 1955 = 45$. All software will distort the data when such a calculation is made.

The calculations based on this programming and related to aspects of the utmost importance such as billing, interest, depreciation, cost and cost effectiveness can only give rise to serious problems for companies that do not immediately look into this situation.

THE CHALLENGE

The challenge lies in the considerable volume of software related to this problem and the complexity of the integrated systems and data banks shared by several companies. The incorrect calculations emanating from such programming of airline reservation systems, hospital surgery schedules, loan and payment administration systems, among so many others, makes one think about the disastrous results such a problem could create.

Several important companies that have already studied the problem and, foresee gaining a competitive edge from it, realize that if the problem

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is not solved by all, a great number of business transactions may abort, given the scope of international computer networks.

LEGAL QUESTIONS

What does the legal community think about all this? Who is liable for an event attributable to the year 2000 problem? Should the Board of Directors of a company, such as American Airlines committed to investing a reported 100 million dollars to solve the problem, be held liable by its shareholders for the lack of care in performing its mandate? Are the computer companies that sold the products, now considered as being defective, liable for latent defects? Were the sellers or the users aware of the latent defects or is this a matter of defects that they should have been aware of? Are the companies that provide maintenance services for the software liable? It also makes one wonder about the companies offering outsourcing services. The answer to all these questions is presently uncertain. Legal advisors of companies involved in the computer industry and other industries, given the omnipresence of computers, will certainly try to find an answer to these questions.

Since there is a problem, how can it be solved? One must examine this matter from two viewpoints: that of the seller of computer products or services and that of the user.

SELLER'S CONSIDERATIONS

The seller must first examine its contracts and ask itself the following questions: What warranties were given? Which were disclaimed? Does the contract provide for a limitation of the seller's liability? What is the term of the agreement and the duration of the warranty? Does a maintenance contract come into force once the warranty expires and, if so, what are the obligations provided for in the contract? Is this a

contract of adhesion or a contract duly negotiated between the parties? Does the contract between the parties represent the entire agreement or is there another document attached to the contract which could indicate, expressly or not, other warranties concerning conformity with year 2000 standards. One should also ensure from now on that the product complies with year 2000 standards, since many users have already asked that a clause in this respect be added to their supply contracts. If the seller is not sure of its product's compliance, all agreements and documents related to the marketing, advertising and sale of the non-compliant product will have to be written and carried out carefully in order to avoid problems in the future.

Another element to consider is that of copyright and right to use, especially for those who would like to take advantage of this business opportunity and penetrate the information services market, of bringing existing systems and software into conformity with year 2000 standards. These rights must be considered closely to avoid any infringement. It is necessary to obtain the appropriate approvals to use this software when bringing same into conformity.

Everyone has to bring its products into conformity with year 2000 standards, or else these products will disappear due to normal market forces.

USER'S CONSIDERATIONS

The user must also assess the non-compliance risks of its computer systems with year 2000 standards and the impact of this non-compliance on its enterprise. For this purpose, it must make an inventory of its software and review all agreements whereby rights to use and other services related to software are granted. The availability of the different software source codes and labour necessary to do the work must also be assessed. How much will it cost to

solve the problem? The other point to verify is the willingness and the capacity of suppliers to solve the problem themselves and, if any, their willingness to pay the cost of remedial work.

Any software purchased today or in the future should comply with year 2000 standards and the user should also reserve the right to assess compliance of the product.

CONCLUSION

In conclusion, a diligent verification of the products, a clear management strategy and appropriate contractual practices are key elements allowing companies to be well prepared for year 2000.

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