IT Disengagement Services: Thinking Ahead for a Smooth Exit

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For this reason, it is critical that customers of IT services negotiate for the provision of comprehensive disengagement / termination services in any outsourcing contract. These services commence where the arrangement comes to an end either due to expiry or earlier termination. This will ensure service continuity through an orderly transition of the services from the supplier to either another supplier or to the customer itself.

A contract that does not contain adequate obligations on the supplier to provide disengagement services will likely result in the customer being held hostage as the contract nears expiry or is in the process of being terminated (whether due to an ongoing dispute or for any other reason). In such a situation, the customer would be left stranded with no alternative but to agree to whatever terms that are dictated by the supplier. Worst still, the customer may not practically be able to exercise its termination rights, even where it wishes to terminate the contract for cause as it has no means of migrating the provision of the services from the supplier in an orderly fashion, without causing disruption to its commercial activities.

This article will outline some aspects of disengagement services that customers ought to turn their minds to when negotiating IT outsourcing contracts.

Scope

Disengagement / termination assistance is essentially just another type of service, except that the service gradually ceases rather than being switched off at once. It is therefore essential that the scope be clearly defined and that associated fees are agreed upfront. Commitments should be obtained from the supplier to perform whatever services are necessary or reasonably required by the customer to effect a smooth transition of the services. Well-drafted contracts lay out (in the text or an exhibit) the scope of the termination services and such matters as: (i) support for a migration plan; (ii) transfers of assets and personnel; and (iii) transfers of work in progress, data, working documentation and contracts.

Fees

Most, if not all, termination assistance activities are performed by the same supplier staff who are assigned to support the customer in the provision of the steady state services. The supplier staff are paid for through the base charges for the service. The Supplier will likely argue that the customer should bear the cost of additional resources or skills (such as a transition manager) that are not ordinarily provided by the supplier in performing the steady state services. Similarly, if the customer needs additional supplier staff to complete disengagement and continue normal operations, the customer may be required to either pay for the additional support, or to relieve the supplier from service level requirements or other performance obligations. This will allow the supplier staff to support both daily operations and the transition.

It would be very difficult for the customer to obtain termination services without charge, even where the customer terminates the contract for default by the supplier. In the case of termination by the customer for default, the customer may of course pursue damages through disputes procedures and formal proceedings. Note however, that consequential losses may not be recoverable – for example, in Saudi Arabia, courts will only award direct damages actually incurred by a party. In any event, it is in the interest of the customer to pay for the disengagement services so as to incentivize the supplier to carry out an efficient disengagement without affecting the commercial operation of the customer's business. This is particularly important in jurisdictions (such as Saudi Arabia) where the courts do not ordinarily compel a party to perform its contractual obligations (including disengagement services) by mandatory injunction or similar remedies.

Timing and Extensions

Time periods (such as notice periods for convenience termination) should be realistic, bearing in mind operational realities, the complexity of the service and other relevant considerations.

Customers need to have some flexibility about timing so it is important that the supplier phase out the services in a sequence that is determined by the customer. Also, it is possible that transition may be delayed, so it is worthwhile having a right to request that some or all services, be extended on a month-to-month or similar basis even after the disengagement services are due to expire. Naturally, this will need to be balanced against the supplier's demands re notice periods, time limits on the provision of disengagement services, relief from service levels and refresh obligations. Inevitably, suppliers will push for higher fees to be payable on the basis that the thencurrent fees for steady state services are predicated on large volumes and therefore not economically feasible for discrete or limited services.

Asset Transfers

Dedicated hardware and other assets used in providing the steady state services to the customer, such as assets at customer sites should be transferred to the customer. Suppliers will strongly resist transferring shared assets to the customer (ie those assets that the supplier uses to provide services to other customers as well). The workaround for the client may be to place an obligation on the supplier to procure assets the same as the shared assets for the customer. Also, the supplier will want to recover its unamortised or stranded costs (the value of assets purchased by the supplier for the purpose of providing the services to the customer). The supplier will ordinarily recover such costs through payment of book value of the assets or through termination charges that include the unamortised asset costs.

Similar considerations apply to leveraged contracts (such as software licenses) or subcontracts that are used by the supplier to support multiple customers. Customer specific third party contracts must contain terms that allow the supplier to transfer such contracts to the customer. This would make it easier for the customer to require that those contracts be transferred to it under the prime contract between the customer and the supplier. As for master or leveraged software licenses that the supplier uses to support multiple supplier customers, they are typically not transferable. To address this, the customer can require the supplier to obtain the relevant software licenses for it. Naturally, suppliers will either seek to pass through the expense to the customer or build it into their cost models and pricing.

Personnel Transfers

It is important for customers to have an opportunity to recruit (or allow the successor supplier to recruit) the supplier's personnel who have been involved in the provision of services to the customer, particularly those that are dedicated to the customer. Where the customer or the successor supplier wishes to acquire the business of the supplier, employment law advice for the relevant jurisdiction should be sought as to whether:

- the staff may transfer automatically through operation of acquired rights; and
- there are any laws and regulations that may affect staff reductions, transfers and severance.

Transfers of Data, Knowledge and Intangibles

The supplier should be required to comply with the following requirements without jeopardising service levels or disrupting the steady state performance of the services:

- transfer customer data, proprietary software and other intangible property to the customer;
- provide copies of procedures manuals and other working documents (at least those parts of a procedures manual or other document that are specific to the customer);
- provide supplier tools, utilities and other proprietary software for the customer’s use during a reasonable transition period;
- provide commercial software products;
- make knowledgeable personnel available for debriefing and knowledge transfer to other IT professionals; and
- train customer or successor supplier personnel.

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