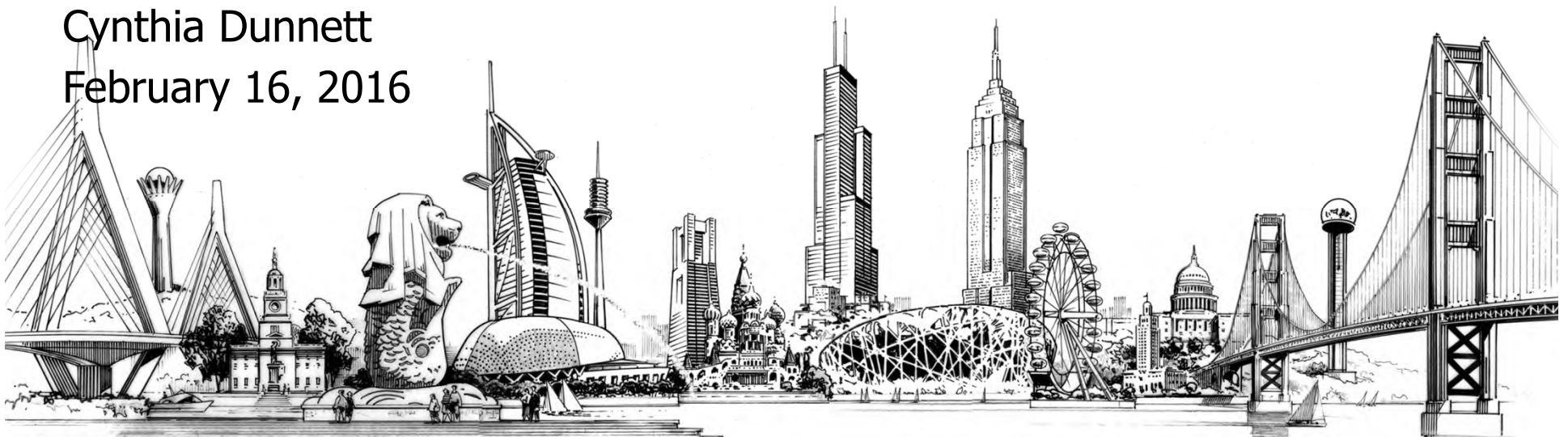


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BRIDGING THE GAP: TRANSITION SERVICES AGREEMENTS IN M&A TRANSACTIONS

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Overview

Transition services agreements (“TSAs”) are used when a buyer acquires part of an enterprise, such as a division or operating subsidiary, but the seller retains assets, personnel and third party relationships needed to supply certain services to the acquired business. Occasionally, a seller is the recipient of services under a TSA.

Depending upon the complexity of the transition services arrangement and the criticality of the services being provided, TSAs range from short form back office administration type services agreements, with set fees and no formal performance standards, to comprehensive services agreements with defined scope, service levels, variable fee arrangements and detailed data security and privacy provisions.

Often the TSA is considered an ancillary agreement in an M&A transaction, and is not given a lot of thought until late in the transaction and then is negotiated by people without a lot of experience dealing with service arrangements. Depending upon the services that are being provided, the TSA can be a complex and sometimes contentious document. Involving the appropriate subject matter experts (such as commercial transaction specialists) early in the process will lead to a clearer and more thought out contractual arrangement and allow the parties to consider and negotiate compliance and other requirements.

Scope of Services

- A clearly defined strategy for how the post-closing company will operate, both immediately following closing and on a more long-term basis, will help determine the scope of the TSA.
- Examples of services include:
 - Management support
 - HR, finance and legal administrative support
 - Facilities use and support
 - Procurement and third party vendor management support
 - IT separation and operational services (either directly or through a third party)
 - Day to day business services until operations are separated

Scope of Services

A common dynamic in TSA negotiations is one side's desire to detail each of the services to be provided so it is clear what the parties' expectations are and to what fees apply versus the other party's desire to remain high level and flexible.

- In many TSAs, the parties wish to allow the scope of the TSA to remain flexible without the need for formal amendment, as the needs of the service recipient may change post-closing.
- In addition, a buyer may prefer flexibility because it may not be certain about the scope of all services that will be required.
- In other situations, such as where critical operations may be impacted, a party may want the TSA to contain detailed and specific day-to-day requirements.

The level of detail may also vary depending upon the what is in the scope of services.

- For example, general back office assistance tends to be described at a higher level, while IT hosting and operations tends to be more detailed.

Performance Standards

A seller is not usually in the business of providing the services covered by a TSA to others and may not agree to assume the same level of liability for performance as a true third party provider.

- Typically a seller will agree that services will be provided in a manner consistent with the seller's historical standards and with the same standard of care as is currently used by the seller.
- The parties may agree that it is appropriate for certain services to be provided in accordance with detailed performance metrics, such as:
 - Hours during which services (such as help desks) will be provided
 - Reports to be delivered in connection with financial and accounting services

Performance Standards (Cont'd)

Consequences of failure to comply with stated performance standards include:

- Seller may be obligated to pay for replacement services.
- Seller (or its third party provider) may be liable for service levels credits or other “penalties.”
- Buyer can terminate the TSA with respect to the deficient services.

TSA Administration

- Specific individuals at seller and buyer organizations are often designated as service coordinators.
- These coordinators can efficiently address issues relating to TSA performance.

Third Party Assets and Providers

Services covered by a TSA can be provided by third party providers.

- The TSA should contain provisions permitting a seller to continue to utilize the third party to perform the services.
- The TSA can also allow the seller to hire new third party providers, if necessary.

The consent of a third party provider for provision of services to the buyer may be necessary.

- The cost of obtaining consents is negotiable.
- Consent issues often arise if IT services are being provided under the TSA.

Be Proactive – What Can You Put into Your Service Contracts Now?

Many companies add obligations in their contracts that:

- require the third party providers to provide services to a divested entity for a period of time
- allow a divested entity to use third party assets that are the subject of a license or lease for a period of time
- allow a seller to use the third party assets or services to provide services to a buyer for a period of time

Data Protection and Security

It is important for a seller and a buyer to understand the types of data that will be used or generated in connection with a TSA. The parties should ensure that the TSA has appropriate data safeguards provisions and includes an allocation of responsibilities if there is a data breach.

- The parties need to understand whether there will be personally identifiable information, health-related information or other sensitive or confidential information used in connection with the services being performed.
- If so, consider implementing appropriate safeguards for the service provider, service recipient and their respective employees and contractors, including technical access controls, export controls, HR/personnel controls and strong non-use and nondisclosure covenants.
- Carefully worded warranties and indemnification obligations should be considered in the event there is a data breach.

Payment

Fees for TSA services are generally set on a per service basis.

- This allows for flexibility in terminating or extending the term for the provision of specific services.
- The TSA should address responsibility for payment of sales taxes (if any) on services.

A TSA may provide that the buyer is directly responsible for certain out-of-pocket expenses and third party provider charges.

Service fees are invoiced by the seller, typically on a monthly basis.

- The TSA should set out payment terms and may include late fees and interest payments.
- Depending on the length of the term of the TSA, the TSA may provide for the buyer to pay any increased costs of providing services during the term.

Term and Termination

A TSA provides a stated term for each service.

A buyer can often terminate any individual service early, upon notice.

- Generally, the seller will not object to early termination of services.

A TSA can provide for extension of the term for services.

- Usually extension will require agreement of the parties.
- Consider if fee adjustments are appropriate.

Termination of the TSA in its entirety by either a buyer or a seller is based on the occurrence of material events, such as a material breach of agreement, including non-payment of invoices when due, or bankruptcy-related events.

Wind Down/Exit

The seller can be obligated to provide support to migrate services to the buyer's internal organization or its third party providers.

The cost of migration assistance should be taken into account in the TSA fees or separately addressed.

Business Continuity

A TSA should outline a contingency plan if there are major service continuity issues.

- It is common for TSAs to contain arbitration clauses or clauses requiring the parties to bring a lawsuit if there are major service continuity issues, however, a service recipient may not want to invest the time and resources needed to comply with these traditional dispute resolution options for anything but the most egregious failures.
- Consider including escalation clauses that allow for internal representatives of the service provider and service recipient to settle continuity issues amicably.
- The parties should consider whether there is any need for enhanced business continuity or disaster recovery plans.

Representations and Warranties

TSA representations and warranties by a seller are usually limited to a statement that provision of services is consistent with historical practice.

Seller typically disclaims warranties as to merchantability or fitness for a particular purpose or for non-infringement of third party intellectual property.

Liability

Limitations on liability are customary provisions in a TSA.

- Representations as to quality and quantity of services are usually limited to historical practices.
- An express disclaimer of liability for consequential and punitive damages, loss of revenue or income or diminution in value is customary.
- The buyer should consider the implications of this type of disclaimer if its business may be significantly disrupted by a failure to provide service. Considerations include (i) alternative methods of obtaining necessary services, (ii) negotiating specific damage provisions for identified material service failures and (iii) availability of insurance protection for service failures.
- Liability is often limited to damages caused only by gross negligence or willful misconduct of the seller.
- The seller may negotiate for a stated dollar amount as a cap for its liability under the TSA.

Force Majeure provisions are typically included in a TSA.

- The seller is excused from its obligations to provide services during a force majeure event.
- Force Majeure events are acts beyond the seller's reasonable control, such as acts of God, disasters, strikes, power interruptions or government actions.
- The seller may be obligated to use commercially reasonable efforts to eliminate the force majeure event.

Compliance and Audit

It is important to understand the service recipient's review and audit needs, including whether it needs additional review and audit rights of any third party contractors used by the service provider to perform services under the TSA.

While general audit rights are common in TSAs, the service recipient should consider whether specific audit rights are necessary to comply with internal policy, regulatory requirements and/or contractual requirements.

Other Key Provisions for Consideration

- Confidentiality
- Separate Reporting and Data Segregation
- IP Rights
- Use of Names and Trademarks
- Non-Solicitation of Employees
- Dispute Resolution

Wrap Up

A TSA can be complex and time consuming to negotiate. The services provided under a TSA are often critical to the success of an acquisition for a buyer.

Attention to the TSA early in the acquisition process will lead to a clearer and more thought out contractual arrangement that will be more effective in meeting the post-closing needs of the seller and the buyer.

Biography



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Barbara Melby has been active in the outsourcing and commercial transaction legal market for the last 20 years. As leader of the firm's outsourcing and strategic commercial transactions practice, and one of the leaders of its privacy and cybersecurity practice, she represents clients in such complex transactions as outsourcing, strategic alliances, technology and data-related agreements, and other services transactions. She also advises businesses on privacy and security issues that arise in transactions involving sensitive data and technologies.

Barbara is recognized as a leading outsourcing attorney, counseling clients in structuring, negotiating, realigning, and terminating information technology (IT) outsourcing and business process outsourcing (BPO) relationships. This includes human resources (HRO), finance and accounting, procurement, research and development, logistics, and facilities outsourcing. She collaborates with clients on transactions for onshore, offshore, managed and co-sourced solutions.

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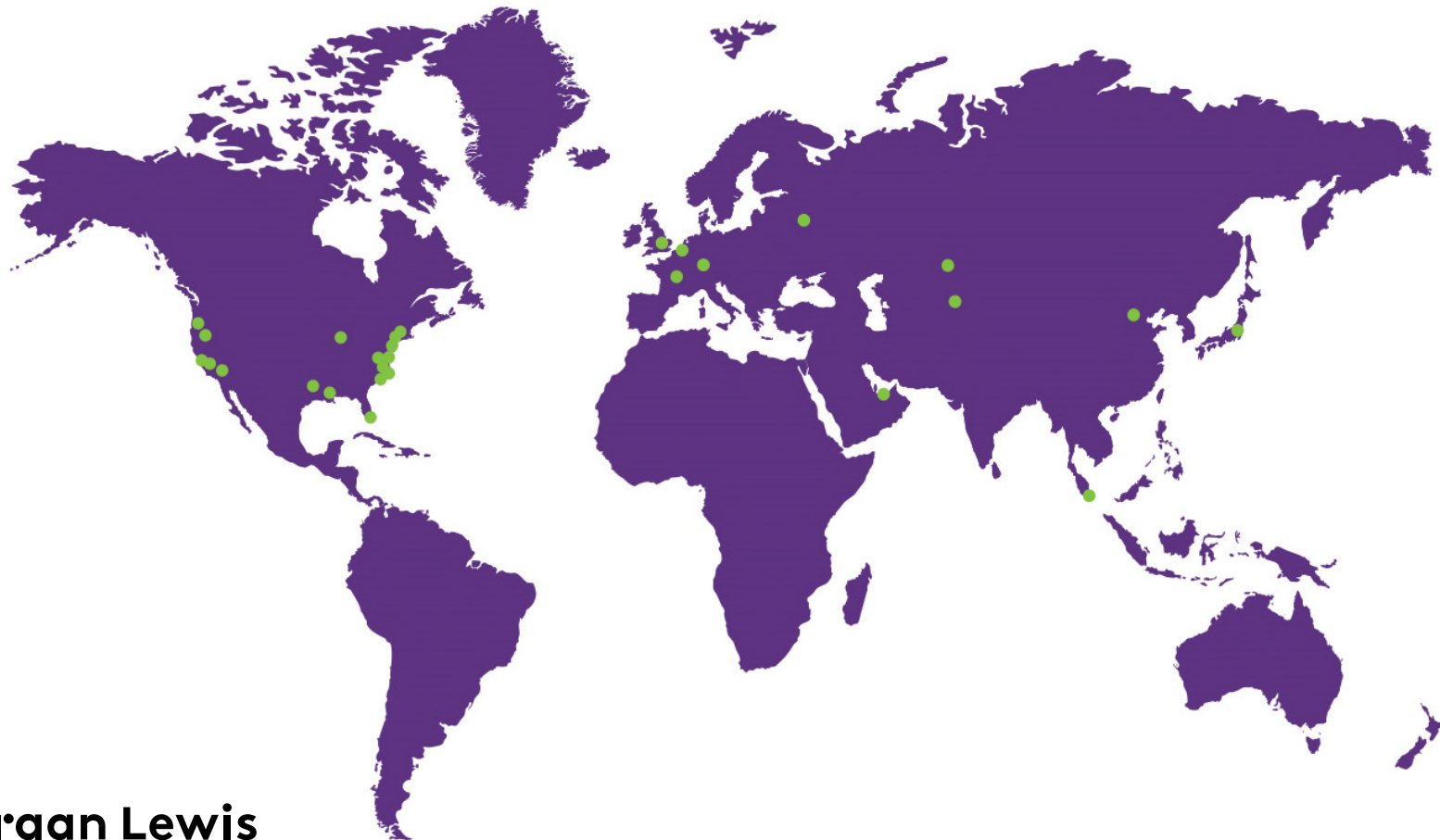
Cynthia M. Dunnett's practice focuses on mergers and acquisitions transactions in a wide variety of industries. Her clients include private equity funds as well as strategic investors. Cynthia has particular expertise in advising clients in the retail industry. She also advises on joint ventures, private placements, commercial contracts and other general corporate matters.

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