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Key Contract Issues in IT Outsourcing Agreements

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Overview

- Structuring the terms of the deal
- Preparing upfront for a break down in the relationship

Structuring the Terms of the Deal

- Term
- Scope
- Measuring performance
- Fees
- IP issues
- Transition

Term

- Initial term
 - Benefits of longer vs. shorter term
 - True length of term may be driven by rights to exit early
- Renewal options
 - Unilateral rights to renew
 - Evergreen contracts

Defining Scope

- Detailed SOW
- Other factors used to define scope
 - Services currently performed by in-scope/displaced employees
 - Services not described in SOW but required for proper performance of the services
 - Changes to the services that are not material or can be performed using existing resources
 - Services necessary to enable continuous improvement and evolution of the services without increasing the price

Measuring Performance

- Service levels
 - Defining objective standards of performance
 - Service level credits
 - Service level bonuses/earnback mechanisms
 - Periodic adjustments
 - Reporting
- Customer satisfaction
- Benchmarking
 - Comparing services/fees to peers in the industry

Fees

- Fees for in-scope services
 - Integrated vs. unit pricing
 - Minimums/maximums
- Fees for new services
- COLA
- Taxes
- Payment schedule
- Audit

IP Issues

- Rights to:
 - Customer IP
 - Vendor proprietary IP during term and at termination
 - Vendor third party IP during term and at termination
 - New developments
 - Procedures manual/other work product
- Rights to customer data

Transition

- Employee transfers
- Assets transfers
- Assignment/access issues (required consents)
- Internal/external communications
- Timing of transition

Preparing Upfront for a Breakdown in the Relationship

- Planning for a major service failure
- Termination rights
- Unwinding the relationship
- Allocating risk and liability

Planning for a Major Service Failure

- Disaster recovery
 - Vendor plan
 - Customer plan
- Excused performance – force majeure
 - What constitutes a force majeure event?
 - Not excused from implementing DR
- Right to obtain services from an alternate source
- Right to terminate

Termination Rights

- Customer right vs. vendor right
- Types of termination
 - For convenience (notice period, fees)
 - For breach
 - For failure to provide critical services
 - For change in control
 - Disaster/force majeure event
 - For non-payment

Unwinding the Relationship

- Termination assistance (to customer and its designees)
 - Time period
 - Costs
 - No degradation in services
- Rights to:
 - Equipment
 - Software
 - Third party services
- Right to hire vendor personnel

Allocating Risk and Liability

- Scope of Indemnities
 - Infringement
 - Employee claims
 - Personal injury/property damage
 - Breach of Confidentiality
- Insurance
- Damages
 - Limiting direct damages
 - Excluding consequential
 - Exceptions from limitations/exclusions