

Key Risk Areas for Banks in contracting with IT Suppliers

Dan Holland

Partner, Stephenson Harwood LLP, London

- The contracting process
- Assumptions and customer obligations
- Regulatory compliance
- Open source software
- Service levels and service credits
- Benchmarking & Step-In
- Liability
- Termination and exit
- Governing law
- What causes IT procurement to fail?
- Q&A

The contracting process

- Running a tender
- Tender documentation
 - confidentiality agreement / NDA
 - scope of the services – is it known?
 - pricing matrix
 - draft contract
- Selection process
- Selection criteria
- Timing
- Cost

The Contracting Process (2)

- Importance of written terms vs starting work quickly
- How can the deliverables be made manageable?
- What is an appropriate allocation of risk?
- What representations has the supplier made during the tender process and have they been incorporated into the contract?
 - BSkyB v EDS [2010]
- How do you get to a clearly drafted contract incorporating all of the terms?

Assumptions and Customer Obligations

- Suppliers will look to place qualifications around the services that they provide and make the provision of those services dependent on the bank carrying out certain activities
- Ensure that those are clearly documented and that the bank is able to perform those obligations in the timescales required

- Compliance with laws: division of responsibility
 - supplier resistance to responsibility for any banking compliance vs customer desire to outsource regulatory burden
 - significant risk for suppliers
- Updates to laws
 - supplier resistance to updating the supplies to comply with unknown future developments
 - customer requirement to have a fully compliant system throughout the term
- Policies and standards
 - both parties desire to impose own policies and standards on the other, throughout the term

- Freely available software provided on a common licence
- Different types of common licence, each of which will have its own fixed terms
- Restrictive OSS licences require any licensee to make available their software (together with all modifications) to any third parties
- Advantages:
 - reduction in costs
 - reduces development phase
 - freely and quickly available

Service Levels and Service Credits

- Aim is to ensure optimal supplier performance
- Need to be objective, measureable, precise and straightforward
- Reflect bank needs
- Typical levels of 10% of monthly charges available as service credits
- Sole and exclusive remedy?
- Application during transition and exit?

- Supplier resistance to benchmarking generally
- Issues around automatic adjustment of pricing and/or service levels
- Ambit of the benchmark exercise: timing, scope, frequency, comparison pool, identity of benchmarker, costs of benchmarker

- Step-In: consider triggers: critical service level failure
- Who will step-in, customer or third party competitor?
- Will step-in be an appropriate remedy? Where is the supplier situated?
- Should charges be suspended or reduced during step-in

- Capped and uncapped liabilities (English law position: no cap = unlimited liability)
- Two factors to assist setting liability caps:
 - duration of the agreement
 - structure (eg framework agreement or simple service agreement)
- Specific risk areas:
 - loss of data
 - breach of applicable law
 - breach of third party IP rights
 - liabilities which cannot be limited by law

- Consider what termination triggers you want, eg change of control, bribery, breach of confidentiality, material breach, insolvency
- Is termination an effective remedy?
- Part termination
- Consequences of termination
 - termination payments
 - treatment of data
 - transfer of licences or contracts

- Exit plan
- Exit assistance
- Payment where termination due to provider default
- What are the exit requirements?

Governing law

- National contracts vs international contracts
- Which governing law?
- Litigation or arbitration?

What causes IT procurement projects to fail?

- Mismatched expectations
- Changing requirements of the customer
- Supplier cash flow issues / profitability
- Overly complex documentation
- Imbalanced allocation of risk and reward
- Inadequate governance
- Inadequate service level regime

Q&A

Contact Details



Dan Holland

Partner, Commercial, Outsourcing & Technology

dan.holland@shlegal.com

Tel: +44 (0) 20 7809 2108

