Legal View: Change – as good as a Rest?

Rob Sumroy and Natalie Donovan

The Technology sector is continually changing as new companies emerge and existing companies merge. In the last few years Cisco Systems acquired NDS Group, SAP acquired Ariba and Hewlett-Packard announced it was leaving the personal computer business and taking over Autonomy Corporation (the UK's largest software company). While it is hard to predict future activity, if 2013 continues in the same vein then economic pressures and changing market requirements may mean 'consolidation' remains the flavour of the day.

This can be a cause for concern for customers who spend a great deal of time, money and resource carrying out due diligence on prospective suppliers and running sophisticated procurement processes to choose the right service provider for their particular needs. An unlucky customer can find that barely a few months after contract signature, its carefully selected supplier merges with, or is bought out by, another company and it is left with a supplier it didn't choose. And what if you are not happy with your new supplier, for example if that new supplier is a company which:

- you are in a dispute with, or with which you have had a bad experience;
- unsuccessfully bid for the contract they will now be running;
- does not have the skill set or financial standing you require;
- off-shores services which you do not want off-shore; or
- competes with you, or is a key supplier to your competitors?

In short, if the identity of the supplier changes, a customer can feel like it has lost control. The key thing for that customer is therefore to retain, or regain, that control.

PROTECTIONS TO KEEP THE CUSTOMER IN CONTROL

There are various protections which can be put into the contract with the original supplier to help the customer plan ahead, and ensure it retains as much leverage as possible with the supplier despite the changing circumstances.

Arguably, the 'ultimate' contractual protection is to include a change of control clause, giving the customer a right to terminate if the supplier's ownership changes.

Unsurprisingly, suppliers resist these clauses wherever possible, as the prospect of losing clients following a company sale is not attractive, particularly to potential purchasers. They may also want to impose conditions on the clause, for example ensuring it is only triggered if the new owner is a competitor of the customer or imposing a time limit on exercise of the clause. Customers should, however, push to include this clause, and make it as broad as possible. Ultimately the risk of ensuring that the customer does not opt to terminate will sit with the new owner – and that is exactly the type of control and leverage that the customer is seeking. Even if a customer does not use it – and most customers appreciate that replacing an outsourcing supplier can be a costly and time consuming exercise – it gives the customer important leverage. This is particularly important if the customer wants to negotiate any changes to the deal or the contract terms with the new supplier.

Even if the contract does not contain a change of control provision, it can still protect the customer. The new supplier will be bound by its terms in the same way that the original supplier was. Therefore even if the contract does transfer to the new supplier, there are a range of protections which may help the customer stay in control, for example:

- restrictions on the supplier being able to assign without consent are particularly important where parts of the supplier's business (rather than the shares) are being sold;
- contractual provisions specifying who will provide the services and how they will be provided will also provide the customer with comfort. These could include key-man clauses, geographical restrictions on service provision, service level / credit regimes which drive the correct behaviour and provisions requiring certain skill sets/ levels of qualification and compliance with certain standards;
- if there are sensitivities around the supplier working with customer competitors, provisions can also be included to address this (always keeping a keen eye on anti-trust concerns).

Most customers will feel more comfortable with the prospect of supplier ownership changing if the contract provisions ensure that the way in which the service is delivered and the key members of the delivery team will remain largely the same under new ownership.

REVIEW THE RELATIONSHIP

While we have looked at the various contractual mechanisms which can be called upon to 'protect' the customer and keep them in control, relationships are far more than just a contract. A change of supplier ownership is also an exciting opportunity for customers to re-evaluate the project and their relationship with the supplier. Are the services running as they should? Are the customer and supplier working together collaboratively? Will things be better or worse with the 'new' supplier?

A change of supplier ownership can create the perfect opportunity to analyse the current contract and engage with the supplier to iron out any issues (historic or new) that there may be. An open dialogue is the best way to achieve this. We have run collaborative, facilitated workshops with a number of clients which have enabled them to identify what is working with the current arrangements, what isn't, and what options are available to make it better. This can help ensure that only the best practice elements of the current practice are carried through to the relationship with the 'new' supplier. It can also sometimes be easier to raise sensitive issues with supplier management who have not been historically involved in the project. An open dialogue with the new supplier at an early stage can therefore sometimes help resolve issues which have been on-going for a number of years.

EMBRACE THE OPPORTUNITY

Change is inevitable in the fast paced Technology and Outsourcing sectors. However, if customers can ensure that they are in the strongest position possible (through robust contractual protections), are prepared for change and are open to engaging with new suppliers, then mergers and consolidations can provide them with an unexpected opportunity to improve their outsourcing relationships.

This article originally appeared in Outsource magazine Issue #31 Spring 2013. A copy of the original is available at http://outsourcemagazine.co.uk/change-as-good-as-a-rest/