Managed Services:
The Basics

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Lawyer's Role

- Helping your client determine whether it's a good idea use managed services
- Participating in RFPs and/or vendor selection
- Advising on the right risk taking/risk aversion balance
- Leading negotiations
- Drafting agreements and schedules
- Renegotiating or terminating
- Protecting intellectual property rights

The best goal of any managed services agreement:

Mutually beneficial deal where each party's needs are met

Structure of a Managed Services Agreement

- Contractual Terms
- Definitions (Glossary)
- Scope (Schedule A)
- Service Levels (Schedule B)
- Charges (Schedule C)
- Governance (Schedule D)
- Other schedules as applicable

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Contractual Terms

- Staffing and Employment
- Confidentiality and Privacy
- Intellectual Property Rights
- Representations and Warranties
- Liability/indemnity/Insurance
- Termination
- Force Majeure
- Dispute Resolution
- Boilerplate

Staffing and Employment – Key Considerations

- Dedicated staff or shared staffing?
- Experience tiers? How promoted?
- Restrictions on staff providing services for competitors?
- Non-solicitation clauses?
- International – will ARD apply?

Staffing and Employment – Key Considerations Discussion

- Dedicated staff or shared staffing?
  - Staff may be spread across several projects (shared staff) or hired specifically for one project only (dedicated staff).
- Experience tiers? How promoted?
  - Staff may work on a project for an extended period of time.
  - Promotions may be based on internal procedures of the internal company or that of the managed services company.
- Restrictions on staff providing services for competitors?
  - Internal companies may want to restrict staff from working with competitors that offer the same types of services while that particular staff member is hired with their company.
- Non-solicitation clauses?
  - A small company may be inclined to add a non-solicitation clause to prevent the larger firm from hiring away staff that they may be working with as part of the managed services project.
  - Larger companies, due to the structure of their hiring, may want to prevent this type of clause.
- International – will the E.U. Acquired Rights Directive (ARD) apply?
  - Will anyone in Europe lose their job or have their functions transfer to the vendor (or back to you at the end of the deal)

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Staffing and Employment – Contract Terms

- Ability to replace staff
- Defined skill requirements
- Training requirements
- Key Personnel

Key contractual terms – Confidentiality and Privacy

- Scope/criticality of confidential information
- Privacy – no cookbook solutions
  - what sort of personal data will be involved
  - where is the data coming from
  - where will the data be stored
  - evolving law (Privacy Shield, HIPAA, GDPR)
- Security Audits
- Third party access to data
- Breach
  - Indemnities
  - Scope of liability
  - Disaster recovery, notification

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Key Contractual Terms- Intellectual Property Rights

- Who owns what and why?
- Software
- Software licenses and content
- Customization
- Open source
- Procedures manuals
- Scripts
- Reports
- Tickets
- Service related database

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Key Contractual Terms – Representations and Warranties

- Timeliness, conformance to specifications and conformance to industry standards
- Technology required to deliver the services will be properly maintained and will be kept current
- The services and the use by the client of the results of the services will not infringe any third party intellectual property rights
- All required licenses, permits and consents have been obtained (including re: data subjects' rights)
- Anti-bribery
- Compliance with applicable laws, export control (international)
- Compliance with applicable customer policies
- No viruses/no disabling code
- Security plan (regularly audited, immediate breach notice/investigation report/access for customer investigation)

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Key Contractual Terms – Liability, Indemnity & Insurance

- Limitation on direct damages/exclusion of consequential damages
- Carve outs
  - Breach of confidentiality
  - Gross negligence/intentional tortious or unlawful conduct
  - Indemnities
  - IP infringement?
  - Data loss/breach
- Indemnities
  - Breach of confidentiality
  - Violation of law
  - IP
  - Others?
- Insurance
  - E&O
  - Cyber liability
  - General liability
  - Direct ability to make claims
  - Other insurance requirements in accordance with customer standards

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Termination/ wind down

- Termination for cause – one-sided, except for non-payment
- Renewal – either unilateral (customer) or with long lead time
- Ability to hire staff or have another supplier hire – non or minimal hiring charges
- Smooth transition – ability to continue to obtain services post termination for a set period of time

Key Contractual Terms – Force Majeure

- Vendor's business continuity plan should be part of contract

- Annual tests of BCP

- Force majeure that should have been overcome by the BCP is not excused

- Prolonged outage should be grounds for termination for cause regardless of force majeure

Dispute Resolution

- Informal dispute resolution
- U.S. JURISDICTION!
- What is vendor's financial ability to stand behind obligations in the U.S.?
- Mediation
- Arbitration or court
  - Separate topic

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Key contractual terms - Boilerplate

- Assignment
- Severability
- Entire agreement
- Governing law
- Waiver
- Notices
- Press releases?
- Cumulative remedies

Scope of Services

- What are you buying – people or services?
- What is the unit of work?
- If people
  - What are the skillsets needed?
  - Dedicated or non-dedicated?
- If services
  - What are the attributes of the services?
  - What are the interaction points (start, end, interface points)?
  - How do you define quality?
- What is the term?
- Wind-down

Service Levels

- Driven by the pricing model, reliance on the services, and the scope of services
- Should measure service quality
- Make sure that service levels drive the right behavior
- Must be objective and measurable
- Should be reported on monthly, reviewed periodically
- Good way to capture and maintain the desired price/quality balance
- Where not to use service levels

Service Levels - Examples

- Availability of applications (e.g., 99.99% availability) other than during agreed maintenance windows
- Response times to incidents (e.g., replace failed server in 30 minutes)
- Average time to answer (e.g., 60 seconds from entering help desk queue) and to fix
- Average time to complete recurring events/services
- Consider having multiple tiers (e.g., premier users v. regular users), severity levels
- If services impact your customers, focus on service levels that measure the customer experience
- Measurement process should isolate steps the vendor controls rather than having assumptions regarding length of steps the vendor does not control

Service Levels - Credits

- Typically a percentage of the overall fees under the contract for the month
- Service level credits tied to fees for specific subservices are sometimes OK, but generally are vendor friendly
- Earn-back (and/or terminate for 1000 cuts) provisions can drive the right behavior
- Earn-forward provisions normally should be avoided
- Use of allocation point systems with 200 or 300 points can be complicated, but is suitable for big deals

Key contractual terms - Price

- Rate Card or Unit/Service Pricing
- Benchmark Clause
- Period in Which Price is Fixed; COLA
- Currency/Exchange Risk
- Audit Rights

Governance

- Critically important and often overlooked or poorly thought out
- Regular (daily, weekly, monthly & quarterly) reporting even more important than for internal functions
- Regular meetings at multiple levels (supervisor, managers, BU, executives)
- Failure to manage the vendor is common source of failure
- Governance should focus on the what, not the how

Process Steps

- Requirements gathering – decide what is needed
- RFI (Request for Information) – get some free consulting
- Prepare a solid RFP (Request for Proposal)
- Send the RFP to qualified vendors
- Down selection to two vendors
- Negotiation of a full contract
- Selection of one vendor – contract execution

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Conclusion

- Where a lawyer can do the most damage
- Common Pitfalls

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