

AstraZeneca and IBM show the way on transitional obligations in ICT contracts

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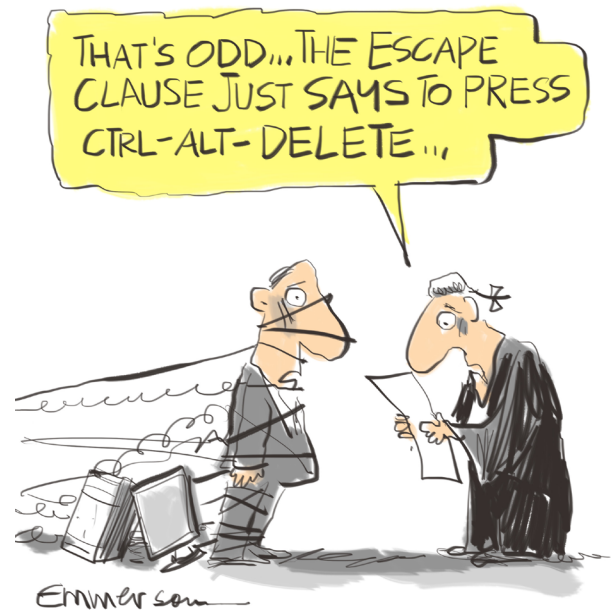
Speed read

When it comes to making the right exit from an ICT contract, the devil is in the detail. It's important that any service agreement clearly specifies each party's transitional obligations from the outset.

Below, we use the 2011 termination dispute between AstraZeneca and IBM to explain why it's in the interests of both parties to negotiate and maintain a detailed exit strategy.

A sound strategy can add considerable value to the agreement as a whole.

Conversely, poorly drafted transitional obligations are a common feature of uncertain commercial relationships and may result in costly disputes down the line.



The Detail

The AstraZeneca story

A costly dispute is exactly what ensued when AstraZeneca terminated its Master Services Agreement with IBM in April 2011.

AstraZeneca relied on exit management clauses in the MSA which stated IBM would continue to provide specified ICT services for a period after termination. Unfortunately, the agreement wasn't sufficiently clear as to how this transition plan would work in practice.

Pre-termination, some of the services IBM provided to AstraZeneca were "Shared Services", i.e. services shared with other IBM customers through "Shared Infrastructure". AstraZeneca acknowledged that Shared Services would be difficult

to transition to another ICT supplier.

Accordingly, it was agreed that IBM would continue supplying Shared Services for 12 months after termination, in return for a fixed fee. AstraZeneca would also provide an IT Transfer Plan outlining specific transition details.

When termination did eventuate, an IT Transfer Plan was never provided, and the parties realised that "Shared Services" and "Shared Infrastructure" had been poorly defined. IBM argued that their Shared Services were limited to hardware or software provided to multiple customers, which did not exist in this case, as IBM had provided AstraZeneca with unique facilities. AstraZeneca countered that Shared Services extended to services like power, staff, security, and global data centres.

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The dispute was heard by the UK's Technology and Construction Court on an expedited basis in November 2011.

The court interpreted the agreement on the basis of what "a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract".¹

The court found in favour of AstraZeneca, holding that the purpose of the exit clauses was to ensure AstraZeneca could continue to function normally while transitioning to another ICT supplier. Consequently, IBM's obligations as to "Shared Services" included their wider systems, equipment and data centres. The court rejected IBM's submission that the transitional obligations were conditional on receiving an IT Transfer Plan from AstraZeneca.

What does this tell us?

The AstraZeneca story demonstrates how crucial it is to consider your exit strategy when negotiating a service agreement.

Well-defined transitional obligations not only reassure customers they won't be left high-and-dry by the termination of an ICT contract, but also provides suppliers with certainty as to payment, specific service obligations, and the length of any post-termination service retention period.

This certainty achieves two things: firstly, it avoids costs and disputes down the line, and secondly (and more importantly), it adds value to the agreement as a whole.

From a customer's perspective, suppliers which offer a comprehensive exit strategy are a more commercially viable option than those which don't.

When to negotiate the exit strategy

The best time to clarify transitional obligations is during the initial contract negotiations.

It's easy to be swept up with the desire of signing off a deal as soon as possible, but there is no better time to flesh-out a detailed exit strategy than when the commercial relationship is at its strongest.

Undertaking a periodic review of an exit strategy also provides an opportunity to clarify transitional obligations in light of emerging issues. If done well, exit strategy maintenance can improve relations between the parties, promote ongoing reassurance and certainty, and resolve problems that could otherwise cause the service agreement to be terminated in the first place.

1. *AstraZeneca UK Ltd v IBM Corporation* [2011] EWHC 306 (TCC).

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