Legal Briefing

Litigation is the least likely way to resolve disputes between customer and service provider, says Julian Millstein of Morrison & Foerster. Parties should use Alternative Dispute Resolution techniques.

Long-term outsourcing agreements are rarely performed without disputes over changed requirements, scope, price or adequacy of performance. Handling these is one aspect of day-to-day relationship governance.

In outsourcing, a business or technology process is transferred from customer to service provider, so that the customer can focus on its core competencies. The process that has been transferred is often vital for the customer's continued business success. Failure to deliver the services in the way anticipated by the customer can have serious repercussions, therefore.

Relationship maintenance

Parties to an ongoing relationship need processes that quickly and fairly address and resolve disputes. Otherwise, the disputes fester and destroy the working relationship.

Litigation is the least likely path to provide successful results for either party. Litigation is expensive, time consuming and often acrimonious. It is unlikely to achieve the customer's primary objective – receipt of satisfactory services at reasonable prices.

The outsourcing provider likewise has reasons to prefer resolving disputes outside court. Its business depends on its reputation as a professional, competent supplier of services. The publicity associated with litigation, combined with the cost of bringing in new business means full-blown litigation is rarely desirable.

"The publicity surrounding it means that full-blown litigation is rarely desirable. Litigation can sometimes be very public."

The parties should adopt a process of Alternative Dispute Resolution (ADR). ADR covers a range of techniques and processes used to help parties resolve disputes without resorting to litigation – which can sometimes be very public.

Relationship maintenance

On the one hand, ADR can mean bringing in different parties within each organisation, perhaps involving executives from other business units who have no 'skin in the game' (so-called 'distant executives') regarding the issues in dispute.

A second type of ADR is the use of mediation, where a neutral third party is called upon to facilitate discussions, but has no authority to impose an agreed resolution. Technical disputes can often be resolved by a neutral technician appointed by the parties.

A third type of ADR is private and confidential binding arbitration by a single arbitrator, or a panel of arbitrators, as a final alternative to litigation.

Different ADR techniques may be combined. For example, with the help of a mediator, general displeasure with service performance may be tracked to a root cause, and both parties may be able to agree a solution. Arbitration may be used to resolve the cost of implementing it.

Some customers prefer litigation to arbitration, but even if a company believes dispute resolution is best handled in court, arbitration should be considered where the court system may be inadequate. For example, the courts of India can be slow, and so parties to a global deal may wish to provide that, if the dispute is between their Indian affiliates, it will be arbitrated.

Practical steps in ADR

• Include ADR provisions in outsourcing agreements. By developing a procedure for the resolution of disputes, parties can avoid wasting time determining 'the shape of the table'. Consider a step-clause approach (e.g., escalated negotiation, mediation, arbitration), and ensure that the clause is clear as to how each step is initiated, how each must be completed, and by when.

• Use ADR in the regular management of outsourcing relationships. Escalation provisions should be strictly followed. Disputes should be tracked through the governance process. All billing disputes should be memorialised in writing and a procedure for memorialisation is best included in the outsourcing agreement.

• Use a neutral third party to resolve disputes that cannot be resolved internally. It is often in the interests of both parties to reach a resolution that allows for the ongoing viability of the relationship. Mediation can help focus the parties' attention on getting the real issues resolved.

• Bring in third-party technical expertise where appropriate, as outsourcing disputes can often be essentially technical in nature. A number of the leading arbitral institutions administer proceedings in which experts can be brought in to mediate or resolve disputes.

• Consider designating arbitration panels in the agreement. In the construction industry, the use of so-called 'Dispute Resolution Boards' is common. These arbitration panels are available on call should an impasse occur.

• Contractually identify specific areas that could be resolved by mediation. For example, parties often know in advance that certain pricing, scope or performance issues will arise because solutions are not complete, or change is expected. The resolution or filling in of these 'holes' could be supported by mediation.

• Be specific in the dispute resolution clause. Address whether arbitration should be administered by an organisation (e.g., the American Arbitration Association [AAA], the International Chamber of Commerce [ICC], and so on), or an ad hoc or non-administered procedure.

• Address questions of choice of law, identify a place of arbitration, the language of arbitration and a method of choosing the arbitrator(s). Most administering organisations have several sets of rules for different types of arbitrations. Be specific as to which rules should apply. Be sure to specify that arbitration awards will be final and binding.

• In developing dispute resolution clauses, avoid complicated or ambiguous procedures. Consider providing for expedited or simplified procedures where disputes may be routine and/or where early resolution is important to the ongoing transaction.

• Consider how much discovery should be exchanged in the arbitration. If there are specific needs for providing or limiting discovery, to the extent they can be itemised up front in the agreement, there will be fewer opportunities for problems to arise later. Often these concerns can be addressed through the choice of arbitrator and/or arbitration/mediation rules.

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