# Session 1

## Deal Structuring

To kick off the Masterclass, Kit Burden reminded us how important deal structuring is at the outset of any outsourcing project. Kit cautioned lawyers from falling into the trap of thinking that every outsourcing project is, when boiled down, the same deal or the same process. Rather, Kit suggested that not only is each client unique, but so is each deal the client undertakes at a particular time. They are pulled by different motivations and interests, even if it appears on the face of it to be for the same outsourced service. And so, outsourcing lawyers and deal teams really need to front load their investment and time in architecting a deal structure that is responsive to the current climate. This includes:

(1) Establishing the foundations of the deal;

(2) Establishing an effective deal team; and

(3) Crafting the deal process.

To establish the foundations (1), the business and its advisers need to consider and understand what the key drivers are for the deal. It's rarely entirely about cost. Indeed, non-financial drivers such as innovation, strategic control and flexibility can be just as important, or even business critical. Once these are identified, they should be documented in such a way that the deal team can readily track their progress against it once under way.

Next, the business needs to establish an effective, cohesive deal team that reflects the scale, technical complexity, cost and legal and commercial issues of the deal (2). Each member of the team must understand their role clearly and take a 'one team' approach to resolving thorny issues along the way. Executive sponsorship is also vital to deal success. The deal team should think about how it will regularly engage the sponsor throughout the process so that when a critical decision needs to be made (sometimes within the day) the sponsor can confidently make a decision.

Kit then considered what would constitute 'the ideal process' (3). Key considerations are: do you run a competitive process (almost always, yes), how much information do you release in the RFP (probably all available if possible), how many bidders will you take through to negotiations (at least 2) and how they will run. Kit also reminded us that there are new and innovative approaches to maximise competitive tension that lawyers should keep an eye on. For example, in a recent deal, Kit's clients employed a 'total cost of ownership' methodology. Using this method, the deal team assigned a monetary value to each contract deviation of the two preferred bidders during the negotiation stage. The values were assigned as a product of the difference between the client's preferred position and that of the bidder. The total value assigned to their deviation was then added to their tendered price. The suppliers were then told their scores (and their new price) and provided a chance to improve the bid. Not only did the process stimulate competition (and a reduction in overall price) but it motivated and engaged the bidders.

A key point Kit made was that ultimately we should think about designing processes that are not only commercially successful but are also fun and enjoyable for the deal teams involved. Outsourcing, unlike other transactions, is ultimately about the forging of a long term relationship between two parties. The best way to guarantee a contract is performed is by ensuring the relationship starts on the right foot. And the bid process is where this can happen.

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# Session 2

## A Regulatory Perspective on Outsourcing Deals

Daniel Gabriel from Accenture reminded us of how heavily regulated the Financial Services sector is and explained the rationale for a number of standard supplier positions. It was interesting to hear how a broad service description and even small service changes can be problematic for suppliers by altering their regulatory position (as well as the usual suspects of ensuring compliance with / monitoring client applicable law and responsibility for regulatory fines). He also outlined the primary focus of the applicable regulations for Financial Services organisations entering into outsourcings. The key take-aways here were that they apply to “material” (not all) outsourcings / service provisions, and that Financial Services organisations cannot contract out of their responsibilities, but must effectively supervise their suppliers. Finally, we heard how emerging technologies (such as AI, machine learning and blockchain) and changing supply ecosystems may result in a shift of regulatory focus to suppliers (as well as Financial Services organisations themselves).

Mercedes Samavi of Morrison & Foerster considered the clarity that the prescribed list of processor terms set out in the GDPR brings in an outsourcing context and noted the areas where there is less clarity and room for a contractual allocation of risk (such as responsibility for supplier costs of implementing necessary security measures, notification of breaches and assisting their clients with data protection matters). She highlighted the continuing uncertainty as to the enforceability of indemnities (and, despite what they may say (!), insurance policies) that purport to cover GDPR (or other regulatory) fines. Emerging technologies were noted as a potential cause for a change in approach in this area too, with the use of AI suppliers, for instance, challenging the traditional ‘supplier as processor’ analysis.

We then heard from Kevin Nordin at Baker McKenzie about current trends in protectionism and sanctions. Further export controls on emerging technologies such as Biotech and AI are anticipated, as are further sanctions, export controls and enforcement globally (with the recent increase in Asia PAC export controls an example of this). He reminded us of the tensions between US and EU sanctions regimes and the difficulties that this can cause for EU based suppliers. He gave the recent example of US company KKR’s acquisition of a Dutch company and requirement that the Dutch company terminate its Cuban distributor because of US sanctions. This was not without consequence for the Dutch company, as the European courts disagreed that the Dutch company was entitled to terminate on that basis. Finally, his discussion of the recent US Iran and Turkey sanctions changes highlighted that this is a faster moving and further reaching area than many of us may realise and emphasised the need for good supply chain mapping and effective compliance programmes.

# Session 3

## Incentivisation

Vik Khurana from Bristows and Matthew Costelloe, General Counsel at Capgemini, considered how an outsourcing contract can be structured such that it incentivises both suppliers and customers to perform to the best of their abilities. They highlighted that whilst of course it is important to set up the mechanisms for incentives at the start of the deal, the actual success of those mechanisms will be measured during the "live" phase of the project.

Both speakers agreed that successful incentivisation is a key mechanism for achieving mutual success of both suppliers and customers, and aligning objectives from the start. From a customer's perspective, they will most likely be aiming for greater innovation, better solutions, early delivery, and cost reduction. From a supplier's perspective, they will most likely be aiming for greater financial benefits and a successful long term relationship.

The speakers considered where in a contract you might be able to incentivise the parties, and concluded that they can be found (amongst other places) in the pricing model, in the governance structure and in terms around innovation and improvement. They also suggested that risk allocation and remedies may impact the parties' actions during the course of the project.

Considering how risk allocation may incentivise (or de-incentivise) the parties, a very onerous liability regime may be effective in ensuring that a supplier adheres to a set of clear requirements. However, customers may want to consider whether that could lead to unexpected behaviours or "perverse incentives". Would an onerous liability regime, for example, drive or deter innovation? Would a supplier be worried about testing new methods? Automatic assignment of all IP to the customer, or "harsh" IP warranties, may deter innovation and information sharing as well.

Certain "hair-trigger" termination rights may also have negative overall effects on delivery. For example, if there is a right for a customer to terminate an agreement as a result of a delivery which is one day late, this might ensure that goods are delivered on time. But would they be the best quality? If the supplier had more time, would they have been able to deliver better quality materials?

The speakers also considered whether remedies such as service credits and delay payments may drive or derail incentivisation. The suggestion was to consider whether effort to achieve a particular SLA may be better used elsewhere in the project.

The speakers considered governance and how this may be used to drive incentivisation, urging parties to consider what forums are necessary and to ensure that there is a feedback loop happening at the right level of the organisation, and noted that there are financial elements which may also help incentivise the parties (e.g. gainshare).

The takeaway from this session was that there are many ways in which parties can use an outsourcing contract to incentivise performance, and this should be considered by both sides at the outset of the deal.

# Session 4

## Exit

Lawrence Graham from Milbank and Jeremy Purton from Herbert Smith Freehills lead us through some of the key considerations in preparing for and exiting an agreement, on expiry or otherwise, and the importance of a successful exit, both to help facilitate a smooth transfer into a relationship with a new supplier and to maintain a 'business as usual' environment for the customer.

One of the key messages of the day was the familiar maxim: "*if you fail to prepare, prepare to fail*", and exit is no different; it should not be an uncomfortable afterthought and should be a key consideration of sourcing strategy.

The overarching theme of the presentation was that a clean, successful disengagement is best for everyone and it is crucial to allow enough time at the start to engage, have a clear discussion and agree what exit looks like. Doing so will help to maintain the relationship through exit, without creating or adding to any existing dispute.

Further, exit should not be an overly formulaic procedure which does not recognise the commercial and operational realities. With this in mind, Jeremy discussed the rise of 'Exit as a Service", which has the advantages of being holistic and upfront, so everyone knows and agrees what will happen at the end of the agreement, and has the potential benefit of making an outsourcing project less adversarial.

Parties may wish to adopt this mind-set, or consider purchasing 'Exit as a Service', to mitigate risk of complying with exit obligations and on-board expertise from suppliers who are well aware with the usual pitfalls of exiting an agreement. We were reminded of another familiar saying that, "*you get what you pay for*", and the importance of not undervaluing a smooth exit.

Key points to consider include:

- Characteristics of services – how simple is it to handover the services, in practice? Are all of the services being handed over? How does the exit procedure deal with full of partial termination of the agreement, e.g. termination only in certain jurisdictions?
- Responsibility – is exit a phase of the original agreement? Or a separate set of post-termination services? What contractual terms apply to Exit services? Who is responsible for governance of information retention during the provision of the services, and subsequent handover procedures and knowledge transfer of the services?
- Timing – exiting an agreement without warning will likely be counter-productive. How does exit align with the termination date, and will the incumbent be required for early life support by the new supplier?
- What happens in a distressed project – are additional exit services forming part of a settlement agreement?
- Exit 'Boilerplate' – including, appropriate customer access to information for knowledge transfer and ongoing service provision, no degradation of service during (and immediately after?) exit, and obligations for the parties to cooperate.

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# Session 5

## Disputes

Shobana Iyer, a barrister at Swan Chambers, started off by reminding us of the general principles of contractual interpretation, which come from *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1997] UKHL 28.

Shobana then went on to discuss the parol evidence rule, i.e. if the parties have a signed agreement it is not generally permissible to adduce extrinsic evidence to interpret the agreement. There are however exceptions to this rule, for example, extrinsic evidence may be permissible if it can be shown that the written contract is not intended to comprise the entire agreement. We then briefly heard about other contractual interpretation principles, such as battle of the forms (e.g. the 'last shot' doctrine and effectiveness of 'prevail' clauses) and the differences between liquidated damages versus penalties.

The presentation continued with a discussion on limitations of liability and a reminder of the fact that a contractual term which excludes or limits liability is subject to statutory and common law controls. The majority of the key statutory restrictions are found under the Unfair Contract Terms Act 1977 ("UCTA"), and exclusions and limitations of liability must satisfy the reasonableness test under UCTA. A sensible approach when dealing with a contractual interpretation dispute is to read the clause, read the whole agreement noting any relevant clauses, consider the relevant background to agreement, take stock and then deal with any uncertainty.

Shobana went on to explain legal professional privilege, which protects confidential communications between lawyers and their clients for the purpose of seeking or giving legal advice, and provided a helpful reminder that legal professional privilege does not automatically protect all communications with a lawyer. Shobana contrasted this with litigation privilege, which protects from inspection confidential communications between lawyers and their clients, or the lawyer or client and a third party, that come into existence for the dominant purpose of being used for actual or pending litigation.

Shobana concluded with briefly highlighting a few key issues to consider in outsourcing agreements, which can lead to disputes: regulatory concerns, TUPE and the potential for the contract to change in terms of scope and value.