Legal Feedback on the xoserve Non-code User Pays Services Agreement

General Comments

The agreement has been drafted very much in favour of xoserve. There is little if any reciprocity in the provisions and potentially a number of exceptions where a supplier's remedies of a rebate of the charges or liquidated damages effectively become ineffective.

Main Agreement

1. **Clause 2.2**

This states that we will be bound by any request from any of our employees or other representatives for the provision of the services. Care needs to be taken to ensure no unauthorised requests are made.

2. **Clause 2.4**

There is no obligation under the agreement for xoserve to accept any requests which leaves us and any other supplier open to a position where we may not be able to obtain the required information. Consideration needs to be given as to the commercial consequences and an amendment made so that there are limited occasions where xoserve can refuse such requests.

Annex 2

3. **Clause 2.2**

Ditto to my comments in paragraph 2 above.

4. **Clause 2.5**

This clause is endeavouring to reject liability for any representations made by xoserve even those in writing. Ideally I would like to delete this clause.

5. **Clause 2.6**

This clause refers to us giving a warranty - my preference would be to use our reasonable endeavours instead. Any breach by us potentially will result in xoserve being able to terminate the agreement which seems a little extreme when there is no other supplier of these services. I suggest some commercial consideration is given to what may be a more appropriate remedy (e.g. suspension of the services until the entitlement to make requests is restored).

6. **Clause 3**

This clause gives xoserve the right to amend the ts&cs on giving 35 days notice. If we don't like it then we can terminate the agreement which is not a great remedy when no-one else is able to

provide the services on offer. In addition, xoserve are entitled to add additional services again without consultation or input from the suppliers. The clause needs to be amended to include some form of modification process (as with other industry agreements) so that suppliers are able to have a say in any changes to the ts&cs. At the very least suppliers should be given an opportunity to comment and have input on the proposed changes.

7. Clause 4

There is no reciprocity in this clause. Xoserve have to use their "reasonable endeavours" to perform the services whereas we have to "undertake" that all our information is correct and "indemnify" xoserve if it is not.

The clause needs to be amended so we use our reasonable endeavours only, and only indemnify xoserve for their reasonable costs, losses etc as a result of a negligent act on our behalf (we should not be penalised for making a genuine mistake or one that may be the result of another party's error).

Clause 4.2 needs to be amended so that it is clear that the information provided only relates to the provision of the services under this Agreement. As currently drafted it is too wide as it refers to "any and all information…..".

8. Clause 5

Clause 5.2 says that the charges will be based on the agency charging statement in force at the time xoserve issued its acceptance which potentially means at any given time we will have to check which statement and therefore what charges apply. In addition there are no provisions that require xoserve to update us as and when a new charging statement is in force nor do we seem to be able to have any input on what the new charges will be both of which ideally should be included in the drafting.

In clause 5.6 I would suggest payment is made 45 days after the date of the invoice in line with normal company payment procedures.

In clauses 5.8 and 5.9 there is reference to "net of any bank charges". I am not sure what charges this is referring to and would recommend that this wording is deleted from both clauses as I do not see where the charges will apply as we have to pay in full and if we do not do so we will be liable to pay interest in the outstanding sums under clause 5.9.2.

I would also suggest that at the start of clause 5.9 the wording "Subject to any disputed sum,……" is added as we are entitled to withhold payments that are in dispute.

In clause 5.9.1 I would recommend amending the wording so that only the Service for which payment has not been made as opposed to xoserve being able to suspend all the Services.

Please be aware that a PCG may be required. If we are to sign up to this agreement we will need to ensure that our parent company is happy to oblige.

In clause 5.10.1 I would recommend that we extend the challenges of invoices to a period greater than 18 months – the higher the better albeit that my preference would be to delete this clause in its entirety.

In clause 5.12 I would limit xoserve's ability to be able to make an amendment to an invoice to 3-6 months no more as they are issuing the invoices they should ensure that they are correct.

9. Clause 6

Xoserve is endeavouring to exclude all warranties bar the one it is prepared to give in clause 6.1 including fitness for purpose etc. This is not acceptable as they are providing a service and should be prepared to provide warranties as to how they perform those services.

I would recommend that clause 6.2 is amended such that xoserve warrants and represents its reports etc are accurate insofar as the information provided to it is accurate – if the data is incorrect then that's our responsibility but if we have provided the correct information then xoserve should be obliged to offer us some form of assurance that they will do their job properly.

In clause 6.3 xoserve has restricted the remedies available to us if it breaches the warranty in clause 6.1 and has set out those remedies that are in the relevant schedules. However, the schedules contain "get-out" clauses that may well mean we will not actually be paid any rebate of the charges or any liquidated damages. I would recommend that either the schedules are amended to reflect the losses that we may incur or the restriction on our remedies is deleted.

In clause 6.4 I would recommend that the wording "and in any event within 90 days of any such…" is amended to read "and in any event within 90 days of the Customer becoming aware of any…"

Please note that in the last paragraph of clause 6.4 where you are entitled to a rebate of the charges or liquidated damages this will not be paid back to you but will be used to offset any future debt under the agreement except where there are no services to be offset in which case they will repay you. My preference would be for us to receive the cash in hand or at the very least interest to be payable on any such sums that retained to be offset against future charges.

10. Clause 7

I would want this clause tightening up so that it is clear that nothing will affect the ownership of our IPR. In addition I would expect xoserve to provide us with warranties and indemnities that they hold all the relevant rights to their IPR. I would also recommend that a clause is added to say that each party will notify the other of any actual or threatened infringement of IPR which comes to its notice and that each party will assist the other as may reasonably be required to resist any proceedings in relation to any infringement claim (as applicable).

Clause 7.1 needs to be limited so that the licence is only granted for so long as the agreement is in force.

In clause 7.2 I believe that we should be including any affiliates of ours in the licence given by xoserve to cover off any eventualities.

Please note that clause 7.5 is advising us that data will be transported outside Europe and they are advising us that we need to let our customers know this. This will obviously cause us some data protection issues and I would recommend that some additional drafting is added that sets some ground rules as to how that information will be sent oversees (encryption, secure link etc) and put

some limits on what those third parties are able to do with it with a warranty and indemnity form xoserve in case a failure on their part/the third parties part causes us an issue.

In clause 7.6 I would recommend that "all reasonable endeavours" are required and that an indemnity is provided for any loss we may incur - particularly as they have included their own negligence as being one of the reasons why the data is lost.

11. Clause 8

I would recommend that a time limit is inserted as it is highly unusual for confidentiality provisions to apply indefinitely – a time limit of 3-5 years should suffice. I would recommend that the confidentiality provisions are tightened up particularly by the inclusion of a clause saying that where a party is obliged to disclose information by a regulatory agency etc then they are obliged to let the other party know and take utilise any exceptions as to the disclosure and ensure that it is made clear such information is confidential.

12. Clause 9

This clause is wholly unacceptable. There is no reciprocity as to the limitation of liability and xoserve seems to be trying to limit itself from any liability to us in the provision of the services. In addition the suggested limitation of xoserve's liability in clause 9.3 is too low and should in any event exclude any indemnities, rebates as to charges and/or any liquidated damages from the cap.

In clause 9.5 we are being asked to insure against any loss or liability we may suffer as a breach of this agreement. Although this would be prudent xoserve should be insuring itself so that we are able to claim some form of recompense from them.

In clause 9.6 we are being asked to agree that the sums set out in the schedules in relation to any breach by xoserve are a genuine pre-estimate of loss. As there are a number of caveats to any sums we are ever likely to be paid I would not wish to agree to this clause as it potentially will prevent us from challenging these sums in the future.

13. Clause 10

Clause 10.4 states that if xoserve's agency agreement terminates then this agreement will terminate but they shall have no liability to us. If the termination is a direct result of their failure to perform their obligations under the Agency agreement then I believe that they should be liable for any losses that we incur.

In clause 10.7.2 there is reference to "a refund of a proportion of the advance payment" which I would like to be clarified as to how that will be determined.

14. Clause 11

In light of the limitations as to payment for service downtime I would recommend that xoserve use all reasonable endeavours to keep us informed as to downtime both planned and estimates of unplanned.

In clause 11.5 we should no have to use our best endeavours to ensure that we do not introduce viruses onto xoserve's system when they only have to use reasonable endeavours in clause 11.6.

They are more likely to have issues with their systems than we are. I would recommend the addition of some drafting covering the use of anti-viral software by xoserve and checks on the system by xoserve to ensure that their system remains virus free.

15. Clause 12

We need to consider if we would like to assign the contract at any stage to an affiliate in which case clause 12.1 would need to be amended at the least to say that xoserve's consent to such an assignment should not be unreasonably withheld or delayed or preferably we are entitled to assign to an affiliate without consent where such an assignment is part of a restructuring etc.

Again in clause 12.8 we need to consider if any affiliate may need to enforce the provisions of this agreement – is this likely?

Schedules

General

Although there are various performance targets and associated reductions in charges/liquidated damages payments there are also a number of means where these targets are no longer applied. Commercial consideration is required as to whether or not the targets/liquidated damages included in the schedules are acceptable and whether not the levels that have been set where these targets no longer apply relate to exceptional use of the system.

There are some typos (mainly in the introductory sections to the schedules) in relation to customer not having a capital c, supply meter point not being defined in all schedules where the term is used and in schedule 4 where there is reference to "authorised users" should this not be "customers"?

16. Schedule 2

In paragraph 2.2 additional wording should be added to ensure that any downtime (where possible) should be notified to us and that any extension in the timescales for the provision of the services should be only in so far as is necessary.

Paragraph 2.3 effectively gives xoserve an opt-out for providing its services on time. Its obligations should, at a minimum, be to use its best endeavours to provide the services on time. Consideration needs to be given to the 400,000 figure quoted – is this an exceptional level of demand – if not then this value should be increased so that only exceptional levels of demand are covered. In addition, there should be a requirement on xoserve to inform us where the limit has been reached.

In paragraph 3.1 a customer will be charged even when it relates to supply points that we are not entitled to receive information about. If this is clearly the case and takes little time or effort to identify then this should be deleted as little if any costs will have been incurred by xoserve. In addition if (as under para 3.4) we have corrected the information provided before any work has been carried out then we should not have to pay for the original requests as well as for our subsequent correction.

Although paragraph 3.2 sets out the reduction in charges this is effectively overwritten by paragraph 3.3 which says that para 3.2 will not apply where there is peak demand. This para will only be acceptable if the levels set in para 2.3 are set at an exceptional level.

17. Schedule 3

As above any downtime and extension in the response times should be extended only in so far as is necessary (para 2.2).

As above there is a limit on the number of requests (par 2.3) and therefore the performance targets are no longer applied. Again is this number acceptable – if the paragraph is included at all it should at he very least be reflective of a period of exceptional demand.

Again we will be obliged to pay even if they do not produce a report (para 3.1) which should have the caveat added that if we correct the information in time then we should not have to pay for the 2 lots of information provided.

As above xoserve don't have to reduce their charges if they fail to meet the performance standards due to more than a certain number of e-mails being received in total on any given day. Again, if we are unable to get this clause deleted we should at least ensure that the limit set reflects a period of exceptional demand.

18. Schedule 4

In para 2.2 there are a number of performance standards that have been included but xoserve only have to use reasonable endeavours to meet them – this should at the very least be all reasonable endeavours/best endeavours.

In para 2.3 there is a reference to IAD terms which also apply to the schedule – are these acceptable? Can they be provided as an appendix to this agreement?

Again any downtime should be notified and any extension to the performance standards should be only in so far as is reasonable.

Para 3.2.1 seems to imply that if any user of the system is the reason for the downtime on the system that the reduction in charges will not apply. This requires clarification and as currently drafted seems very wide.

In para 3.2.2 (c) will we be aware of when the data has been updated and how easy is it for us to check? If not then I don't see how we can make a claim.

19. Schedule 5

No major comments other than are the terms commercially acceptable.

20. Schedule 6

No major comments other than are the terms commercially acceptable.

21. Schedule 7

As a slight aside the Core business hours are different for this service as compared to those in schedule 4 – are they correct?

In para 3.4 we will be charged if we exceed the limits set for the service we have signed up to. However, there is no obligation on xoserve to advise us of this – we need to include such an obligation as I suspect that we will be asked t pay more for those additional calls.

Please be aware that if we decide to change the volume band at any time during the year (para 4.1) then the price applicable for that band will be whatever the latest charging statement refers to as opposed to being by reference to the original charging statement when we signed up to the service.