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Agila IT-system deliveries – flexibility on equal terms?

The Agila project methodology represents a new trend in IT and system development and one which has firmly rooted itself in recent years. The majority of its advocates are on the supply side and some feel that it will come to dominate the industry within a couple of years. From the lawyers point of view it is not merely the behaviour of the parties and the development processes which must change. A new project methodology also demands new considerations and formulation in drafting contracts. What advantages and disadvantages does the Agila process entail for the orderer or the supplier? What legal risks must be taken into account and how are the interests of both parties met in an Agila system delivery?

In line with the meaning of the word agile, the purpose of the project platform is to create system deliveries which are flexible and which can be tailored to the orderer's needs. This objective is met by the supplier delivering a steady stream of value to the orderer. Instead of delivering the entire system at the end of the project, the system is delivered in parts on a rolling basis. Production of the code is started at once and by adapting the system during the development phase, the risk of a collapse as development draws to an end is greatly reduced. Continual feedback and evaluation allows the supplier to reduce the risk errors in development.

The Agila system development agreement

In theory then, the Agila project methodology would appear to be ideal. It is based upon communication and interaction between orderer and supplier and is encompassed by soft and "woolly" values such as cooperation and confidence. The problem with these values is, however, that they are difficult to incorporate into a legal contract in a way which has any real effect. What would happen, for instance, if the supplier suddenly experiences personnel problems and can no longer interact and cooperate with the orderer in the manner agreed? What would happen if the supplier misunderstood the orderer and develops functions for the orderer incorrectly? Who is to be held responsible in these cases?

System delivery agreements based on the traditional, so-called, waterfall method, avoid the problems outlined above by drafting detailed demand specifications. The demand specification can be described as the heart of the system delivery agreement because it describes what is to be achieved, i.e. the result and when this result should be achieved. The demand specification thus constitutes the benchmark and the basis of the supplier's liability for faults and delays. In order to work as a benchmark, the demand specification is often very extensive and frequently takes a lot of time to draft. Advocates of the Agila project methodology are of the opinion that it is not necessary to put a lot of work into the demand specification and that it should, instead, be drafted afterwards as the orderer's circumstances and needs emerge. Less focus should, in other words, be placed on the contract negotiations and more focus should be placed on the development of the system per se in consultation

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with the orderer in accordance with the watch words “customer cooperation before contract negotiations”. But then we are back to the same dilemma: what can the orderer do if the customer cooperation does not work and what sanctions are available for shortcomings in cooperation? How can the orderer make claims for faults if there has been no agreement on what should be delivered? How is the orderer to be able to claim a delay when nothing has been agreed as to when the system is to be delivered or even how the complete system is to be structured?

Leaving these questions open in an agreement in this way involves great risks and disadvantages for the orderer because it is impossible for the orderer to assess in advance the cost, risks, time requirements and results.¹ It is also difficult for the supplier to plan its business because it lacks a clear time frame or specification of the work that will be necessary for each project. It can also be difficult for the supplier to understand the extent of its liability and which future claims may be made against the supplier because this has not been clearly regulated. If entering an agreement, in which the terms and conditions or demand specifications are to be determined after the signing of the agreement, then our principal advice would be to ensure that the agreement regulates how these open questions are to be handled and details the amendment procedure. The amendment clause should regulate: i) how changes are to be agreed; ii) whom is to have the right to decide on changes; and iii) how the changes are to be documented to be valid between the parties. The parties should also define by way of introduction the intended objective and functions of the system and agree on an indicative time frame for the project. It is also important to regulate what will happen if the parties cannot agree. Because the Agila system delivery agreement is to be based on cooperation and communication, it may be important to consider including in the agreement a mediation mechanism.

Absence of Swedish standard agreement

Another problem with the Agila project methodology is that the current standard agreement is not well suited to this project form. In the absence of a suitable standard agreement, we would therefore advise our clients not to use one of the IT industry’s existing standard agreements but instead to draft a separate agreement intended for an Agila system delivery and which takes into account the specific project’s objectives and structure.

There is, however, a Norwegian standard agreement for Agila deliveries “PS2000 Smidig/Agile”, prepared by the Norwegian Computer Society, from which guidance can be obtained. It should, however, be noted that the Norwegian standard agreement is based to a great extent on the traditional Norwegian IT standard agreement PS2000 and retains its fundamental features with target price, introductory demand specification and test phases. The agreement has a complex structure, a comprehensive demand specification and is, in many respects, difficult to apply. It is, therefore, be questionable how well suited the Norwegian standard agreement really is to the practical execution of the Agila project methodology.

It is probably the central role of the demand specification in the traditional system delivery agreement which has led to the demand specification and target price being retained in the Norwegian Agila standard agreement. It is evident from the commentary to the Norwegian standard agreement that it is the competitive element, i.e. the result, price and time frame, which is intended to be established in the introductory needs phase containing the target price, introductory demand specification and test phases. Nothing is said, however, about

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the importance of not getting locked into an overly detailed demand specification in order to retain flexibility in the project.

In summary, it can be concluded that the Norwegian Agila standard agreement cannot in itself provide a standard agreement or the basis for Agila project methodology. Swedish development of a standard agreement is still in its infancy and a standard agreement has yet to be presented. We therefore advise our clients to draft a specific agreement for each project to ensure that the agreement is adapted to the ordered project. Without such an agreement there is a considerable risk of future conflicts.

Change of supplier

One of the advantages of an "agile" delivery and one which is frequently emphasised by suppliers is that the orderer is not as dependent upon the supplier. If the orderer finds that the development does not correspond to its expectations, the orderer will be able more readily to switch supplier so that a new supplier can take over where the former ended. This imposes greater demands on the supplier who must ensure that the orderer gets what it wants.

The supplier must also ensure that the programming is correct with the requisite sorting, documentation and testing so that a new supplier can continue if the assignment comes to an end. For both parties, it is important to regulate in the agreement when a change of supplier is permitted and the compensation to which the supplier is entitled for its investments in the project.

For a change of suppliers to be a real opportunity, it is important to regulate the intellectual property rights in such a way that the project and development of the system can continue after a change of suppliers without the risk of infringement in the first supplier's intellectual property rights. From the perspective of the orderer, it is important that the orderer is given continual access to and the right to use all material which is delivered and a right for the orderer or a third party to modify, develop, and transfer software in the event the contractual relationship between with the supplier comes to an end. Systems delivered under the Agila methodology are often more customer-specific at the start of development. The supplier therefore has less need to protect its standard tools. If the supplier nonetheless uses such platforms which the supplier intends to use in other system deliveries, the intellectual property rights should be separated into one element, which is customer-specific and another, which is a part of the supplier's pre-existing elements. One further condition for a project being able to continue with a new supplier is that the orderer is given access to source code including the source code to standard programs and pre-existing elements. In the Norwegian Agila standard agreement, the parties are recommended to introduce such a possibility in the event the agreement comes to an end. Case law demonstrates that the orderer, in addition to access to the source code, must be given a right to further develop, transfer and modify the source code. Without such a right, the orderer has no real opportunity to continue to develop the system with a new supplier. From a supplier perspective, it is of the utmost importance, however, that regulation of how the source code may be used is clearly limited – most importantly use of the source code to standard programs and pre-existing elements.

As for traditional system delivery agreements, in practice it is often factors other than the intellectual property rights or access to the source code that mean that the orderer does not feel it has a real opportunity to change suppliers. For example, the orderer may be unwilling to provide access to sensitive information regarding its business to more parties than necessary. Extensive resources may already have been invested in the project and a change of suppliers can take a long time and be even more expensive because the new supplier has

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to get to understand the system and the orderer's needs. But, even if a change of suppliers is rare in practice, it is important for the orderer to have a real opportunity to switch suppliers, regardless of the project methodology employed, in order to avoid getting locked in. If no other supplier may modify or develop the software or source code, the orderer is bound to the first supplier to carry out all updates, maintenance and further development of the system.

Conclusion

The Agila project methodology represents a reaction to the failure of front-loaded IT projects in which far too much time was dedicated to planning which ultimately needed re-doing. Of course, flexibility is much needed in an IT project but at the same time the value of a thorough pre-study and reasonable foreseeability in the agreement should not be disregarded. In many cases, perhaps a combination of the different models would be preferable.

The Agila project method has many advantages but is not in itself always the best alternative. It is important that the project leader on the orderer's side is aware of the various methodologies' relative pros and cons to be able to determine which methodology is best suited to the project in question. If the Agila methodology is chosen for a project, the orderer should ensure that the agreement is well suited to the method. It is not possible, therefore, to reuse old agreements which were employed for the traditional project methodology. In an Agila system delivery agreement, the terms for demands and tests should be stated so that liability for faults and delays can be foreseen. Likewise, the agreement should regulate the terms governing when the orderer is entitled to terminate the cooperation and any right of the supplier to compensation for this. It must also be clearly regulated how contractual issues or contractual terms are to be determined after signing of the agreement and what is to happen if the parties cannot agree. Finally, the intellectual property rights clause should be so drafted that that a change of supplier is a real possibility in order to avoid a lock-in effect.

If you would like to know more about the consultant's or the orderer's rights to specially ordered products, you are welcome to join our breakfast seminar on intellectual property rights on 19 October 2011 in Göteborg.

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