BERNICE KARN

Major Issues in Outsourcing

Negotiating and Drafting Key Business Agreements

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Why Outsource?

- Definition of outsourcing
- Common reasons for outsourcing
- Risks of outsourcing
Offshoring/Rightshoring

- Meaning
- Risks
  - Security
  - Quality of service
  - Differences as to relevant legal systems
Common Methods of Offshoring/Rightshoring

- Outsourcing to a third-party service provider directly
- Outsourcing to the domestic office of a global service provider
- Creating an overseas subsidiary
Service Provider Selection: The RFP Process

- Goal
- Methods of Service Provider Selection
  - Single source
  - Several service providers
  - Negotiations with several service providers
- The law of tendering
General Considerations when Drafting the Outsourcing Agreement

- Standard Form Agreements
- Negotiation Style
- Due Diligence
- Flexibility
- Comprehensive Agreement
Scope of the Contract

• OSFI Guideline B-10 “Outsourcing of Business Activities, Functions and Processes”

• Issues to consider
  • Nature and scope of the service
  • Performance measures
  • Price
  • Ownership and access to assets
  • Subcontracting
  • Reporting requirements
  • Contingency planning
  • Auditing
  • Dispute resolution
  • Termination and events of default
  • Transition
Employment Issues

- Minimum requirements if no “rebadging”
- Transfer of employees to the service provider
  - Issues to uncover in due diligence process
  - Termination of employment concerns
Performance Measures and Service Levels

- Service Level Agreements (SLA)
- Types of SLAs
  - Simple
  - Complex
Determining the Appropriate Service Levels

- Weighting the SLA
- Other Potential SLA Provisions
  - Gain sharing
  - Reporting requirements
  - Increasing credits over the course of the agreement
  - Excused performance failures
Consequences

- Motivate the service provider to provide better service
- Default and termination of the agreement – extreme remedy
- Earning back of lost revenue
Benchmarking

- Meaning of benchmarking
- Why have benchmarking
- Service provider’s view
Governance and Risk Management

- Responsibility of board of directors
- Basel Guidelines
- Business continuity plans
Auditing

- Audit rights
- Types of audits
- Elements of audit language
- OSFI supervision
Representations, Warranties, Covenants, and Indemnities

• Definitions
  • Representations
  • Warranties
  • Covenants
  • Indemnities
Drafting Representations, Warranties and Covenants

- Examples of common service provider assurances
- Examples of common customer assurances
- Subcontracts
- Timing of negotiation
Are Indemnities Necessary?

- Common law protection
- Risks associated with indemnities
  - Antagonism
  - Inefficiency
  - Price of the agreement
When are Indemnities Useful?

- Third parties
- Elements of proof
- Efficient resolution
- Legal costs
- Mitigation
Drafting Indemnification Clauses

- Party vs. party claims/third party claims
- Timing of negotiation
- Procedures regarding enforcement of indemnities
Limitations of Liability

- Why this is an important issue for the service provider
- Types of damages
- Limiting exposure through time
- Relationship to insurance coverage
- Requesting mutuality
- What’s the right number?
• Ownership of work product
• Ensuring customer ownership
• Licensing
• Customer’s materials
• Service provider’s materials
Change Management

- Why an issue?
- Change order process
  - Inclusions
  - Typical process
Privacy and Data Protection

- Framing the issue
- Applicable statutes in Canada
- Issues emanating from the *Personal Information Protection and Electronic Documents Act* ("PIPEDA")
- Issues relating to the *USA PATRIOT Act*
- Dealing with confidential business information
Ending the Outsourcing Relationship

• Common Circumstances of Termination
  • Expiration
  • Customer events of default
  • Service provider events of default
  • Termination for convenience
  • Termination due to force majeure
Transitioning

- Description of the problem
- Typical provisions to consider
- Transitioning and service level agreements