



BERNICE KARN

Major Issues in Outsourcing

Negotiating and Drafting Key Business Agreements

The Canadian Institute
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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

Offshoring/Rightshoring



- 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?

Intellectual Property: Ownership and Licensing



- 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



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