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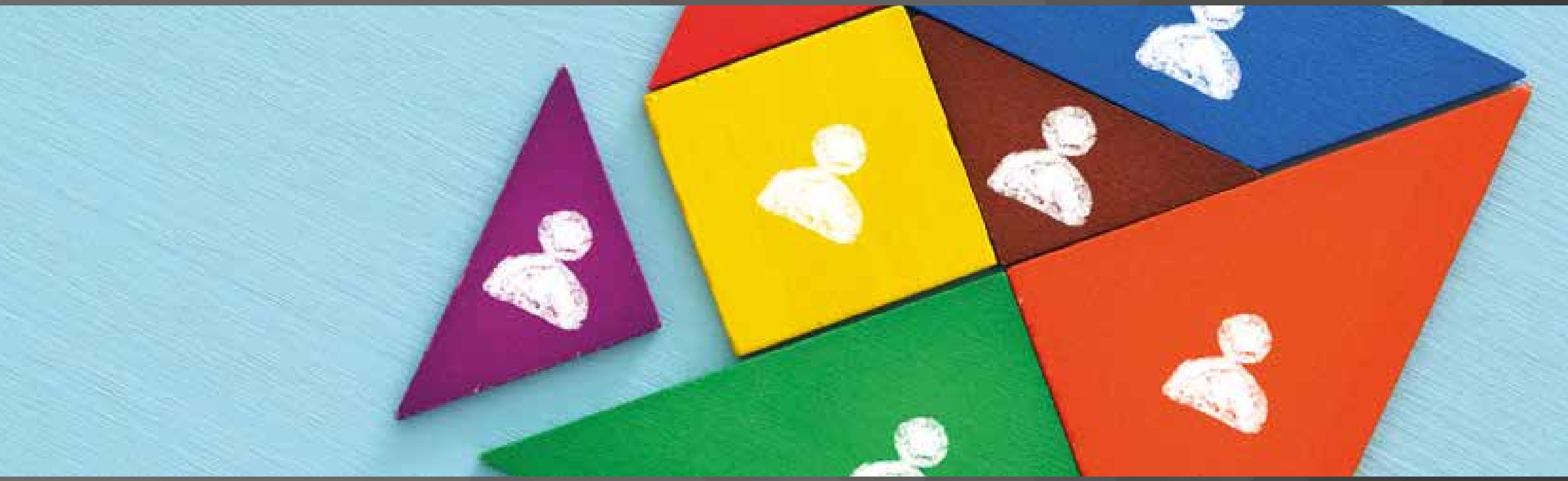

Outsourcing 2020

A practical cross-border insight into outsourcing law

Fifth Edition

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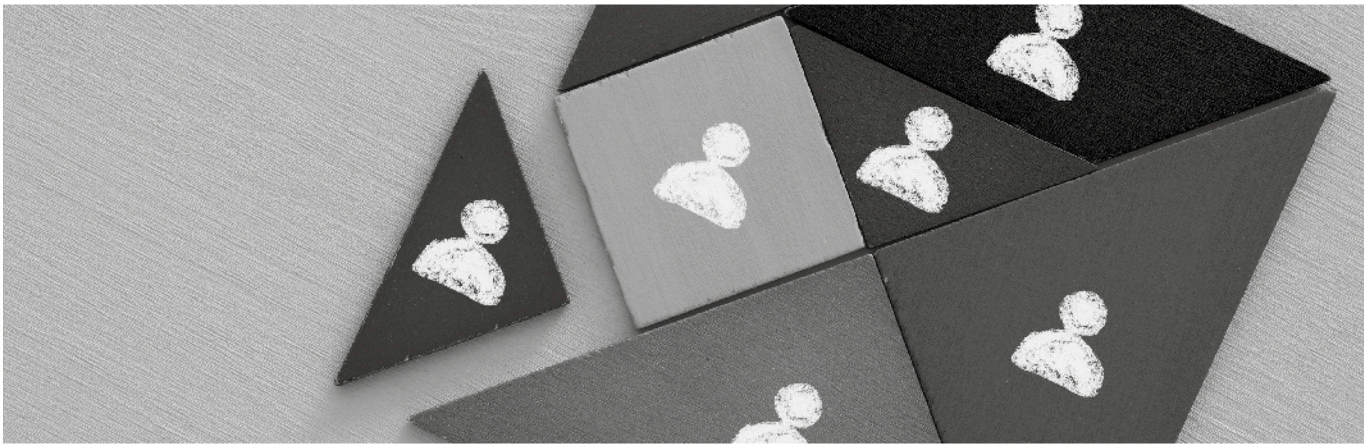

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ISBN 978-1-83918-057-6
ISSN 2397-6896

Published by

glg global legal group
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London SE1 3PL
United Kingdom
+44 207 367 0720
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www.iclg.com

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Printed by
Ashford Colour Press Ltd.

Cover image
www.istockphoto.com

Strategic Partners

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MIX Paper from responsible sources FSC® C011748

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1 Regulatory Framework

1.1 Are there any national laws or regulations that specifically regulate outsourcing transactions, either generally or in relation to particular types of outsourcing transactions (e.g. business process outsourcings, IT outsourcings, telecommunications outsourcings)?

There are no national laws or specific national regulations that regulate outsourcing transactions generally or in relation to particular types of outsourcing transactions. In the U.S., contracts are interpreted and governed by state law. However, there are federal and state laws and regulations that may apply to the subject matter or other aspects of the transaction (e.g., data privacy) or industry of the contracting party (e.g., financial services, healthcare). In addition, under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), there may be outsourcing restrictions on companies that participate in the Main Street Lending Program. See also question 7.4.

1.2 Are there any additional legal or regulatory requirements for outsourcing transactions undertaken by government or public sector bodies?

Outsourcing transactions with federal or state entities typically follow a formal procurement process and are subject to federal and state procurement laws (e.g., federal acquisition regulations (FARs), New York State Procurement Guidelines). These are specialised transactions, and specific advice regarding the process should be obtained.

1.3 Are there any additional legal or regulatory requirements for outsourcing transactions undertaken in particular industry sectors, such as for example the financial services sector?

There are a variety of federal and state legal and regulatory requirements that may apply to outsourcing transactions in particular industries and touching specific matters. For example, (i) in healthcare related industries, HIPAA and the HITECH Act, and their implementing regulations may apply, and (ii) in the financial services industry, third-party risk guidance (e.g., from the Federal Reserve, OCC, FINRA, and the New York Department of Financial Services (the "NYDFS") and other regulatory agencies) may apply. The scope of the outsourcing services also may implicate additional laws. For example, the FDCPA, TCPA and other consumer protection laws (e.g., Do Not Call Registry and the CAN-SPAM Act) may apply to outsourced outbound contact centre services. Finally, there may be restrictions on the transfer of data to or the access of data from outside the U.S. (e.g., drivers' licence data). See also section 8.

1.4 Is there a requirement for an outsourcing transaction to be governed by local law? If it is not to be local law, is there any generally accepted norm relating to the choice of governing law?

Generally, parties are free to agree upon the choice of governing law of an outsourcing contract. However, there may be matters under the outsourcing arrangement that will be governed by specific local law (e.g., real property transactions described in section 6 and potential employee issues described in section 7).

2 Legal Structure

2.1 What are the most common types of legal structure used for an outsourcing transaction?

While there are several common contract structures used by practitioners to document and memorialise outsourcing services arrangements, by far the most widely utilised contract structure is a Master Services Agreement accompanied by one or more Statements of Work.

The Master Services Agreement acts as the singular governing document for all potential Statements of Work between the parties. Its purpose is to establish the generally applicable provisions (e.g., payment terms, representations and warranties, limitations of liability, indemnification provisions and the like) that will govern all Statements of Work and to create the organisational framework for documenting and describing in the Statements of Work the business terms for future services engagements.

Each Statement of Work, on the other hand, acts as the functional operational document that the parties prepare in connection with each specific services engagement and describes the business terms relevant to the engagement, including the duration of the term, the service descriptions, service levels and credits, pricing methodologies and fees, transition terms, services locations, key personnel resources, and other engagement-specific terms.

3 Procurement Process

3.1 What is the most common type of procurement process that is used to select a supplier?

In the U.S., the procurement process for outsourcing engagements may involve some form of competitive supplier qualification or selection. That process may begin with a Request for Information (RFI) in an effort to winnow the field of potential suppliers and then proceed to a full-blown Request for Proposal (RFP), or it may commence directly with an RFP. In other cases, where the customer has outsourcing experience or existing supplier relationships, the process may be less formal, or a direct supplier engagement may be pursued without a competitive selection/negotiation process.

4 Term of an Outsourcing Agreement

4.1 Does national or local law impose any maximum or minimum term for an outsourcing contract?

No, neither U.S. federal law nor any individual state law imposes a minimum or maximum term on outsourcing contracts. Generally, however, parties to an outsourcing contract will agree to contract terms that range from three to 10 years, depending on the nature, scope, and complexity of the outsourced services. In recent years, the majority of outsourcing contracts have settled on an initial term of three to five years with a right to renew for one or more set periods after the initial term.

4.2 Does national or local law regulate the length of the notice period that is required to terminate an outsourcing contract?

No, there are no laws in the U.S. that regulate the length of the notice period required to terminate an outsourcing contract. The length of any termination notice period and the termination provisions themselves are instead negotiated by the parties on a case-by-case basis in view of the nature, complexity and criticality of the outsourcing services and the initial investments incurred by the parties. Generally, however, the parties will include in their contracts termination notice periods varying in length from 30 days to 180 days, depending on the nature of the termination event.

5 Charging

5.1 What are the most common charging methods used in outsourcing transactions?

Pricing methodologies vary greatly. The following are a few examples:

- A methodology based on the volume of resources. Under this approach, resource volume determines the fees. This method may include a fixed charge with a variable fee or credit based on volume, or may be purely variable. This method is common in IT outsourcing transactions.
- A fee based on the number of FTE resources, or chargeable days/hours, used to perform the services. These charges are often based on FTE and/or periodic rates. This approach is used more often in business process and application development outsourcings where there are certain productivity commitments to help manage the resources.
- A fee based on the costs of the supplier, commonly referred to as a cost-plus model. This method requires the supplier to disclose its costs, which are the basis of the fee, plus the supplier's margin. This method is exceedingly rare.
- A fee based on the number of users or transactions. Under this method, the number of users or transactions determines the fees. As the number of users or transactions fluctuates, the fees fluctuate. This method is more common in business process arrangements.

Certain distinct parts of outsourcing arrangements, such as the transition, may be priced on a fixed-fee or time and materials basis, which may or may not be tied to the completion of certain milestones.

5.2 What other key terms are used in relation to costs in outsourcing transactions?

The following key terms also are used in relation to costs:

- Minimum Revenue Commitment – A minimum monthly or annual revenue commitment to help cover the supplier's fixed cost to deliver the services.
- Cost of Living Adjustments – Adjustments to certain portions of the fees that are sensitive to inflationary pressures. These adjustments are typically tied to specific inflation indices and may include a cap and temporal limitations. Some arrangements may have a combination of indices based on the jurisdictions from which the services are provided.
- Currency Exchange – When services are delivered from offshore locations, the fees may be adjusted to reflect significant swings in the exchange rates between/among the countries from where the services are provided and where the services are received.
- Benchmarking – Often, customers and suppliers will agree to a benchmarking provision in which the services are benchmarked against similar arrangements. If the benchmark results show that the services are more expensive to the customer than for other similarly situated customers, the supplier may agree to adjust the fees to retain the business.
- Changes in Laws or Other Circumstances – The outsourcing contract may include provisions which allocate the risk of changes in the legal, regulatory, socioeconomic, and corporate environment that may impact costs for either party.
- Gainsharing – Where technology (e.g., automation) or other investments are available to substantially reduce the supplier's cost to deliver the services, the parties will often share in the investment and/or the gains in productivity. Conditioning committed fee reductions on these types of investments (especially as relates to automation) is increasingly common in business process arrangements.

6 Transfer of Assets

6.1 What formalities are required to transfer, lease or license assets on an outsourcing transaction?

The transfer of assets in connection with an outsourcing transaction is much less common in today's market, but if relevant, should be in writing, addressed in the outsourcing contract, and documented as required (often, via a bill of sale). Any lease of equipment or facilities, or licence to software, IP or similar assets, also should be in writing and addressed in the outsourcing contract or in a related agreement. Those transfers, leases and licences may require consents from third parties, may be governed by an agreement with such third parties, and may be subject to certain fees or other charges.

6.2 What are the formalities for the transfer of land?

Real property, including land and buildings, is transferred in the U.S. according to deeds which are recorded locally. These transfers are subject to the state and local laws applicable to the property. Local law advice is critical to ensure local formalities are followed.

6.3 What post-completion matters must be attended to?

If there is a transfer of licences or leases under the arrangement, consents and approvals from the licence/lease holders must be documented and obtained. Assignments of patents, trademarks and copyrights should be appropriately recorded. Transfers of real property should be documented and recorded as described above.

6.4 How is the transfer registered?

The transfer of real property is recorded in the local jurisdiction of the property. Transfers of patents and trademarks are recorded in the U.S. Patent and Trademark Office, and copyrights are recorded in the U.S. Copyright Office. Transfers of other licences and leases are typically not recorded, except in rare circumstances.

7 Employment Law

7.1 When are employees transferred by operation of law?

In the absence of a collective bargaining agreement or other contractual arrangement, employees in the U.S. are never transferred to a supplier solely by operation of law. In the U.S., employees are generally considered "at will" employees and, therefore, these employees may be terminated at any time and for any lawful reason. In short, the employer has no obligation to ensure continued employment for its employees in the absence of a contractual arrangement requiring it to do so.

7.2 On what terms would a transfer by operation of law take place?

There are no employee transfers by operation of law in the U.S.

7.3 What employee information should the parties provide to each other?

If the customer intends to transfer some of its employees to the supplier in connection with the proposed outsourcing, the supplier will need all information relevant to making an offer of employment to those affected employees, including information relating to the affected employees' salary, years of service and skill sets. Much of this information is personal and highly-regulated; see section 8.

7.4 Is a customer/supplier allowed to dismiss an employee for a reason connected to the outsourcing?

Generally, yes. Employees in the U.S. are considered "at will" employees and may be terminated by an employer for any lawful reason, in the absence of a collective bargaining agreement (in which case, specialty advice is required) or other employment contract prohibiting such a termination. The specific terms of any employee termination or separation may, however, be affected by the employer's existing policies or prior course of conduct. Further, the Worker Adjustment and Retraining Notification Act (the "WARN Act") and similar state laws require certain employers to notify their employees of mass layoffs or plant closures (more than 100 employees for federal law purposes; state laws may vary). A prior course of conduct or other existing company policy might also obligate the employer to notify its employees or even to provide severance or other bonuses to employees whose employment is being terminated as a result of a new outsourcing arrangement. More recently, under the CARES Act, certain companies receiving loans or other monetary benefits under the Act may be restricted in the outsourcing or offshoring of jobs.

7.5 Is a supplier allowed to harmonise the employment terms of a transferring employee with those of its existing workforce?

Yes, as noted above, under the laws of the U.S., the parties are generally free to negotiate and establish the new employment terms for transitioning employees, subject to any existing collective bargaining arrangements, employee contracts, company policies and/or prior course of conduct. Suppliers may therefore seek to harmonise the employment terms of transferring employees for reasons unrelated to the specific outsourcing, such as avoiding the appearance of impropriety or discrimination and for general employee morale purposes.

7.6 Are there any pensions considerations?

Yes. Companies that maintain pension benefits for their employees cannot discharge or avoid these benefit liabilities by simply outsourcing the affected services and transferring the in-scope employees. Liability for any existing or future pension benefits is governed and determined by federal law. Commonly, the parties will consult a benefits attorney to help identify and allocate responsibility for these pension-related obligations in the outsourcing contract.

7.7 Are there any offshore outsourcing considerations?

Yes. Current U.S. law generally accommodates the offshoring of work by U.S. corporations. There are a number of U.S. laws, however, that either prohibit the offshoring of work generally (e.g., OFAC's Sanctions Programs and SDN List), or specifically (e.g., the CARES Act). In addition, the laws of an offshore jurisdiction may also impact the parties' respective liabilities in any proposed outsourcing contract (e.g., the Transfer of Undertakings Directive). Given the number of laws and variety of geographies that are involved in common offshore outsourcing arrangements, an experienced local practitioner should always be consulted by the parties.

8 Data Protection Issues and Information Security

8.1 What are the most material legal or regulatory requirements and issues concerning data security and data protection that may arise on an outsourcing transaction?

Data security, data protection and allocation of risk for data breaches are some of the most heavily negotiated issues in U.S. outsourcing contracts today. The U.S. has a patchwork of federal and state laws, some of which are complimentary and some of which are distinct. At the federal level, the Gramm-Leach-Bliley Act (applicable to financial services) and HIPAA and the HITECH Act (applicable to protected health information) and their implementing regulations are the most frequently implicated. Data security and protection requirements at the state level vary significantly from state to state, with the requirements of some more recent laws (e.g., the California Consumer Privacy Act, the New York SHIELD Act, and the NYDFS regulations) driving more activity in outsourcing negotiations. Finally, U.S. customers with international operations remain subject to international privacy laws like GDPR as well, and compliance with those laws must also be addressed in the contract.

8.2 Are there independent legal and/or regulatory requirements concerning information security?

In addition to the data security requirements referenced at question 8.1, there are some industry-specific requirements related to information security. For example, there are federal guidelines applicable to critical infrastructure operators, and certain industries (e.g., telecommunications, electrical utilities, transportation, and the public sector) are subject to federal and state statutes and regulations that include information security requirements.

9 Tax Issues

9.1 What are the tax issues on transferring the outsourced business – either on entering into or terminating the contract?

Services may be subject to state and local sales and use taxes in the U.S., typically depending on the states from which the services are provided and received. If the transfer of the outsourced business includes the transfer of certain assets (e.g., software, equipment, facilities, real estate), the transfer may be subject to federal, state and/or local taxes. The outsourcing contract typically allocates responsibility for taxes in connection with the arrangement. The customer is often responsible for the sales and use taxes attendant to the services. Each party retains responsibility for the taxes on their income and on their assets (e.g., software, equipment, facilities, real estate) in their own jurisdiction.

9.2 Is there any VAT leakage on the supply of services under the outsourcing contract?

There are no value-added taxes in the U.S.

9.3 What other tax issues may arise?

There are often complex tax considerations for both the customer and the supplier when the services are provided from offshore locations or across jurisdictions. For example, suppliers may have potential tax liabilities based on revenue and income generated outside the U.S. on services provided within the U.S. Today, many suppliers mitigate these issues by contracting in the U.S. with an entity domiciled outside the U.S.

10 Service Levels

10.1 What is the usual approach with regard to service levels and service credits?

Service levels are commonly included in U.S. outsourcing contracts. Each service level is defined in terms of the process or service measured, a unit of quality, and a period of time. Service levels are typically measured on a monthly basis, but may be measured over longer periods of time (e.g., quarterly, annually), or as one-time events where appropriate.

Service level metrics are set based on the customer's requirements, the customer's historical data or sometimes via baselining. Monitoring tools, data capture and reporting methods should be specified for each service level at the inception of the arrangement. Service level accountability and/or credits may be delayed for a stabilisation period in certain instances.

There are often two or more classes of service levels, and each service level may have single or multiple metrics depending upon the complexity of the chosen methodology. The more critical service levels are tracked and measured and bear credits if the supplier's performance fails to meet the applicable target. Other service level objectives may be tracked and measured, but not result in credits. Customers usually have the periodic right to reclassify service levels as credit-bearing or not and to reconfigure the allocation of credits across the service levels. In some arrangements, there are other general reporting metrics that are tracked, measured, and reported, but are not eligible to be promoted to credit-bearing service levels.

Service level credits are reductions of the fees paid by the customer if the supplier fails to meet the service levels. Importantly, these service level credits are not characterised as penalties, which are generally unenforceable, or as liquidated or exclusive remedies. Rather, service level credits are most often treated as a credit against the customer's damages.

There are many different methods for calculating service level credits, but the most significant factor related to service level credits is the amount at risk if the supplier fails to adequately perform the services. Generally, that amount is defined as a percentage of monthly or annual fees, ranging from 10% to 15%, with outliers in exceptional circumstances. In more complicated transactions, the customer may have the right to over allocate a percentage pool across the credit-bearing service levels, with the pool typically ranging from 150% to 275% of the amount at risk, but aggregate credits payable are always bounded by the amount at risk. In some instances, the supplier is provided the right to "earn-back" the service level credit for continued performance at or above the target level.

11 Customer Remedies

11.1 What remedies are available to the customer under general law if the supplier breaches the contract?

Customers are entitled to recover proven, direct damages for breach of contract. What constitutes a direct damage is a common law question the answer to which varies from state to state, with some states having a more well-developed body of common law lending more predictability to the outcome of potential recovery. Outsourcing contracts frequently include:

- A definition of what constitutes recoverable "direct damages" to lend predictability to the types of damages that are recoverable, including the cost of cover and other foreseeable damages that would result from a supplier breach.
- A negotiated monetary damages cap on amounts that would otherwise be recoverable under common law for breach of contract (typically ranging from 12 to 24 months' fees under the contract with outliers in exceptional circumstances).
- Disclaimers of indirect, consequential and punitive damages and often of lost profits, reputational harm, diminution in value and similar damages to a party's business.
- Exclusions from both the monetary damages caps and the disclaimers of indirect damages, often with a separate, higher cap (typically ranging from 24 to 48 months' fees under the contract with outliers in exceptional circumstances) for certain types of damages and indemnities (e.g., for data breaches) and with other damages and indemnities not being subject to any limit (e.g., for gross negligence and willful misconduct).

In addition, equitable remedies (e.g., injunctive relief) may be available where monetary damages are not sufficient to make the customer whole and other conditions are satisfied, and additional common law remedies (e.g., rescission) also may be available.

11.2 What additional protections could be included in the contract documentation to protect the customer?

Outsourcing contracts often include the following additional customer leverage mechanisms and remedies:

- The ability to withhold a portion of the fees when there is a scope dispute.
- The right to step-in and correct supplier performance failures and to recover the incremental costs of stepping in.
- The right to set off amounts in dispute and credits and other amounts due to the customer against the charges under the contract (sometimes subject to an escrow requirement above a certain threshold or, less commonly, an outright cap).
- Service levels as described in section 10.
- A defined acceptance process, with no cost repair, cover, and termination remedies for transition and other one-time deliverables that are not provided in an acceptable fashion.
- Milestone payments and sometimes credits to incentivise timely and proper completion of transition services and deliverables.
- The right to approve and request removal or replacement of personnel or subcontractors for reasonable cause.
- A prohibition against intentional breach (abandonment) by the supplier and injunctive relief and enhanced financial recovery for same.
- A guaranty of payment and performance from the ultimate parent company of the supplier.
- The termination rights described at section 13.
- Caps on charges/increases to charges and benchmarking and other market price protection mechanisms as described in question 5.2.
- An express obligation for the parties to continue to perform during dispute resolution.

11.3 What are the typical warranties and/or indemnities that are included in an outsourcing contract?

Warranties customarily are limited to express warranties and relate to:

- Authority to enter into the contract and absence of material litigation (mutual).
- The supplier and its personnel having the proper experience to perform.
- That the supplier perform in a skillful, diligent and workman-like manner consistent with industry standards.
- Supplier commitments regarding the efficiency and quality of services.
- Compliance with applicable laws, rules and regulations (mutual).
- Supplier's compliance with defined customer policies (which usually express legal compliance obligations specific to the customer).
- Warranty of non-infringement (often mutual).

Indemnities are customarily limited to third-party claims and typically cover claims arising out of or related to:

- Infringement or misappropriation of intellectual property rights.
- Breaches of intellectual property, confidentiality and data security obligations.
- Breaches of applicable laws or of customer policies, and breaches of the contract that result in a breach of the law.
- Injury, death and damage to property resulting from negligence or willful misconduct.
- Gross negligence, willful misconduct and fraud.
- Claims by a party's employees or subcontractors.
- A party's tax liability.
- Supplier abandonment (see question 11.2).

12 Insurance

12.1 What types of insurance should be considered in order to cover the risks involved in an outsourcing transaction?

Customers typically require the supplier to obtain and provide insurance coverages that generally cover the risks attendant with the services being provided. These coverages will often include worker's compensation, commercial general liability, errors and omissions, professional liability, cyber-security/data beach and umbrella coverages. The scope of the insurance will usually cover the supplier's performance, including its affiliates and often its subcontractors.

13 Termination

13.1 How can a party to an outsourcing agreement terminate the agreement without giving rise to a claim for damages from the terminated party?

An outsourcing contract will generally include express customer and supplier termination rights. These termination rights will, when properly invoked and exercised, enable the applicable party to terminate the agreement without giving rise to a claim for unspecified damages from the terminated party, but each party may have claims for damages independent of the termination itself.

13.2 Can the parties exclude or agree additional termination rights?

Yes. The parties can and typically do agree to limit the supplier's termination rights (often to non-payment by customer) and to additional customer termination rights in their outsourcing contracts. A sampling of these additional customer termination rights might include: (1) a right to terminate for convenience subject to payment of an express termination charge; (2) a right to terminate for the supplier's insolvency; (3) a right to terminate for repeated or significant service level failures; (4) a right to terminate for persistent, uncured breaches of other material aspects of the arrangement; (5) a right to terminate for a breach of the agreement's confidentiality and data security requirements; (6) a right to terminate based on the supplier's abandonment; and (7) a right to terminate for other material breaches that remain uncured for more than 30 days. In addition to the foregoing termination rights, an outsourcing contract may also include certain rights, exercisable by the customer upon termination or expiration of the arrangement. Those rights almost always include a post-expiration/termination wind down period during which the customer can continue to receive the services and request other cooperation to effectively repatriate or transition services to a replacement provider and sometimes include the right to purchase or acquire the assets and other resources used by the supplier in the performance of the outsourced services.

13.3 Are there any mandatory local laws that might override the termination rights that one might expect to see in an outsourcing contract?

In the absence of fraud or other misconduct, there are generally no mandatory local laws that would act to override the termination rights that one might expect to see in an outsourcing contract. Nevertheless, customers in regulated industries such as the financial services industry may be subject to enforcement actions by their regulators if any outsourced service is not performed in strict compliance with applicable regulations. As a result of this regulatory backdrop, certain clients in regulated industries may include the right to terminate an outsourcing contract if required by any laws, rules or regulations applicable to the regulated customer or by any changes in the same.

14 Intellectual Property

14.1 How are the intellectual property rights of each party protected in an outsourcing transaction?

The intellectual property rights (IP) of each party are typically protected by the terms of the outsourcing contract and specific statutory protections for certain IP (e.g., patents, copyrights and trademarks).

The licences and allocation of IP ownership under an outsourcing contract vary based on the type and scope of services being provided. It is typical for the customer and supplier to retain ownership of the IP that they bring to the arrangement as well as any improvements or derivative works thereof. For net new developments, the scope of the arrangement will dictate the allocation of ownership.

During the term of the outsourcing contract, each party will licence to the other party its IP that is necessary to perform or receive the services, as applicable. There are several instances in which the customer will receive perpetual licences to the supplier's IP. These licences often relate to IP that is necessary for the customer to continue operations post-termination/expiration or to IP that is embedded within, or is otherwise necessary for the use and maintenance of, the customer's software and systems, and other deliverables.

14.2 Are know-how, trade secrets and other business critical confidential information protected by local law?

Generally, know-how, trade secrets and other business critical confidential information are protected by statute and by common law. In particular, 48 states have adopted some form of the Uniform Trade Secret Act protecting trade secrets at the state level. In the other two states, trade secrets are protected by common law. In addition, trade secrets may be protected under certain other federal laws. In most instances, the outsourcing contract includes language protecting know-how, trade secrets and other business critical confidential information.

14.3 Are there any implied rights for the supplier to continue to use licensed IP rights post-termination and can these be excluded from the agreement?

In most outsourcing contracts, the parties agree to broad disclaimers of implied rights that would permit the supplier to continue using the customer's IP post-termination. However, the supplier may negotiate the right to continue using such IP rights into the arrangement, and there is often an exception included in the outsourcing contract for the residual knowledge retained in the unaided minds of the supplier personnel (and the customer personnel), provided that the use of such IP does not violate a registered IP right (e.g., copyright, patent), data privacy or other similar exclusions.

14.4 To what extent can the customer gain access to the supplier's know-how post-termination and what use can it make of it?

Typically, the customers do not have the right to use or access any of the supplier's know-how post-termination, unless such rights are negotiated as part of the outsourcing contract, as described above. With regard to specific tools or other know-how used by the supplier to provide the services, if these tools and know-how are commercially available, the customer can often obtain a separate licence post-termination. If these items are not commercially available, there often are commercially available alternatives. Please see question 13.2.

15 Liability

15.1 To what extent can a party limit or exclude liability under national law?

The interpretation and enforcement of clauses that seek to limit a party's liability are generally made at the state level, and not at the national or federal level. As a general rule, if the parties to an outsourcing contract are both sophisticated business entities dealing at arm's length, they are free under the laws of most states to negotiate both limits on liability and exclusions from liability in their outsourcing contracts. It should be noted, however, that some states view liability limitations in contracts less favourably than others, and the parties should, therefore, take care in their choice of governing law for their outsourcing contracts.

15.2 Are the parties free to agree a financial cap on liability?

Generally, yes. The parties to an outsourcing contract are free to agree to and seek enforcement of a financial cap on liability if the proposed cap on liability: (i) is reasonable in relation to the outsourcing services fees; (ii) generally relates to economic damages arising out of the negligent acts or default performance of either party; and (iii) would not otherwise violate public policy if enforced by a court.

In the ordinary course, the amount of the liability cap, the application of the liability cap to the services (that is, whether there will be separate liability caps for each Statement of Work or one aggregated cap for all services provided under the outsourcing contract as a whole) and any exclusions from the liability cap are among the most heavily negotiated matters in the outsourcing contract. See also question 11.1.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

Most outsourcing contracts resort first to informal dispute resolution between representatives of the parties and sometimes with escalation to management representatives before resorting to more formal dispute resolution – usually litigation or binding arbitration, although sometimes mediation is a precursor to litigation. Contracts will often specify the federal and/or state courts for the resolution of litigated disputes, taking into account facts relevant to personal jurisdiction requirements under federal and state law. U.S. customers with foreign-domiciled suppliers often prefer arbitration, with the preferred arbitral rules and tribunal varying based upon where the parties are domiciled and other factors. If arbitration is the chosen means of dispute resolution, the parties will usually reserve certain matters for litigation (e.g., claims for injunctive relief or related to confidentiality or intellectual property).

17 Good Faith

17.1 Is there any overriding requirement for a customer and supplier to act in good faith and to act fairly according to some objective test of fairness or reasonableness under general law?

The common law of most states imposes an implied duty of good faith and fair dealing on the parties to a contract. The meaning of those terms is not objective and is determined by the state law that governs the contract. It is customary for outsourcing contracts to include a more definitive, express covenant for the parties to cooperate and deal with each other reasonably and in good faith to effect the purposes of the contract.

Sean Christy is a trusted business and legal advisor to many public and privately-held companies in complex business process outsourcing (BPO) and information technology outsourcing (ITO) transactions; strategic IT products and service; software licensing, maintenance and development agreements, including software as a service (SaaS) and cloud computing arrangements; internet-related and other technology-based service agreements; and other strategic procurements. He represents clients in their most critical strategic initiatives, ranging from global transactions by multinational corporations to the core business deals of early stage start-up companies.

Sean's role as a business and commercial advisor to his clients is often a critical component in his clients' success. He is known for providing guidance on strategic direction, analysing client operations, selecting suppliers, scope, pricing, providing post-transaction support, counseling on trans-governance disputes, audit defence, and other key commercial issues his clients face throughout the lifecycle of their deals.

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Chuck Hollis co-leads BCLP's Global Outsourcing Group, and has over 20 years of experience as a technology, commercial and outsourcing attorney handling a range of commercial and technology arrangements globally.

Chuck supports a diverse client base in the financial services, hospitality, energy, healthcare, and consumer products/retail industries, among others. His experience includes not only traditional outsourcing services (ITO, BPO, ADM), but also the purchase and implementation of cloud services, broad scale implementation of ERP, SaaS, XaaS and other technology and software platforms. In many cases, these arrangements are associated with corporate transactions, joint ventures and divestitures and extend throughout the Americas, EMEA and Asia. Chuck also actively counsels clients with regard to software audits, disputes, realignment and workouts related to outsourcing and technology arrangements.

Chuck received his Bachelor's in mechanical engineering from the Georgia Institute of Technology and his J.D. from the University of South Carolina School of Law.

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Derek Johnston's practice focus has three aspects:

- customer side offshore and onshore outsourcing transactions including business process outsourcing (BPO), information technology outsourcing (ITO), application development maintenance (AD/M), human resources outsourcing (HRO) arrangements, software as a service (SaaS) and other XaaS and cloud arrangements;
- software systems acquisition and implementation transactions;
- and transition services arrangements in merger and acquisition transactions.

Derek has over 20+ years of experience practising in the financial services, hospitality, restaurant, franchise, consumer products, electronics, utility, energy and online data/analytics industries.

The geographical coverage of his engagements includes North and South America, Europe, Asia, the Middle East and Africa.

Before joining Bryan Cave, Derek was a partner in other international law firms in their outsourcing, software systems integration and capital markets groups/private equity.

Derek received his bachelors in international relations from Brown University and his J.D. from Northwestern University School of Law.

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With over 1,400 lawyers in 31 offices across North America, Europe, the Middle East and Asia, Bryan Cave Leighton Paisner LLP is a fully integrated global law firm that provides clients with connected legal advice, wherever and whenever they need it. The firm is known for its relationship-driven, collaborative culture, diverse legal experience and industry-shaping innovation and offers clients one of the most active M&A, real estate, financial services, litigation and corporate risk practices in the world.

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