

TABLE OF CONTENTS

CHAPTER 1

Overview of Outsourcing

§ 1.01	Outsourcing Defined	1-2
§ 1.02	Reasons Customers Elect to Outsource	1-5
§ 1.03	Types of Outsourcing Transactions	1-7
	[1] Information Technology	1-7
	[a] Applications Development and Maintenance	1-7
	[b] Information Technology Infrastructure	1-7
	[2] Business Process Outsourcing	1-8
	[3] Knowledge Process Outsourcing	1-9
	[4] Legal Process Outsourcing	1-10
	[5] Other Transactions Sometimes Described as “Outsourcing”	1-11
	[a] Manufacturing	1-11
	[b] Software as a Service	1-12
	[c] Cloud Computing	1-12
	[i] Elements of Cloud Computing	1-13
	[ii] Cloud Computing Benefits	1-13
	[iii] Cloud Computing: Legal and Business Risks	1-14
§ 1.04	Getting Started	1-18
	[1] Objectives for the Arrangement	1-18
	[2] Outsourcing Strategy	1-18
	[a] Why Outsourcing	1-18
	[b] What to Outsource	1-19
	[c] Who to Engage to Outsource	1-19
	[d] Where to Outsource	1-19

CHAPTER 2

Outsourcing Team and Process

§ 2.01	Deal Team Roles and Objectives	2-2
--------	--	-----

OUTSOURCING: LAW & BUSINESS

	[1]	Customer's Internal Team	2-4
	[2]	External Technical Advisers	2-5
	[a]	Assist Customers with Evaluating Costs and Benefits of Outsourcing Specific Functions	2-6
	[b]	Conduct Bid Process	2-7
	[c]	Know "Market" for Key Business Terms	2-8
	[d]	Help Design Key Service Documents	2-9
	[e]	Help Structure and Negotiate Pricing	2-9
	[3]	Outside Counsel	2-10
	[a]	Typically, Some Combination of Outside Counsel and Internal Legal Team	2-10
	[b]	Assist with Structuring Deal	2-10
	[c]	Draft Contract and Negotiate with Provider	2-11
	[d]	Know "Market" for Key Legal and Business Terms	2-11
	[e]	Know Sensitivities of Providers and Appropriate Middle Ground	2-11
§ 2.02		Proper Scope	2-13
	[1]	Identification of Scope	2-13
	[2]	Identification of Proper Retained Scope	2-14
§ 2.03		Sole Source or Competitive Bid	2-15
§ 2.04		Request for Proposal and Selection Process	2-16
	[1]	Preparation of Request for Proposal Materials	2-17
	[a]	Solution	2-17
	[b]	Financial	2-18
	[c]	Legal	2-18
	[d]	Human Resources	2-19
	[2]	Initial Price Proposals	2-19
	[3]	Oral Presentations and Account Team Introduction	2-19
	[4]	References	2-20
	[5]	Scoring and Down-Selection	2-20
	[6]	Due Diligence	2-21

CHAPTER 3**Services**

§ 3.01		Services Scope and Service Description	3-2
	[1]	Identifying the In-Scope Services	3-3

TABLE OF CONTENTS

[2] Drafting the Service Description 3-4

 [a] Service Description Schedule 3-4

 [i] The Attorneys’ Role 3-4

 [ii] Description Style 3-5

 [iii] Specificity vs. Generalization. 3-6

 [b] Sweep Clauses 3-6

 [i] Services “Inherent” in the
 Service Description. 3-6

 [ii] Former Customer Employees’
 Responsibilities 3-7

 [iii] Services in a Base Case 3-7

 [iv] Standard Practices in the
 Service Provider’s
 Industry 3-8

 [v] Standards for Internal
 Performance of Services. 3-8

 [vi] Practical Limits on Sweep
 Clauses 3-8

 [c] Goals and Objectives 3-9

§ 3.02 Service Recipients. 3-10

§ 3.03 Transition. 3-11

§ 3.04 Customer Responsibilities. 3-12

 [1] Description of Customer Responsibilities 3-12

 [2] Remedies for Failure to Meet Customer
 Responsibilities. 3-12

 [3] Customer Equipment and Facilities 3-13

§ 3.05 Interface Manual and Policies and Procedures
 Manual 3-14

§ 3.06 Service Locations 3-15

 [1] Customer Service Locations 3-15

 [2] Service Provider’s Service Locations 3-15

 [3] Work from Home Locations. 3-16

§ 3.07 Changes and Additions to Services 3-16.1

 [1] Changes to In-Scope Services 3-16.1

 [2] Projects 3-18

 [3] New Services. 3-18

§ 3.08 Knowledge Sharing. 3-20

§ 3.09 Third-Party Consents. 3-21

 [1] Consent for Contract Assignments. 3-21

 [2] Consent for Service Provider’s Use in
 Performing Services. 3-21

 [3] Consent Costs 3-22

§ 3.10 Disaster Recovery and Business Continuity 3-24

§ 3.11 Subcontracting 3-27

§ 3.12 Transformation 3-29

§ 3.13 Transfers of Customer Assets and Personnel 3-30.1

§ 3.14 Managed Contracts 3-32

§ 3.15	Step-In Rights	3-33
§ 3.16	Termination Assistance Services	3-34

CHAPTER 4

Fees

§ 4.01	Introduction	4-2
§ 4.02	Establishing the Business Case	4-4
	[1] Developing the Base Case	4-5
	[2] Leveraging the Base Case	4-6
	[3] Determining the Cost of Outsourcing	4-7
	[a] Ongoing Service Fees	4-7
	[b] Transition Costs	4-8
	[c] Retained Costs	4-9
	[d] Planning and Execution Costs	4-10
§ 4.03	Ongoing Service Fees	4-11
	[1] Common Fee Methodologies	4-12
	[a] Fixed Fee Methodology	4-12
	[b] Volumetric Pricing – Labor Based	4-12
	[c] Volumetric Pricing – Resource Unit-Based	4-13
	[i] Utility/Price Times Quantity (PxQ) Pricing	4-14
	[ii] Baseline/ARC-RRC Pricing	4-15
	[d] Time and Materials	4-17
	[e] Cost Plus	4-17
	[f] Gainsharing/Savings-Based	4-18
	[2] Choosing a Fee Methodology	4-19
	[3] Evaluating Proposed Fees	4-20
	[4] Minimum Commitments	4-22
§ 4.04	Billing and Payment	4-24
	[1] Timing of Invoice and Payment Terms	4-24
	[a] Timing of Invoices and Payment	4-24
	[b] Late Payment Charges/Early Payment Discounts	4-25
	[2] Disputes and Right to Withhold Payment	4-25
	[3] Financial Engineering	4-26
§ 4.05	Adjustments for Changed Economic Conditions	4-28
	[1] Inflation Adjustment/COLA	4-28
	[2] Currency Exchange Rate Fluctuations	4-29
§ 4.06	Customer Price Protection	4-31
	[1] Benchmarking	4-31
	[2] Most Favored Customer	4-33
§ 4.07	Expenses	4-34
§ 4.08	Taxes	4-35
	[1] Transaction Taxes	4-37
	[2] Withholding Taxes	4-38
	[3] Asset Transfer Taxes	4-39

TABLE OF CONTENTS

xvii

[4] Permanent Establishment 4-39
[5] Transfer Pricing Issues 4-40

CHAPTER 5

Service Levels

§ 5.01 Overview 5-2
§ 5.02 Service Level Metrics and Reporting. 5-5
 [1] Selecting SLA Metrics 5-5
 [2] Types of SLA Metrics 5-6
 [a] Volume of Work Metrics. 5-6
 [b] Quality Metrics. 5-7
 [c] Responsiveness Metrics 5-7
 [d] Efficiency Metrics 5-8
 [e] End-to-End SLAs 5-8
 [3] Example SLA Metrics. 5-8
 [4] SLA Metric Measurability 5-9
 [5] Setting SLA Metric Performance Levels. 5-10
 [6] Number of SLA Metrics. 5-11
 [7] Monitoring and Reporting. 5-11
 [8] When SLA Metrics Are Effective 5-12
 [9] SLA Metrics with and Without Credits. 5-13
§ 5.03 Performance Credits, Termination and Other Remedies. 5-14
 [1] Types of Remedies 5-14
 [a] Root Cause Analysis and Other Remedial Actions. 5-15
 [b] Performance Credits. 5-15
 [i] Performance Credits Amounts and Caps 5-16
 [ii] When Performance Credits Are Issued. 5-16
 [iii] Calculating Performance Credits 5-17
 [iv] Performance Credits Under Contract Law (Liquidated Damages and Unenforceable Penalties). 5-19
 [c] Termination. 5-21
 [d] Breach of Contract. 5-21
 [2] Earnbacks and Performance Bonuses. 5-22
 [3] Limitations on Remedies 5-23
 [a] Relief Events 5-23
 [b] Customer Dependencies 5-23
 [c] Single Event Causing Multiple Failures. 5-23
§ 5.04 Changes and Improvement to Service Levels 5-24

CHAPTER 6

Personnel and Human Resource Matters

§ 6.01	Overview	6-2
§ 6.02	Service Provider Staff.	6-4
	[1] Co-employment/Joint Employment Issues	6-4
	[2] Warranties: Qualified and Reasonably Skilled	6-6
	[3] Pre-Employment Screening: Background Checks, Drug Screening, and Authorization to Work	6-6
	[4] Retention Goals	6-8
	[5] Customer's Right to Request Replacement of Service Provider Staff	6-9
	[6] Provider Staff Hired Through Employment Visas	6-9
	[7] Non-Solicitation	6-12
§ 6.03	Key Personnel	6-14
	[1] Requirements of Key Personnel	6-14
	[2] Relationship Manager	6-15
§ 6.04	Human Resource Transition Issues	6-16
	[1] Human Resource Due Diligence	6-16
	[2] Typical Personnel and Human Resource Terms	6-18
	[3] The Transition	6-21
§ 6.05	U.S. Transfer and Dismissal Laws	6-22.3
	[1] Federal Worker Adjustment and Retraining Notification Act ("WARN") Notification	6-22.3
	[a] Federal WARN Act Requirements	6-23
	[i] Covered Employer	6-23
	[ii] Mass Layoff or Plant Closure	6-24
	[iii] Notice Requirements	6-25
	[b] Determining Whether Outsourcing Results in an Employment Loss	6-26
	[c] Failure to Provide Federal WARN Notice	6-29
	[2] State Mini-WARN Acts	6-29
	[3] Employment Retirement Income Security Act ("ERISA")	6-31
	[4] Health Care Continuation ("COBRA") Notice	6-32
	[5] Employees on Leave of Absence	6-32
§ 6.06	U.S. Unions and Collective Bargaining Agreements	6-33

TABLE OF CONTENTS

xix

§ 6.07	European Union Transfer and Dismissal Laws	6-35
	[1] Acquired Rights Directive: Employees	
	Go with the Work	6-35
	[a] Personal and Material Scope	6-36
	[b] Territorial Scope	6-37
	[c] Obligations Under the Directive	6-38
	[d] Transfer of an Undertaking in an Outsourcing Transaction	6-41
	[e] Application to Collective Agreements and Pensions	6-44
	[f] Key Protections in Outsourcing Transactions	6-45
	[2] European Works Council Directive	6-45
	[3] Redundancy Obligations	6-47

CHAPTER 7

Term and Termination

§ 7.01	Term	7-2
	[1] Initial Term	7-2
	[2] Renewal Term	7-4
§ 7.02	Termination and Expiration	7-6
	[1] Termination and Expiration Overview	7-6
	[2] Termination for Convenience	7-7
	[a] Termination Right	7-7
	[b] Termination for Convenience Fee	7-8
	[3] Termination for Cause	7-11
	[a] Material Breach	7-11
	[b] Repeated Non-Material Breaches	7-14
	[c] Other “For Cause” Termination Rights	7-14
	[d] Pre-Termination Process	7-15
	[4] Other Common Termination Rights	7-16
	[a] Change of Control	7-16
	[b] Bankruptcy and Negative Financial Condition	7-17
	[c] Change in Laws	7-18
	[d] Loss of Key Personnel or High Turnover	7-18
	[e] Benchmarking	7-18
	[f] <i>Force Majeure</i>	7-19
	[5] Scope of Termination	7-19
	[6] Termination as Renegotiation Leverage	7-19
	[7] Insourcing	7-20
§ 7.03	Termination and Expiration: Unwinding the Outsourcing Arrangement	7-22

[1]	Termination Assistance	7-22
[2]	Exit Activities	7-28

CHAPTER 8

Risk Management Issues

§ 8.01	Generally	8-1
§ 8.02	Audit	8-3
	[1] Identifying the Scope of the Audit.	8-6
	[2] Fees Audit Right	8-7
	[3] Audit of General Compliance with Agreement.	8-9
	[4] Evolution of Audit Standards	8-9
	[5] ISAE 3402 and SSAE 18 Audits	8-10
	[6] Differences Between SSAE 16 and SSAE 18 Standards, and SSAE 18 and ISAE 3402 Standards	8-12
	[7] SOC Reports	8-14
	[8] Service Provider Internal Reports	8-16
§ 8.03	Insurance	8-17
§ 8.04	Security	8-21
	[1] General Security Requirements	8-22
	[2] Physical and Other Non-Technical Security Measures	8-23
	[3] Security Assessments	8-24
	[4] Comprehensive Information Security Program.	8-25
	[5] Offshore Security Concerns	8-26
	[6] Incident Plans	8-28
	[7] Additional Security Measures.	8-28
§ 8.05	Guarantee.	8-29
§ 8.06	Transparency in AI Use	8-31

CHAPTER 9

Intellectual Property

§ 9.01	Introduction	9-4
§ 9.02	Overview of Intellectual Property Law	9-5
	[1] Copyrights	9-5
	[a] Subject Matter of Copyrights.	9-5
	[i] Copyrights in Software	9-5
	[ii] Copyrights in Data	9-7
	[b] Idea vs. Expression.	9-7
	[c] Identifying the Copyright Holder	9-8
	[i] Authors and Transferees	9-8
	[ii] Work Made for Hire	9-9

TABLE OF CONTENTS

- [d] Exclusive Rights of Copyright Holder 9-10
- [e] Moral Rights 9-11
- [f] Infringement 9-11
 - [i] Elements of Infringement Claim 9-11
 - [ii] Fair Use 9-13
 - [iii] Special Considerations in Software Infringement 9-14
 - [iv] Audiovisual Works Subsisting in Software 9-15
- [g] Registration 9-16
- [h] Remedies 9-17
- [i] Comparison with Other Intellectual Property Rights 9-18
- [j] Copyright Ownership of AI-Generated Works 9-18
- [2] Trade Secrets 9-19
 - [a] Subject Matter 9-20
 - [b] Misappropriation 9-22
 - [c] Remedies 9-23
 - [i] Injunctive Relief 9-23
 - [ii] Inevitable Disclosure Doctrine 9-23
 - [iii] Damages 9-24
 - [iv] Attorney Fees 9-25
 - [v] Civil Seizure 9-25
 - [d] Comparison with Other Intellectual Property Rights 9-25
- [3] Patents 9-26
 - [a] Subject Matter 9-26
 - [b] Statutory Bars 9-26
 - [c] Patent Application Process 9-27
 - [d] Exclusive Rights 9-28
 - [e] Employer’s Rights in Inventions 9-29
 - [i] Hired-to-Invent Doctrine 9-29
 - [ii] Shop Right 9-29
 - [f] Remedies 9-30
 - [i] Injunctive Relief 9-30
 - [ii] Damages 9-31
 - [g] Comparison with Other Intellectual Property Rights 9-31
- [4] Trademarks 9-31
- [5] Information Rights Under Contracts 9-32
 - [a] License Agreements 9-33
 - [b] Confidentiality Agreements 9-33

§ 9.03	Allocation of Intellectual Property Rights in the Outsourcing Relationship	9-35
[1]	Intellectual Property Inventory	9-35
[2]	New Intellectual Property Arising from the Outsourcing	9-36
[a]	Resolving the Ownership Issue	9-38
[i]	Resolution by Intellectual Property Categorization	9-38
[ii]	Resolution in Advance Regarding Individual Items of Intellectual Property	9-38
[iii]	Catch-All General Principle for Deciding Ownership	9-39
[iv]	Joint Ownership	9-39
[b]	Implementing Agreed Ownership Allocation	9-41
[i]	Ownership by the Customer	9-41
[ii]	Licenses to Embedded Preexisting Components	9-42
[iii]	Ownership by the Service Provider	9-42
[iv]	Securing Ownership from Employees and Contractors	9-43
[c]	Protection of Non-Ownning Party's Interests	9-43
[i]	License to Customer of Service Provider-Owned Developments	9-44
[ii]	License Back to Service Provider of Customer-Owned Development	9-45
[iii]	Restrictions on Use by Owner	9-45
[3]	Intellectual Property Owned by the Parties	9-45
[a]	Retained Ownership	9-45
[b]	Assigned Ownership	9-46
[4]	Intellectual Property Owned by Third Parties	9-46
[a]	Identifying Consent Issues	9-46
[i]	Limits on Assignment	9-47
[ii]	Limits on Users	9-47
[iii]	Limits on Scope of Use	9-48
[iv]	Confidentiality and Other Restrictions	9-48
[b]	Obtaining Consents	9-49

TABLE OF CONTENTS

xxiii

	[5]	Licenses to Be Granted by the Parties	9-50
		[a] Licenses Granted by Service Provider	9-50
		[b] Licenses Granted by Customer	9-51
	[6]	Warranties About Rights in Intellectual Property	9-52
	[7]	Customer’s Control of IP Used to Provide the Services	9-53
§ 9.04		Allocation of Liability for Third-Party Infringement Claims	9-55
	[1]	Principles for Allocating Liability	9-55
	[2]	Warranties and Indemnification	9-56
		[a] Warranties of Non-Infringement	9-56
		[i] Implied Warranties	9-56
		[ii] Express Warranties	9-58
		[iii] Warranty Compared with Indemnification	9-58
		[b] Infringement Indemnification	9-59
		[i] Interpretation and Enforcement	9-60
		[ii] Who is Indemnified	9-60
		[iii] Variability in Scope of Indemnification	9-61
	[3]	Remedies for Enjoined Use	9-64
§ 9.05		Special Issues Relating to Source Code	9-66
	[1]	Significance of Source Code	9-66
	[2]	Source Code Escrows	9-67
	[3]	Open Source Software	9-69
§ 9.06		Offshore Intellectual Property Considerations	9-71
	[1]	Offshore Intellectual Property Protection	9-72
		[a] China	9-72
		[b] India	9-73
	[2]	Precautions	9-74
§ 9.07		Confidentiality Terms	9-78
	[1]	Parity of Terms	9-78
	[2]	Definition of Confidential Information	9-78
		[a] Labeling Requirement	9-78
		[b] Rule of Reason	9-79
		[c] Confidential Information Broadly Defined	9-79
	[3]	Limits on Use and Disclosure	9-80
	[4]	Customary Exceptions to Confidentiality Obligations	9-80
	[5]	Effect of Termination	9-81
	[6]	Residual Rights	9-82
	[7]	Subpoenas and IT Service Providers	9-82
§ 9.08		Blockchain	9-84

[1]	Introduction to Blockchains	9-84
[2]	Blockchain and Outsourcing.	9-84

CHAPTER 10

Privacy and Data Security

§ 10.01	Overview	10-3
§ 10.02	Key Privacy and Data Security Regulations	10-4
[1]	Privacy in the E.U.	10-4
[a]	General Data Protection Regulation	10-4
[i]	Data Portability	10-6
[ii]	Right to Be Forgotten	10-6
[iii]	Breach Notification	10-6
[iv]	Privacy by Design and Default.	10-7
[v]	Data Protection Officer	10-7
[b]	Transfer of Personal Data to Third Countries	10-8
[i]	Derogations	10-8
[ii]	<i>Schrems II</i> —Invalidation of Privacy Shield.	10-9
[iii]	Model Contractual Clauses	10-9
[iv]	Binding Corporate Rules.	10-12
[c]	Enforcement and Remedies	10-14
[d]	Outsourcing Implications	10-15
[2]	Privacy in the U.S.	10-16
[a]	California	10-17
[b]	Virginia	10-19
[c]	Colorado	10-21
[d]	Connecticut	10-24
[e]	Florida.	10-26
[f]	Utah.	10-29
[g]	Forthcoming State Privacy Laws.	10-31
[3]	Gramm-Leach-Bliley Financial Services Modernization Act (1999)	10-31
[a]	Financial Privacy Rule	10-32
[b]	Safeguards Rule	10-34
[c]	Pretexting Provisions	10-35
[d]	Outsourcing Implications	10-35
[4]	Health Insurance Portability and Accountability Act (1996)	10-37
[a]	Privacy Rule	10-38
[b]	Transactions and Code Sets Rule	10-40
[c]	Security Rule	10-41
[i]	Administrative Safeguards.	10-41

TABLE OF CONTENTS

		[ii] Physical Safeguards	10-42
		[iii] Technical Safeguards	10-42
		[d] Unique Identifiers Rule	10-43
		[e] Enforcement Rule	10-44
		[f] Outsourcing Implications	10-44
[5]	Data Breach Laws		10-46
	[a] State Laws		10-47
	[b] Federal Laws		10-49
		[i] Health Information Technology for Economic and Clinical Health Act (2009)	10-49
		[ii] Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice	10-51
		[iii] Securities and Exchange Commission	10-52.1
		[c] International Laws	10-52.2
		[d] Outsourcing Implications	10-52.3
[6]	Data Security Laws and Standards		10-52.4
	[a] State Laws		10-52.4
	[b] FTC Enforcement Under the Federal Trade Commission Act		10-52.7
	[c] Payment Card Industry Data Security Standard		10-52.8
	[d] Outsourcing Implications		10-52.11
§ 10.03	Other Privacy and Data Security Regulations		10-52.12
	[1] Children’s Online Privacy Protection Act (1998)		10-52.12
		[a] Summary of the Law	10-52.12
		[b] Outsourcing Implications	10-53
	[2] Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act (2003)		10-53
		[a] Summary of the Law	10-53
		[b] Outsourcing Implications	10-54
	[3] Electronic Communications Privacy Act (1986) and Wiretap Act		10-54
		[a] Summary of the Law	10-54
		[b] Outsourcing Implications	10-55
	[4] Electronic Funds Transfer Act (1978)		10-55
		[a] Summary of the Law	10-55
		[b] Outsourcing Implications	10-55
	[5] Fair Credit Reporting Act (1970)		10-55
	[6] Fair Debt Collection Practices Act		10-55

OUTSOURCING: LAW & BUSINESS

[7]	Family Educational Rights and Privacy Act (1974)	10-56
	[a] Summary of the Law	10-56
	[b] Outsourcing Implications	10-56
[8]	Foreign Intelligence Surveillance Act (1978) and FISA Amendments Act (2008).	10-56
	[a] Summary of the Law	10-56
	[b] Outsourcing Implications	10-57
[9]	Freedom of Information Act (1974).	10-57
	[a] Summary of the Law	10-57
	[b] Outsourcing Implications	10-57

CHAPTER 11**Risk, Liability, and Selected Legal Protections**

§ 11.01	Risk in Outsourcing Transactions	11-3
§ 11.02	Indemnification	11-6
	[1] Generally	11-6
	[2] Coverage of Indemnity: Direct Claims vs. Third-Party Claims	11-8
	[3] Typical Indemnities	11-10
	[a] Intellectual Property	11-10
	[b] Human Resource Claims	11-11
	[c] Claims Resulting in Damage to Persons or Property	11-12
	[d] Breach of Assigned and Managed Contracts	11-13
	[e] Breach of Confidentiality and Data Privacy	11-14
	[f] Failure to Obtain or Comply with Required Consents	11-15
	[g] Violations of Law	11-15
	[h] Breach of Certain Representations, Warranties or Other Contractual Obligations	11-16
	[i] Tax Obligations	11-16
	[j] Claims Covered by Insurance	11-17
	[k] Compliance with Customer's Instructions	11-17
[4]	Indemnification Scope, Limitations and Procedures	11-18
	[a] Scope and Limitations	11-18
	[b] Indemnity Procedures	11-19
[5]	Advantages of Indemnity Rather Than a Warranty	11-20

TABLE OF CONTENTS

xxvii

§ 11.03	Limitation of Liability	11-24
	[1] Generally	11-24
	[2] Disclaimer of Consequential Damages	11-27
	[a] Recoverable Damages	11-27
	[b] Typical Damages Disclaimed	11-28
	[c] Categories of Damages	11-28
	[i] Incidental Damages	11-28
	[ii] Exemplary Damages	11-29
	[iii] Punitive Damages	11-29
	[iv] Indirect Damages	11-29
	[v] Special Damages	11-30
	[vi] Consequential Damages	11-30
	[d] Determining What Damages Are Direct vs. What Damages Are Consequential	11-31
	[e] “Lost Profits” Disclaimer	11-33
	[3] Cap on Direct Damages	11-33
	[a] Structuring the Liability Cap	11-33
	[b] Liability Cap Amount	11-34
	[4] Exemptions (Carve-Outs)	11-35
	[a] Structure of Exemptions	11-36
	[b] Common Exemptions	11-37
	[i] Indemnities	11-37
	[ii] Breach of Confidence/Data Privacy	11-38
	[iii] Bad Acts	11-40
	[iv] Violations of Law	11-42
	[v] Damages to People or Tangible Property	11-42.1
	[vi] Claims Covered by Insurance	11-42.1
	[vii] Compensation Owed to Either Party	11-42.1
	[5] Cloud Contracts	11-42.2
§ 11.04	Representations, Warranties and Covenants	11-43
	[1] Generally	11-43
	[2] Typical Warranties from the Customer	11-43
	[3] Typical Warranties from the Service Provider	11-44
	[a] Adequacy of Services	11-44
	[b] Conforming Deliverables	11-44
	[c] Personnel Warranties	11-44
	[d] Compliance with Law	11-45
	[i] Parties’ Concerns and Positions	11-45
	[ii] Common Approaches to Compliance with Law	11-46
	[iii] Related Obligations	11-47

OUTSOURCING: LAW & BUSINESS

	[e]	Updated Technology	11-47
	[f]	Authority	11-48
	[g]	Proper Licenses, Permits and Consents	11-48
	[h]	Non-Infringement	11-48
	[i]	No Viruses or Malicious Code	11-49
[4]		Warranty Disclaimers	11-50
[5]		Difference Between a Representation, a Warranty and a Covenant	11-52
[6]		Reasons Service Providers Limit Warranties	11-54
[7]		Cumulative Remedies vs. Sole and Exclusive Remedies	11-54
§ 11.05		Miscellaneous Legal Provisions	11-56
	[1]	<i>Force Majeure</i>	11-56
	[2]	Governing Law and Venue	11-60
	[a]	Importance of a Governing Law Provision	11-60
	[b]	Enforceability	11-60
	[c]	Determining an Appropriate Choice of Law	11-61
	[d]	Venue	11-62
[3]		Assignment and Delegation	11-62
	[a]	Interests of Outsourcing Contract Parties	11-62
	[b]	Default Contracting Rules	11-63
	[c]	Assignment Clauses	11-64
	[i]	Clauses Permitting Assignments and Delegations	11-64
	[ii]	Clauses Prohibiting Assignment and Delegation	11-64
[4]		Independent Contractors	11-67
[5]		Cumulative Remedies	11-67

CHAPTER 12**Transition**

§ 12.01		Preparing for Transfer of Responsibility	12-2
	[1]	Critical Handoff	12-2
	[2]	Steep Learning Curve	12-3
	[3]	Most Transitions Succeed, Eventually	12-4
	[4]	Focus on Transition Early	12-5
	[5]	Draft Transition Plan	12-6
§ 12.02		Transition Team	12-7
	[1]	Preliminary Team Members	12-7
	[2]	Key Traits of a Transition Manager	12-7

TABLE OF CONTENTS

xxix

§ 12.03	Types of Transitions	12-9
	[1] Lift and Shift	12-9
	[2] Transformation	12-9
	[3] Acquisition.	12-9
	[4] Simultaneous	12-10
	[5] Staggered	12-10
	[6] Transitions to a Multi-Sourced Environment	12-11
§ 12.04	Transition Plan	12-12
	[1] Generally	12-12
	[2] Topics Covered in the Transition Plan	12-12
	[a] Responsibilities	12-12
	[b] Tasks	12-13
	[c] Assets	12-14
	[d] Team	12-14
	[3] Milestones	12-15
	[4] Planning for Transition of Personnel	12-16
	[a] Retained Personnel	12-16
	[b] Career Development Potential	12-17
	[c] Additional Transition Plan Topics Relating to Transition of Personnel	12-17
§ 12.05	Transition Finance Issues	12-19
	[1] Transition Costs	12-19
	[2] Financing Transition Costs	12-19

CHAPTER 13

Governance

§ 13.01	Documenting and Effectively Implementing a Governance Structure	13-3
§ 13.02	Governance Organization	13-5
	[1] Customer Enterprise Level Governance.	13-5
	[2] Deal-Specific Governance.	13-6
§ 13.03	Reporting, Performance Dashboards and Document Repositories.	13-9
	[1] Reporting and Performance Dashboards	13-9
	[2] Document Repositories	13-11
§ 13.04	Customer Satisfaction Surveys	13-12
§ 13.05	Change Control Management	13-14

CHAPTER 14

Disputes

§ 14.01	Disputes Generally	14-3
---------	------------------------------	------

§ 14.02	Common Disputes and Causes	14-7
	[1] Disputes Originating Pre-Contract	14-9
	[a] Selection of Wrong Service Provider	14-9
	[b] Unachievable Expectations	14-10
	[c] Mismatched Goals	14-10
	[d] Low-Balling	14-10
	[e] Lack of Customer Preparation	14-11
	[f] Customized Versus Standard Delivery Solutions	14-12
	[g] Contentious Negotiations	14-12
	[2] Disputes Arising During Service Performance	14-13
	[a] Constant Change and Static Agreements	14-13
	[b] Lack of an Effective Customer Retained Organization	14-14
	[c] Overly Complicated or Ambiguous Contract Language	14-15
	[d] Performing Contrary to the Contract	14-16
	[e] Poor Performance by the Service Provider	14-16
	[f] Failed ERP Implementation	14-16
§ 14.03	Resolving Disputes	14-18
	[1] Governance	14-18
	[2] Contractual Informal Dispute Resolution	14-19
	[3] Mediation	14-20
	[4] Arbitration	14-21
	[5] Litigation	14-23
§ 14.04	Survey of Selected Outsourcing Litigation Matters	14-25
	[1] <i>Metavante Corp. v. Emigrant Savings Bank</i>	14-25
	[a] Reporting Requirements	14-25
	[b] Misrepresentation of Experience	14-25
	[2] <i>Sourcecorp BPS, Inc. v. Kenwood Records Management, Inc.</i>	14-26
	[a] Exclusivity Provision	14-26
	[b] Projected Volumes	14-26
	[3] <i>Penncro Associates, Inc. v. Sprint Spectrum, L.P.</i>	14-27
	[a] Consequential Damages	14-27
	[b] Minimum Commitment	14-27
	[4] <i>Former Employees of International Business Machines Corp. v. U.S. Secretary of Labor</i>	14-27

TABLE OF CONTENTS

[5] *Technical Support Services v. International Business Machines Corp.* 14-28

 [a] Service Level Agreements 14-28

 [b] Transfer of Employees 14-29

[6] *Sprint/United Management Co. v. International Business Machines Corp.* 14-29

[7] *Vertex Data Science Ltd. v. Powergen Retail Ltd.* 14-29

 [a] Quality of Service 14-29

 [b] Injunctive Relief to Compel Performance by the Parties 14-30

 [c] Arbitration Provision 14-31

[8] *Detroit Medical Center v. Provider Healthnet Services, Inc.* 14-31

[9] *Cable & Wireless PLC v. IBM United Kingdom Ltd.* 14-31

 [a] Benchmarking 14-32

 [b] ADR Escalation Clause 14-32

[10] *California State Automobile Association Inter-Insurance Bureau v. Policy Management Systems Corp.* 14-32

 [a] Waiver of Notice 14-32

 [b] Consequential Damages 14-33

 [c] Misrepresentation of Expertise 14-33

[11] *GB Gas Holdings Limited v. Accenture.* 14-33

 [a] Aggregation of Breaches 14-33

 [b] Consequential Damages 14-34

[12] *BSkyB Limited v. HP Enterprise Services UK Limited.* 14-34

 [a] Fraudulent Misrepresentation and Effectiveness of Integration Clause 14-34

 [b] Damages and Mitigation 14-35

[13] *Bank of Louisiana v. Sunguard Recovery Services, Inc.* 14-36

[14] *Iusacell, S.A. de C.V. v. International Business Machines Corp.* 14-36

[15] *Carlson, Inc. v. International Business Machines Corp.* 14-37

[16] *Ericsson Ltd. v. Hutchinson 3G UK Ltd.* 14-37

[17] *Epic Systems Corp. v. Tata Consultancy Services Ltd.* 14-38

 [a] Provider Security Failures 14-38

 [b] Customer Security Failures 14-38

[18] *Workgroup Technology Partners, Inc. v. Anthem, Inc.* 14-39

OUTSOURCING: LAW & BUSINESS

	[19]	<i>Perrero v. HCL America, Inc. and Walt Disney Parks and Resorts U.S., Inc.</i>	14-39
	[20]	<i>State of Indiana v. International Business Machines Corp.</i>	14-40
	[21]	<i>In Re Marriott International, Inc., Customer Data Security Breach Litigation.</i>	14-40
	[22]	<i>Atos IT Solutions and Services, Inc. v. ACT, Inc.</i>	14-40
	[23]	<i>Goonewardene v. ADP, LLC</i>	14-41
	[24]	<i>Wipro Limited, LLC v. State of Nebraska</i>	14-42
	[25]	<i>Reid Hospital and Health Care Services, Inc. v. Conifer Revenue Cycle Solutions, LLC</i>	14-42
	[26]	Other Disputes	14-42.1
§ 14.05		Special Considerations for India	14-43
	[1]	Dispute Resolution Mechanism Through Court Adjudication	14-43
		[a] Foreign Judgments	14-43
		[b] Interim Orders Issued by a Foreign Court.	14-44
		[c] Choice of Venue.	14-45
		[d] Choice of Law	14-45
	[2]	Dispute Resolution Mechanism Through Arbitration.	14-46
		[a] Foreign Awards	14-46
		[b] Domestic Awards	14-47
	[3]	Dispute Resolution Mechanism Through Mediation	14-48

CHAPTER 15**A Modern Approach to Outsourcing**

§ 15.01		Characteristics of the Legacy Outsourcing Market and Transactions.	15-4
	[1]	Limited to Information Technology Outsourcing.	15-4
	[2]	Single U.S.-Based Provider	15-4
	[3]	Long-Term Contracts	15-5
	[4]	Complicated Agreements	15-6
	[5]	Asset and Human Resource Transfers	15-7
	[6]	Exclusivity and Minimum Commitments	15-7
	[7]	Long Negotiations.	15-8
	[8]	High Transaction Costs for Customers	15-8
	[9]	Terminations Are Expensive and Risky.	15-9
	[10]	Rigid and Adversarial Process	15-10

TABLE OF CONTENTS

§ 15.02 Characteristics of the Modern Outsourcing Market 15-11

[1] Customers Are Outsourcing Many Areas of Their Businesses 15-11

[2] Non-U.S. and Niche Providers Increase Competition 15-12

[3] Multi-Provider Environments Are Common and Present Challenges 15-13

[4] Shorter Terms 15-14

[5] Fewer Personnel and Asset Transfers, and Captives 15-15

[6] No Exclusivity and Lower Minimum Commitments 15-17

[7] Termination is Less Expensive and Less Risky 15-17

[8] Robotic Process Automation and Cloud Computing Adoption 15-18

[a] Robotic Process Automation 15-18

[b] Cloud Computing 15-20

[9] Modern Characteristics Allow for More Companies to Outsource 15-20

§ 15.03 A Modern Approach: New Processes, Contracts and Governance 15-20.1

[1] Expedited and Flexible RFP Process 15-20.1

[a] Expedited RFP Process 15-21

[i] UseRFIs Differently or Not at All 15-21

[ii] Solidify Customer Needs Early 15-22

[iii] Sole Source or Narrow the Field of Service Providers Quickly 15-22

[iv] Include a Full Contract in the RFP 15-23

[v] Conduct a “Mini-Yellow Pad” Session Prior to RFP Issuance 15-24

[vi] Down-Select Based on Limited Criteria 15-24

[vii] Use an Electronic Reverse Auction 15-25

[viii] Start Due Diligence Earlier 15-25

[ix] Engage Legal and Start Contract Negotiations Earlier 15-26

OUTSOURCING: LAW & BUSINESS

	[b]	Flexible RFP Process: Do Not Force Apples-to-Apples Results	15-26
		[i] Consider Eliminating or Combining Parts of the Legacy RFP Process	15-27
		[ii] Create Individualized RFPs	15-27
		[iii] Accept Different Pricing Solutions	15-27
		[iv] Accept Service Provider Off-the-Shelf Services	15-28
[2]		Collaborative, Focused and Managed Negotiations	15-28
	[a]	Take a Reasonable, Constructive and Collaborative Approach	15-29
	[b]	Have Customer Leadership Involved	15-30
	[c]	Manage as a Project	15-30
[3]		Condensed and Modernized Outsourcing Contract Terms	15-31
	[a]	Streamlined Master Terms and Conditions: The Modern Form	15-31
	[b]	Customized Service Delivery Contract	15-32
	[c]	Simplified “Utility Model” Pricing	15-33
	[d]	Targeted Service Levels	15-34
	[e]	Standard Services Descriptions	15-34
	[f]	Multi-Provider Service Levels, Confidentiality and Cooperation Agreement	15-35
[4]		Targeted and Integrated Multi-Provider Governance	15-36

CHAPTER 16**Regulatory Environment**

§ 16.01		Regulation of Outsourcing Generally	16-3
	[1]	Increasing Number of Legislative Prohibitions in the United States	16-3
	[2]	United States and European Union Taking Different Approaches	16-4
§ 16.02		Federal Regulation	16-5
	[1]	Indirect Regulation of Outsourcing	16-5
	[2]	Visa Regulations	16-5
	[3]	Regulations on Exports	16-6
		[a] Exports in Outsourcing Arrangements	16-6
		[b] Governed by Several Federal Agencies	16-6

TABLE OF CONTENTS

	[c]	Determining Regulations Applicable to an Export	16-7
	[d]	Department of Commerce	16-7
		[i] Commerce Control List and Country Chart	16-8
		[ii] Ten General Prohibitions	16-9
		[iii] License Exceptions	16-10
		[iv] Deemed Exports	16-11
		[v] Encryption Regulations	16-12
		[vi] Civil and Criminal Liability	16-14
	[e]	Department of State	16-15
	[f]	Department of Treasury	16-16
	[g]	Prohibited Persons Screening	16-17
[4]		Worker Adjustment and Retraining Notification Act	16-18
	[a]	Impact on Outsourcing	16-19
	[b]	Penalty	16-20
[5]		Sarbanes-Oxley Act of 2002 (“SOX”)	16-20
	[a]	Attestation	16-20
	[b]	Personal Liability	16-22
	[c]	Unavoidable	16-22
[6]		Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”)	16-22
	[a]	Generally	16-22
	[b]	Applicability	16-22
	[c]	Impact on Outsourcing	16-23
[7]		Foreign Corrupt Practices Act (“FCPA”)	16-24
[8]		Occupational Safety and Health Act (“OSHA”)	16-25
[9]		Fair Debt Collections Practices Act (“FDCPA”)	16-26
[10]		Americans with Disabilities Act (“ADA”) Applicability to Websites	16-27
§ 16.03	State	Regulation	16-29
	[1]	Generally	16-29
	[2]	Constitutionality	16-29
		[a] Commerce Clause	16-29
		[b] Supremacy Clause	16-30
	[3]	Preferential Laws	16-31
		[a] Sample Preferential Laws	16-31
		[b] Government Outsourcing/ Procurement	16-31
	[4]	Economic Development Incentive Clawbacks	16-32
	[5]	Other State Statutes and Regulations	16-33
		[a] Certified Public Accountants	16-33
		[b] Elections	16-33

	[c]	International Trade	16-33
	[d]	Medical	16-34
	[e]	Payment Card Industry Data Security Standard	16-34
	[6]	Executive Orders	16-36
	[a]	Generally	16-36
	[b]	Executive Order Examples	16-36
§ 16.04		International Regulation	16-38
	[1]	North American Free Trade Agreement ("NAFTA")	16-38
	[2]	World Trade Organization Agreement on Government Procurement ("WTO AGP")	16-38
	[3]	World Trade Organization General Agreement on Trade in Services ("WTO GATS")	16-39
	[a]	Most Favored Nation Status	16-39
	[b]	Non-Applicability	16-39
§ 16.05		Regulated Industries	16-40
	[1]	Overview	16-40
	[2]	Financial Services	16-40
	[a]	Generally	16-40
	[b]	Gramm-Leach-Bliley Financial Services Modernization Act of 1999 ("GLBA")	16-41
	[c]	Bank Secrecy Act of 1970	16-41
	[d]	Regulations Specific to Third-Party Arrangements	16-42
	[e]	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("U.S.A. Patriot Act")	16-43
	[f]	Fair Credit Reporting Act ("FCRA")	16-44
	[g]	Affiliated Institution Transactions	16-44
	[h]	OCC Guidance	16-45
	[i]	International Banking Regulations	16-46
	[3]	Health Care	16-47
	[a]	Outsourcing in Health Care	16-47
	[b]	Health Insurance Portability and Accountability Act of 1996 ("HIPAA")	16-50
	[c]	Other Specific Laws	16-51
	[4]	Energy	16-52
	[5]	Telecommunications	16-53
	[6]	Law Firms	16-53
	[a]	Generally	16-53

TABLE OF CONTENTS

xxxvii

[b]	Engagement	16-53
[c]	Competency	16-54
[d]	Confidentiality	16-54
[e]	Reasonable Fees	16-55
[f]	Unauthorized Practice of Law	16-55

CHAPTER 17

Governmental Outsourcing

§ 17.01	Outsourcing by Governmental Entities	17-1
§ 17.02	Restrictions on Outsourcing by the Federal Government.	17-5
	[1] Office of Management and Budget Circular A-76	17-5
	[2] Thomas-Voinovich Amendment.	17-7
§ 17.03	Restrictions on Outsourcing by State Government . . .	17-8
	[1] Sample Preferential Laws	17-8
	[2] Government Outsourcing/Procurement.	17-9
§ 17.04	Special Considerations in Governmental Outsourcing.	17-10
	[1] Longer Procurement Cycles	17-10
	[2] Political Climate and Political Realities.	17-10
	[3] Use of Tax Dollars Requires Focus on Value for Money	17-11
	[4] Frequent Leadership Change	17-12
	[5] Public Disclosure Laws.	17-12

CHAPTER 18

Form of Outsourcing Agreement

§ 18.01	Forms Historically.	18-1
§ 18.02	Shorter Forms Fit Current Market and Clients	18-3
§ 18.03	Features of the Modern Form Master Outsourcing Services Agreement	18-4
§ 18.04	Menu of Supplemental Provisions to the Modern Form	18-5
§ 18.05	Service Delivery Contract.	18-6
§ 18.06	<i>Form</i> : Master Outsourcing Services Agreement (the Modern Form).	18-7
§ 18.07	<i>Form</i> : Form of Service Delivery Contract	18-58
§ 18.08	<i>Form</i> : Menu of Supplemental Provisions to the Modern Form	18-62.1
§ 18.08A	<i>Form</i> : Modern Form Term Sheet.	18-82.5
§ 18.09	<i>Form</i> : Outsourcing Cooperation and Accountability Agreement	18-83

INDEX	I-1
--------------	-----------	-----