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The International Comparative Legal Guide to:

Outsourcing 2017

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A practical cross-border insight into outsourcing

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1 Regulatory Framework

1.1 Are there any national laws that specifically regulate outsourcing transactions?

No U.S. federal laws specifically regulate outsourcing contracts. Rather, they are governed by the law of contracts in each state and relevant state or federal statutes. Combinations of state and federal legislation apply to various regulated industries (such as banking, insurance and healthcare) and to such important issues as data protection, employment and environmental protection, among others.

1.2 Are there any additional legal or regulatory requirements for certain types of outsourcing transactions, for example: a) public sector transactions; b) business process transactions; c) financial services transactions; d) IT transactions; and e) telecommunications transactions?

A number of federal and state laws may apply depending upon the commercial context, including the services performed and the customer's industry. For example, both state and federal laws regulate debt collections; there are federal laws regulating telemarketing and the use of autodials; and there are state and federal laws applicable to healthcare claims processing as well as mortgage processing. Public contracting in the U.S. is highly specialised and regulated, and contract terms (sometimes dictated by regulations) may differ substantially from commercial practice. No specific laws regulate business process outsourcing (BPO) generically, but outsourced functions may be subject to a variety of legal requirements, depending upon the function.

1.3 Are there any further legal or regulatory requirements for outsourcing transactions in any particular industry sector?

Healthcare and related businesses, such as medical insurance and the manufacture and distribution of pharmaceuticals, are subject to various federal laws, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH), which, together with related regulations, apply to the protection of personal health information. HIPAA created (a) the Privacy Rule or standards for the creation, use and disclosure of personal health information, and (b) the Security Rule or standards when personal health information is transmitted or maintained electronically. These rules require "covered entities" (such as hospitals, pharmaceutical companies or medical insurers) to have "business associate agreements" with suppliers of related services that create, receive or transmit personal health information, and such suppliers are now directly regulated by HIPAA as "Business Associates".

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?

Parties are generally free to choose and negotiate choices of law and those choices are likely to be respected; however, particular state laws may still apply to some issues within the particular state's jurisdiction.

2 Legal Structure

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

The most common structure involves a master contract between the principal customer and the principal supplier of services, supported by exhibits or schedules that define the scope of service, performance standards, pricing and other particulars (e.g., concerning transitional arrangements or transfers of personnel, among others). Local or companion agreements may apply between the parties or their affiliates for performance of services in other countries, with variations for those countries' tax, employment, or other laws, currencies and other details. Many variations are possible.

3 Procurement Process

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

Many U.S. companies favour a competitive bidding processes. The buyer or customer may begin with a preliminary request for information (RFI) and follow with a detailed request for proposal (RFP) requiring bids against a set of detailed performance, financial and other requirements, usually including a proposed form of master agreement. Detailed negotiations then follow with one or more finalists, leading to a contract based upon the proposal, as refined through negotiation. Many contracts, however, are negotiated without competitive bidding, especially where there are ongoing business relationships between organisations.

4 Term of an Outsourcing Agreement

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

No; although terms of five to seven years are common, sometimes with extensions by mutual agreement or, at the customer's option, upon the terms then in effect (and in those cases, often with cost of living, foreign exchange or other financial adjustments).

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

The parties are free to negotiate notice periods. In cases of default termination, notice and cure periods of at least 30 days are common and usually followed by an orderly disengagement that may take months, depending upon the scale and complexity of the relationship. Notice periods for termination without cause (for "convenience") are typically much longer (e.g., 180 days), depending upon the scale and complexity of the relationship, so that there is adequate time to assure an orderly transfer of knowledge, data, operations and sometimes personnel. Such convenience terminations usually involve payment of a fee to the supplier to cover unamortised or upfront investments, redeployment of personnel and disposal of assets that cannot be repurposed and some reasonable portion of unrealised profit due to the premature termination of the relationship.

5 Charging

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

Many methods are available, ranging from fixed charges to "cost plus" methods (tied to the supplier's costs), but the most common methods involve variable charges tied to resource consumption (such as numbers of devices or users, volumes of data or storage) or levels of effort (such as numbers of staff, full-time equivalents, chargeable hours or volumes of transactions or other activity). Charges for transitions to outsourced operations are often fixed, but allocated among a number of phases or milestones. Similar methods are sometimes used for major projects, such as implementation of new systems. Contracts provide a variety of methods for adjustments, including incremental charges or credits for increases or reductions in volumes of service or resource consumption, change orders for various contingencies (with pricing for net adjustments tied to contract rates or similar criteria) and equitable adjustments (tied to levels of effort and resource usage) for large swings in levels of activity.

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

Other important cost-related terms may include provisions for expenses that may be absorbed by the supplier or passed through to the customer, as well as the cost of changing regulatory requirements. Suppliers will not disclose their internal costs (other than pass through expenses). Suppliers require compensation for changes caused by factors outside their control such as changes in laws or new or different customer requirements like customer policy or technology changes or additional resources required to accommodate customer mergers or acquisitions.

6 Transfer of Assets

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

Asset transfers are less common than formerly. Assignments or other transfers of equipment leases, software licences and other contracts should be effected in writing, often require consents and may require payment of a charge to the lessor, licensor or other third parties. Sales of tangible property (other than land and buildings) may be effected through a bill of sale.

6.2 What are the formalities for the transfer of land?

Transfers of land and buildings are comparatively rare in outsourcing transactions. Leased facilities may be transferred through a sublease or a written assignment of the lease. A title to land and buildings is transferred by deeds, which are recorded in public records. Specialist local advice is essential, not only about title and other formalities, but also potential environmental liabilities which may pass to new occupants, operators or owners of land and buildings.

6.3 What post-completion matters must be attended to?

The most important post-completion activity is the transfer of operations to the supplier, generally according to a detailed transition plan. Consents to assignments or other transfers of software licences or other transferred contracts are often obtained during the transition period that follows signing and precedes commencement of service by the supplier of outsourced services. Formalities concerning transfers of major assets (such as land and buildings) are generally completed at the time of closing.

6.4 How is the transfer registered?

Land titles are not registered in the United States. Rather, state recording laws provide for the recording in public records of deeds, mortgages and other instruments affecting title in land. Transfers of patents, trademarks and copyrights (rare in outsourcing) are effected through recording or registration at the U.S. Patent and Trademark Office or U.S. Copyright Office.

7 Employment Law

7.1 When are employees transferred by operation of law?

In the United States, unlike the European Union, employees displaced or otherwise affected by outsourcing do not transfer to the outsourcer by operation of law. In the absence of an employment contract or collective bargaining agreement, U.S. companies' staff are generally employed at will, and may be terminated upon notice and without cause. When employees transfer to an outsourcer, they are severed by the customer and receive conditional offers of employment from the outsourcer, effective when the agreement takes effect (often for comparable pay and benefits, but such details are negotiable). Various state and federal statutes may be relevant, including those concerning maternity and other leave, pensions, plant closures, discrimination and other unfair practices, and collective bargaining.

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

There are no transfers by operation of law.

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

Disclosures of aggregated, anonymised information are common, subject to applicable privacy laws and the companies' own policies, but sufficient to understand costs. Many states have privacy laws with respect to information that is contained in, or which should be contained in, a personnel file. Some of those laws have exceptions for vendors retained by employers to maintain such files; however, state statutes should be checked before proceeding. Individual consent may be required for personal data concerning employees. Confidential personnel policies (such as evaluations and disciplinary records) are not disclosed.

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

In the United States, employers may generally discharge employees at will and without cause, in order to reduce work forces and for other purposes; however, as in many countries, discrimination based on age, disability, race, religious beliefs, sex, national origin and other improper reasons is prohibited by law.

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

Yes, although in order to ease transitions and assure high rates of acceptance, suppliers employing their customers' former employees may choose to match or approximate former pay and benefits, or otherwise compensate transferring employees, at least for a transitional period. For example, incentive payments may be offered (and subsidised by the customer) in order to motivate employees to remain through a transition period.

7.6 Are there any pensions considerations?

Yes. Pension benefits are governed by a comprehensive federal statute, the Employee Retirement Income Security Act of 1974. Expert advice is often required concerning disposition and transfers of amounts held in various kinds of retirement plans and accounts.

7.7 Are there any offshore outsourcing considerations?

U.S. companies enjoy considerable freedom to have outsourced services performed outside the United States. Public agencies and some private companies may, for policy or regulatory reasons (or both), require that services be performed or data maintained within the United States.

8 Data Protection Issues

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?

Unlike the European Union and other jurisdictions with comprehensive approaches to privacy, the United States takes a piecemeal approach, with a multitude of overlapping state and federal laws, based on specific industries or categories of data. Overall, legal requirements are often as stringent (and in some cases) more stringent than comparable laws in other countries; and some laws involve potential liability to data subjects and other private parties, as well as fines and civil penalties payable to public authorities. Data security is pivotal to successful outsourcing arrangements, particularly when the information involved contains personally identifiable information (PII). In the United States, this is regulated at the federal and state level. At the federal level, if the services address financial services or healthcare, for example, the parties must fulfil the conditions laid down by the Gramm-Leach-Bliley Act and HIPAA and HITECT, respectively. The various states have their own myriad laws protecting individual categories of PII in different ways. Moreover, if it is a global outsourcing deal, E.U. and other jurisdictions' regulations must also be fulfilled. Hence, parties typically include detailed instructions for the handling, storage, treatment and destruction of data.

9 Tax Issues

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

State sales and use taxes sometimes apply to sales or leases of equipment and other assets from the services recipient to the outsourcing service provider. Outsourced services may also be subject to sales and use taxes and, depending on the state, such services may be taxable where the services are provided or where the service recipient resides. Generally, parties to outsourcing agreements agree to pay taxes of their own assets and net income taxes in their own jurisdiction, and customers agree to pay or reimburse any sales, use or similar tax upon the services or charges, even if the tax is assessed upon the supplier as seller of the service.

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

The United States does not have a value-added tax.

9.3 What other tax issues may arise?

When services are performed offshore or in support of a U.S. company's worldwide operations, complex tax questions may arise concerning withholding, value-added and other taxes.

10 Service Levels

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

Service levels are documented as a set of objective metrics measured and reported at regular intervals, typically monthly. Unexcused failures to achieve service levels following some initial stabilisation or burn-in period generally bear financial consequences, in the form of credits assessed against the supplier's charges, and generally computed as a percentage of those charges, subject to an overall ceiling (negotiable, but commonly 8–12% of monthly charges). Initial service levels may be based upon the customer's historic performance (if adequately documented and confirmed during a validation period) or through a baselining period where the supplier's actual performance is measured for a period of time. Credits can usually be offset through incentives (or "earn-backs") tied to consistent good or superior performance.

11 Customer Remedies

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

When contracts are breached, customers may recover direct, compensatory damages and, in appropriate cases, seek injunctions or other equitable remedies, if money damages are inadequate and other usual criteria are satisfied. Liability for damages is invariably subject to negotiated limits (discussed below).

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

Contracts commonly provide a variety of remedies, in addition to the recovery of damages. They may include rights to:

(a) collect credits for unexcused failures to meet service levels or timely complete phases of the initial transition;

(b) terminate the contract, wholly or partially, if a material breach is not cured within the relevant notice and cure period (and material breach may include various specific examples, such as excessive numbers of unexcused service level failures);

(c) withhold disputed charges (subject to a negotiated ceiling);

(d) require removal of unsatisfactory subcontractors or staff (in the latter case, only for lawful and legitimate reasons);

(e) require performance of corrective work; and

(f) measure the supplier's charges against the current marketplace through an independent benchmark and, if the supplier's charges fall outside an agreed competitive range, based on a normalised comparison with a peer sample, there may be a termination right with a reduced convenience termination charge.

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

Outsourcing contracts commonly contain a variety of warranties concerning the quality and efficiency of the service, the training and experience of staff and other matters. There are commonly mutual indemnities for a range of potential third party claims, such as infringement of intellectual property rights, bodily injury to or death of individuals, damage to tangible property, employment-related claims by displaced or transferred employees, taxation, and breaches of confidentiality and other obligations. The indemnitor's liability is generally limited proportionally to the extent of the indemnitor's fault, and in infringement cases, the indemnitor is generally not responsible for an indemnitee's infringing processes or specifications, unauthorised modifications or misuse of material supplied by the indemnitor. All of these obligations, like the warranties and indemnities themselves, are established by contract and are negotiable.

12 Insurance

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

Customers commonly require that suppliers obtain and provide proof of various kinds of insurance coverage. Specific requirements vary, depending upon the particular outsourced service and other circumstances, including the cost and availability of coverage for novel risks and the scope of coverage under such conventional policies as commercial general liability insurance (CGL).

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?

Outsourcing contracts typically include provisions for default termination (if material breaches are not cured within applicable notice and cure periods) and termination without cause (for the customer's "convenience") and a limited number of other circumstances (such as inability to restore service within a reasonable time after a *force majeure* event or failure to agree upon price or other adjustments after a benchmark determination that the supplier's charges exceed some reasonable threshold above then-current market rates). In cases of default termination, however, the parties may have competing claims of damages for breach, depending upon the circumstances.

13.2 Can the parties exclude or agree additional termination rights?

Yes. The termination rights referred to above are created by contract and are negotiable. Issues likely to be negotiated include: termination charges (where relevant); notice and cure periods; materiality thresholds; and the varieties of breach that may justify termination.

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

No, there are not.

14 Intellectual Property

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

Specific arrangements vary considerably, depending upon the function outsourced, the extent of any anticipated new development and the extent to which services depend upon software or other technology or intellectual property provided by one party or the other. Generally, each party will license its intellectual property to the other to the extent necessary for performance or receipt of services, and each party will own improvements to its intellectual property. Suppliers may agree to transfer some intellectual property rights in new developments created expressly for the particular customer (excluding, of course, supplier intellectual property that may be incorporated in any new developments) so long as the supplier can continue to perform similar services for other customers. Rights transferred, the scope of licences granted or reserved and other particulars are typically intensely negotiated. Suppliers generally retain ownership in developments in their methods, processes, tools and other technologies that may occur during the course of performance, but are not created expressly for the particular customer. Suppliers only usually permit customers to use their intellectual property following the conclusion of the contract to the extent their intellectual property is incorporated in new developments delivered to the customer (but then only in connection with the customer's use of such new developments) or when offered in the market as a commercial product or service (but then subject to standard terms and conditions, including license fees). Proprietary tools used for internal operations or offered only as part of service offerings are not typically available after contracts expire.

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

Forty-seven of the fifty U.S. states have codified common law protection of trade secrets by adopting the Uniform Trade Secrets Act, which protects information, including formulae, patterns, compilations, programs, devices, techniques or processes that derive independent economic value from not being generally known or readily ascertainable and are the subject of reasonable efforts to maintain secrecy. State courts may enjoin misappropriation and, in appropriate cases, award damages for misappropriation. A federal statute, the Defend Trade Secrets Act of 2016, empowered federal courts to protect trade secrets, including (in certain cases) through seizure of property in order to prevent dissemination of misappropriated trade secrets.

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?

Outsourcing licences commonly contain extensive, heavily negotiated licences and disclaim implied licences. Suppliers' rights to use the customer's software, confidential information and other intellectual property commonly end when the contract concludes (apart from normal rights to use residual knowledge retained in the unaided memories of the supplier's employees).

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?

Suppliers' commercial software and other products are commonly available on standard terms after service contracts conclude. Other tools and technologies incorporated in service offerings or used for the suppliers' internal operations are much less likely to be made available, but commercial substitutes are commonly available. Arrangements for disengagement support (or "termination assistance") help to assure an orderly reverse transition to another supplier or the customer's internal operations through cooperation in transfers of data, knowledge and sometimes personnel as well as support for an exit or disengagement plan.

15 Liability

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

U.S. law and courts generally respect contractual limitations upon sophisticated parties' liability in commercial contracts. Ceilings upon total liability, exclusions of indirect or consequential damages and other limitations are generally enforceable; but liability for intentional wrongdoing (e.g., fraud) cannot be limited by contract.

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

Yes, although they cannot limit liability for their own intentional wrongdoing. Details are intensely negotiated, and negotiated outcomes vary considerably, but in general, contracts for outsourced services:

(a) preclude recovery of consequential, indirect and punitive damages, as well as lost profits, unrealised savings and other business losses;

(b) limit recovery of damages for breach of the contract and other claims related to the contract to an overall ceiling, often (though not necessarily) an amount equal to 12 months' service charges (excluding applicable taxes and reimbursable expenses); and

(c) permit recovery in excess of the foregoing limits for certain remote, unusual risks, such as: claims of intentional misconduct (e.g., fraud), gross negligence (generally involving blatant disregard for legal duties and the rights of others); certain indemnified claims (e.g., infringement and bodily injury); and wilful refusal to perform services (other than good faith exercise of the supplier's rights to terminate).

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

Most contracts provide for consultations between management and then, if necessary, adjudication of disputes by the courts or through binding arbitration. When arbitration is agreed, the parties may reserve disputes concerning confidentiality, intellectual property rights and claims arising in third party litigation for decision by the courts. Jurisdiction requires some factual nexus to the place of adjudication, and contracts often specify jurisdiction and venue (often at the location of one of the parties).

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?

In many U.S. states, the common law implies into contracts an obligation to deal fairly and in good faith. Some contracts make this explicit and may add an express obligation to act reasonably.

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