# 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
o .	[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	
	<b>Outsourcing Team and Process</b>	
§ 2.01	Deal Team Roles and Objectives	2-2
	:::	

xiv	<b>OUTSOURCING: L</b>	AW & BUSINESS

	[1] [2]		omer's Internal Team	2-4 2-5
	[-]	[a]	Assist Customers with Evaluating Costs and Benefits of Outsourcing	23
			Specific Functions	2-6
		[b]	Conduct Bid Process	2-7
		[c]	Know "Market" for Key Business	• 0
		F 13	Terms	2-8
		[d]	Help Design Key Service	2 0
			Documents	2-9
		[e]	Help Structure and Negotiate	2.0
	F2.1	0-4-	Pricing	2-9
	[3]		de Counsel	2-10
		[a]	Typically, Some Combination of	
			Outside Counsel and Internal	2.10
		Γh٦	Legal Team	2-10 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	2-11
		լսյ	Business Terms	2-11
		[e]	Know Sensitivities of Providers and	2-11
		[C]	Appropriate Middle Ground	2-11
§ 2.02	Prope	er Scop	e	2-11
3 2.02	[1]		ification of Scope	2-13
	[2]		ification of Proper Retained Scope	2-14
§ 2.03			or Competitive Bid	2-15
§ 2.04			Proposal and Selection Process	2-16
Ü	[1]		aration of Request for Proposal	
	. ,		aterials	2-17
		[a]	Solution	2-17
		[b]	Financial	2-18
		[c]	Legal	2-18
		[d]	Human Resources	2-19
	[2]		l Price Proposals	2-19
	[3]		Presentations and Account Team	
		In	troduction	2-19
	[4]		rences	2-20
	[5]		ng and Down-Selection	2-20
	[6]	Due	Diligence	2-21
			CHAPTER 3	
			Services	
§ 3.01	Servi	ces Sco	ope and Service Description	3-2
	[1]		ifying the In-Scope Services	3-3

	TABLE OF CONTENTS	XV
	[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

xvi	<b>OUTSOURCING: LAW &amp; BUSINESS</b>	
§ 3.15 § 3.16	Step-In Rights	3-33 3-34
	CHAPTER 4	
	Fees	
§ 4.01 § 4.02	Introduction	4-2 4-3 4-4
	[2] Cost of Outsourcing	4-6 4-6
	<ul><li>[b] Transition Fees</li><li>[c] Retained Costs</li><li>[d] Planning and Transaction Costs</li></ul>	4-7 4-8 4-9
§ 4.03	Ongoing Fees.	4-10
	[1] Choosing a Fee Methodology	4-10 4-11
	(PxQ) Pricing	4-12
	[ii] Baseline/ARC-RRC Pricing	4-13
	[b] Fixed Price	4-14
	[c] Time and Materials	4-15
	[d] Cost Plus	4-15
	[e] Gainsharing/Savings-Based	4-16
	[2] Evaluating Proposed Fees	4-17 4-19
§ 4.04	[3] Minimum Commitment	4-19 4-21
8 4.04	Billing and Payment	4-21
	[1] Timing of Invoice and Payment Terms [a] Timing of Invoices and Payment [b] Late Payment Charges/Early	4-21
	Payment Discounts	4-22
	[2] Disputes and Right to Withhold Payment	4-22
	[3] Financial Engineering	4-24
§ 4.05	Adjustments for Changed Economic Conditions	4-25
	[1] Inflation Adjustment/COLA	4-25
	[2] Currency Exchange Rate Fluctuations	4-27
§ 4.06	Customer Price Protection	4-29
	[1] Benchmarking	4-29
	[2] Most Favored Customer	4-31
§ 4.07	Expenses	4-33
§ 4.08	Taxes	4-34
	[1] Transaction Taxes	4-36
	[2] Withholding Taxes	4-37
	[3] Asset Transfer Taxes	4-38
	[4] Permanent Establishment	4-38
	[5] Transfer Pricing Issues	4-39

		TABLE OF CONTENTS	xvii
		CHAPTER 5	
		Service Levels	
§ 5.01			5-2
§ 5.02		rel Metrics and Reporting	5-5
	[1] Selec	cting SLA Metrics	5-5
	[2] Type	es 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] Exar	nple SLA Metrics	5-8
	[4] SLA	Metric Measurability	5-9
		ng SLA Metric Performance Levels	5-10
	[6] Num	ber of SLA Metrics	5-11
	[7] Mon	itoring and Reporting	5-11
	[8] Whe	n SLA Metrics Are Effective	5-12
	[9] SLA	Metrics with and Without Credits	5-13
§ 5.03		e Credits, Termination and Other	
		S	5-15
	[1] Type	es of Remedies	5-15
	[a]	Root Cause Analysis and Other	
		Remedial Actions	5-16
	[b]	Performance Credits	5-16
		[i] Performance Credits Amounts	
		and Caps	5-17
		[ii] When Performance Credits	
		Are Issued	5-17
		[iii] Calculating Performance	
		Credits	5-18
		[iv] Performance Credits Under	
		Contract Law (Liquidated	
		Damages and Unenforceable	
		Penalties)	5-20
	[c]	Termination	5-22
	[d]	Breach of Contract	5-22
		backs and Performance Bonuses	5-23
	[3] Limi	tations on Remedies	5-24
	[a]	Relief Events	5-24
	[b]	Customer Dependencies	5-24
	[c]	Single Event Causing Multiple	
		Failures	5-24
§ 5.04	Changes and	d Improvement to Service Levels	5-26

#### **OUTSOURCING: LAW & BUSINESS**

## **CHAPTER 6**

# Personnel and Human Resource Matters

§ 6.01 § 6.02	Overview	6-2 6-4			
8 0.02	[1] Co-employment/Joint Employment Issues [2] Warranties: Qualified and Reasonably	6-4			
	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	6-10			
	[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			
	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")	0 0 1			
	Notice	6-32			
	[5] Employees on Leave of Absence	6-32			
§ 6.06	U.S. Unions and Collective Bargaining				
Ü	Agreements	6-33			

	TABLE OF CONTENTS	XIX
§ 6.07	European Union Transfer and Dismissal Law [1] Acquired Rights Directive: Employee	
	Go with the Work	6-35
	[a] Personal and Material Scope	
	[b] Territorial Scope	
	[c] Obligations Under the Directiv [d] Transfer of an Undertaking in	an
	Outsourcing Transaction [e] Application to Collective Agree	ements
	and Pensions [f] Key Protections in Outsourcing	2
	Transactions	
	[2] European Works Council Directive	
	[3] Redundancy Obligations	6-47
	CHAPTER 7	
	<b>Term and Termination</b>	
§ 7.01	Term	
	[1] Initial Term	
. =	[2] Renewal Term	
§ 7.02	Termination and Expiration	
	[1] Termination and Expiration Overview	
	[2] Termination for Convenience	
	[a] Termination Right [b] Termination for Convenience I	
	[b] Termination for Convenience I  [3] Termination for Cause	
	[a] Material Breach	
	[b] Repeated Non-Material Breach	
	[c] Other "For Cause" Termination	
	Rights	
	[d] Pre-Termination Process	
	[4] Other Common Termination Rights.	
	[a] Change of Control	
	[b] Bankruptcy and Negative Final Condition	
	[c] Change in Laws	7-18
	[d] Loss of Key Personnel or High	
	Turnover	
	[e] Benchmarking	7-19
	[f] Force Majeure	
	[5] Scope of Termination	
	[6] Termination as Renegotiation Leverage	
§ 7.03	[7] Insourcing Termination and Expiration: Unwinding the	7-20
8 7.05	Outsourcing Arrangement	7-22

XX	<b>OUTSOURCING: LAW &amp; BUSINESS</b>	
	[1] Termination Assistance	7-22 7-28
	CHAPTER 8	
	Risk Management Issues	
§ 8.01 § 8.02	Generally	8-1 8-3 8-6 8-7
	Agreement	8-8 8-8
	<ul><li>[5] ISAE 3402 and SSAE 18 Audits</li><li>[6] Differences Between SSAE 16 and SSAE 18 Standards, and SSAE 18</li></ul>	8-9
	and ISAE 3402 Standards	8-11 8-13
§ 8.03	[8] Service Provider Internal Reports Insurance	8-15 8-16
§ 8.04	Security	8-19
	<ul><li>[1] General Security Requirements</li></ul>	8-20
	Security Measures	8-21
	[3] Security Assessments	8-22
	Program	8-23 8-24
	<ul><li>[5] Offshore Security Concerns</li><li>[6] Incident Plans</li></ul>	8-24 8-26
	[7] Additional Security Measures	8-26
§ 8.05	Guarantee	8-27
	CHAPTER 9	
	<b>Intellectual Property</b>	
§ 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 9-7
	[ii] Copyrights in Data	9-7 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	XX1
		[d]	Exclusive Rights of Copyright	
		F 3	Holder	9-10
		[e]	Moral Rights	9-11
		[f]	Infringement	9-11
			[i] Elements of Infringement	0.11
			Claim	9-11
			[ii] Fair Use	9-13
			[iii] Special Considerations in	0.14
			Software Infringement	9-14
			[iv] Audiovisual Works Subsisting	0.15
			in Software	9-15
		[g]	Registration	9-15
		[h]	Remedies	9-16
		[i]	Comparison with Other Intellectual	0.17
	[0]	7F 1	Property Rights	9-17
	[2]		e Secrets	9-18
		[a]	Subject Matter	9-19
		[b]	Misappropriation	9-21
		[c]	Remedies	9-21
			[i] Injunctive Relief	9-22
			[ii] Inevitable Disclosure	0.22
			Doctrine	9-22
			[iii] Damages	9-23
			[iv] Attorney Fees	9-23
		F.43	[v] Civil Seizure	9-24
		[d]	Comparison with Other Intellectual	0.24
	[2]	Dotor	Property Rights	9-24
	[3]		Subject Matter	9-24
		[a]	Subject Matter	9-25
		[b]	Statutory Bars	9-25 9-26
		[c]	Patent Application Process	9-20 9-27
		[d]	Exclusive Rights	9-27
		[e]	Employer's Rights in Inventions [i] Hired-to-Invent Doctrine	9-28 9-28
				9-28
		[f]	[ii] Shop Right	9-28
		[1]	[i] Injunctive Relief	9-29
				9-29
		[g]	[ii] DamagesComparison with Other Intellectual	9-29
		LBJ	Property Rights	9-30
	[4]	Trade	emarks	9-30
	[4] [5]		mation Rights Under Contracts	9-31
	[2]		License Agreements	9-31
		[b]	Confidentiality Agreements	9-32
§ 9.03	Δ1100		f Intellectual Property Rights in the	7-32
8 7.03			ng Relationship	9-34
	[1]		ectual Property Inventory	9-34
	[+]	111011	Troporty involtory	) J-T

[2]	New Intellectual Property Arising from	
	the Outsourcing	9-35
	[a] Resolving the Ownership Issue	9-37
	[i] Resolution by Intellectual	
	Property Categorization	9-37
	[ii] Resolution in Advance	
	Regarding Individual Items	
	of Intellectual Property	9-37
	[iii] Catch-All General Principle for	
	Deciding Ownership	9-38
	[iv] Joint Ownership	9-39
	[b] Implementing Agreed Ownership	
	Allocation	9-40
	[i] Ownership by the Customer	9-40
	[ii] Licenses to Embedded	
	Preexisting Components	9-41
	[iii] Ownership by the Service	
	Provider	9-41
	[iv] Securing Ownership from	
	Employees and	
	Contractors	9-42
	[c] Protection of Non-Owning Party's	
	Interests	9-43
	[i] License to Customer of	
	Service Provider-Owned	
	Developments	9-43
	[ii] License Back to Service	
	Provider of Customer-Owned	
	Development	9-44
	[iii] Restrictions on Use by	
	Owner	9-44
[3]	Intellectual Property Owned by the	
	Parties	9-44
	[a] Retained Ownership	9-45
E 43	[b] Assigned Ownership	9-45
[4]	Intellectual Property Owned by Third	0.45
	Parties	9-45
	[a] Identifying Consent Issues	9-45
	[i] Limits on Assignment	9-46
	[ii] Limits on Users	9-47
	[iii] Limits on Scope of Use	9-47
	[iv] Confidentiality and Other	0.49
	Restrictions	9-48 9-48
[5]	[b] Obtaining Consents	9-48 9-49
[5]	Licenses to Be Granted by the Parties [a] Licenses Granted by Service	9-49
	[a] Licenses Granted by Service	9_49

		TABLE OF C	ONTENTS	xxiii
	[6]		anted by Customer	9-50
	[7]	Property	of IP Used to Provide	9-51
	[/]			9-52
§ 9.04	Allo	ation of Liability for		
	In	ringement Claims		9-54
	[1]		cating Liability	9-54
	[2]		emnification	9-55
			f Non-Infringement	9-56
			ed Warranties	9-56
			ss Warranties	9-57
			nty Compared with	
			emnification	9-57
			Indemnification	9-58
			retation and	
			forcement	9-59
			is Indemnified	9-60
			pility in Scope of	
			emnification	9-60
	[3]		ned Use	9-63
§ 9.05	-	_	Source Code	9-65
	[1]		irce Code	9-65
	[2]		WS	9-66
	[3]		rare	9-67
§ 9.06			erty Considerations	9-70
	[1]		al Property Protection	9-71
				9-71
				9-72
	[2]			9-73
§ 9.07				9-77
	[1]			9-77
	[2]		dential Information	9-77
			quirement	9-77
			son	9-78
			Information Broadly	9-78
	[2]		Disclosure	9-78 9-79
	[3]			9-79
	[4]		ons to Confidentiality	9-79
	[5]		on	9-80
	[6]			9-81
	[7]		Service Providers	9-81
§ 9.08				9-83
~	[1]		ckchains	9-83
	[2]		tsourcing	9-83

#### **OUTSOURCING: LAW & BUSINESS**

## **CHAPTER 10**

# **Privacy and Data Security**

§ 10.01			10-3
§ 10.02		and Data Security Regulations	10-4
		cy 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] Schrems II—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
		ey in the U.S	10-17
		m-Leach-Bliley Financial Services	
		odernization Act (1999)	10-19
	[a]	Financial Privacy Rule	10-20
	[b]	Safeguards Rule	10-21
	[c]	Pretexting Provisions	10-22
	[d]	Outsourcing Implications	10-23
		n Insurance Portability and	
		countability Act (1996)	10-24
	[a]	Privacy Rule	10-26
	[b]	Transactions and Code Sets Rule	10-28
	[c]	Security Rule	10-29
	F-3	[i] Administrative Safeguards	10-29
		[ii] Physical Safeguards	10-30
		[iii] Technical Safeguards	10-30
	[d]	Unique Identifiers Rule	10-31
	[e]	Enforcement Rule	10-31
	[f]	Outsourcing Implications	10-32
		Breach Laws	10-33
	[a]	State Laws	10-34
	[b]	Federal Laws	10-37
	[۵]	[i] Health Information Technology	10 37
		for Economic and Clinical	
		Health Act (2009)	10-37
		11001011 1101 (2007)	10-37

		TABLE OF CONTENTS	XXV
		[ii] Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and	
		Customer Notice	10-39
		[c] International Laws	10-40
		[d] Outsourcing Implications	10-42
	[6]	Data Security Laws and Standards	10-42
	[-]	[a] State Laws	10-42
		[b] FTC Enforcement Under the Federal Trade Commission Act	10-45
			10-43
		[c] Payment Card Industry Data Security	10-47
		Standard	10-47
§ 10.03	Otho	[d] Outsourcing Implications	10-49
g 10.03			10-31
	[1]	Children's Online Privacy Protection Act (1998)	10-51
			10-51
		[a] Summary of the Law	10-51
	[2]	[b] Outsourcing Implications	10-33
	[2]	Controlling the Assault of Non-Solicited	
		Pornography and Marketing ("CAN-SPAM") Act (2003)	10-53
			10-53
		[a] Summary of the Law	10-55
	F21	[b] Outsourcing Implications	10-34
	[3]	Electronic Communications Privacy Act	10-54
		(1986) and Wiretap Act	10-54
		[a] Summary of the Law	
	F43	[b] Outsourcing Implications	10-55
	[4]	Electronic Funds Transfer Act (1978)	10-55
		[a] Summary of the Law	10-55
	[5]	[b] Outsourcing Implications	10-55
	[5]	Fair Credit Reporting Act (1970) Fair Debt Collection Practices Act	10-55
	[6]		10-55
	[7]	Family Educational Rights and Privacy Act	10.56
		(1974)	10-56
		[a] Summary of the Law	10-56 10-56
	F01	[b] Outsourcing Implications	10-30
	[8]	Foreign Intelligence Surveillance Act (1978)	10.56
		and FISA Amendments Act (2008)	10-56
		[a] Summary of the Law	10-56 10-57
	[0]	[b] Outsourcing Implications	10-57
	[9]	Freedom of Information Act (1974)	
		[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				
§ 11.02	Indemnification				
	[1]	Gene	erally	11-6	
	[2]				
		T	11-8		
	[3]	Typi	ical 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]	Inde	mnification Scope, Limitations and		
		Pı	rocedures	11-18	
		[a]	Scope and Limitations	11-18	
		[b]	Indemnity Procedures	11-19	
	[5]	Adva	antages of Indemnity Rather Than		
	a Warranty				
§ 11.03	Limitation of Liability				
	[1]	Gene	erally	11-24	
	[2]	Disc	elaimer 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	11-30	
			[v] Special Damages	11-30	
			[vi] Consequential Damages	11-30	

		TABLE OF CONTENTS	xxvii
		[d] Determining What Damages Are	
		Direct vs. What Damages Are	
		Consequential	11-31
		[e] "Lost Profits" Disclaimer	11-33
	[3]	Cap on Direct Damages	11-34
		[a] Structuring the Liability Cap	11-34
		[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	Repr	esentations, 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	11.46
		Compliance with Law	11-46
		[iii] Related Obligations	11-47
		[e] Updated Technology	11-47
		[f] Authority	11-48
		[g] Proper Licenses, Permits and	11 40
		Consents	11-48
		[h] Non-Infringement	11-48
	F 4 7	[i] No Viruses or Malicious Code	11-49
	[4]	Warranty Disclaimers	11-50
	[5]	Difference Between a Representation, a	11.50
	[6]	Warranty and a Covenant	11-52
	[6]	Warranties	11-54
		vv arrantics	11)4

xxviii	<b>OUTSOURCING: LAW &amp; BUSINESS</b>	
	[7] Cumulative Remedies vs. Sole and	
	Exclusive Remedies	11-54
§ 11.05	Miscellaneous Legal Provisions	11-56
	[1] Force Majeure	11-56
	[2] Governing Law and Venue	11-59
	[a] Importance of a Governing Law	
	Provision	11-59
	[b] Enforceability	11-60
	[c] Determining an Appropriate Choice	
	of Law	11-60.1
	[d] Venue	11-61
	[3] Assignment and Delegation	11-61
	[a] Interests of Outsourcing Contract	
	Parties	11-61
	[b] Default Contracting Rules	11-62
	[c] Assignment Clauses	11-63
	[i] Clauses Permitting Assignments	
	and Delegations	11-63
	[ii] Clauses Prohibiting Assignment	
	and Delegation	11-63
	[4] Independent Contractors	11-66
	[5] Cumulative Remedies	11-66
	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
0 12 02	[2] Key Traits of a Transition Manager	12-7
§ 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	10 11
e 12.04	Environment	12-11
§ 12.04	Transition Plan	12-12
	[1] Generally	12-12
	[2] Topics Covered in the Transition Plan	12-12

	TABLE OF CONTENTS	xxix
	[a] Responsibilities	12-12 12-13 12-14 12-14
	[3] Milestones	12-15
	[4] Planning for Transition of Personnel	12-16
	[a] Retained Personnel	12-16
	<ul><li>[b] Career Development Potential</li><li>[c] Additional Transition Plan Topics</li><li>Relating to Transition of</li></ul>	12-17
0.10.05	Personnel	12-17
§ 12.05	Transition Finance Issues	12-19
	[1] Transition Costs	12-19 12-19
	[2] Thunding Transition Costs	12 17
	CHAPTER 13	
	Governance	
§ 13.01	Documenting and Effectively Implementing a	
0.12.02	Governance Structure	13-3
§ 13.02	Governance Organization	13-5
	[1] Customer Enterprise Level Governance	13-5
§ 13.03	[2] Deal-Specific Governance	13-6
	Repositories.	13-9
	[1] Reporting and Performance Dashboards	13-9
0.12.04	[2] Document Repositories	13-11
§ 13.04 § 13.05	Customer Satisfaction Surveys	13-12 13-14
y 15.05	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	14.12
	Delivery Solutions	14-12
	[g] Contentious Negotiations	14-12

		TABLE OF CONTENTS	XXX1
		[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
	F107	[b] Damages and Mitigation	14-36
	[13]	Bank of Louisiana v. Sunguard Recovery	14.26
	E1 43	Services, Inc	14-36
	[14]	Iusacell, S.A. de C.V. v. International	14.26
	F1.63	Business Machines Corp	14-36
	[15]	Carlson, Inc. v. International Business	14.27
	[17]	Machines Corp	14-37
	[16]	Ericsson Ltd. v. Hutchinson 3G UK Ltd	14-37
	[17]	Epic Systems Corp. v. Tata Consultancy	14 20
		Services Ltd	14-38
		[a] Provider Security Failures	14-38 14-38
	Г107	[b] Customer Security Failures	14-38
	[18]	Workgroup Technology Partners, Inc. v.	14-39
	[10]	Anthem, Inc	14-39
	[19]	Perrero v. HCL America, Inc. and Walt	14-39
	[20]	Disney Parks and Resorts U.S., Inc State of Indiana v. Intermedianal	14-39
	[20]	State of Indiana v. International	14-40
	[21]	Business Machines Corp In Re Marriott International, Inc.,	14-40
	[21]	Customer Data Security Breach	
		Litigation	14-40
	[22]	Atos IT Solutions and Services, Inc. v.	1-7-70
	[44]	ACT, Inc	14-40
	[23]	Goonewardene v. ADP, LLC	14-41
	[24]	Other Disputes	14-42
§ 14.05		al Considerations for India	14-43
0	1, 2, 2, 2, 2, 2, 2, 2, 2, 2, 2, 2, 2, 2,		

xxxii		OUTSOURCING: LAW & BUSINESS	
	[2]	Dispute Resolution Mechanism Through Court Adjudication.  [a] Foreign Judgments  [b] Interim Orders Issued by a Foreign Court.  [c] Choice of Venue.  [d] Choice of Law  Dispute Resolution Mechanism Through Arbitration.  [a] Foreign Awards  [b] Domestic Awards  Dispute Resolution Mechanism Through Mediation	14-43 14-44 14-45 14-46 14-46 14-48
		CHAPTER 15	
	A	Modern Approach to Outsourcing	
§ 15.01	an [1]	acteristics of the Legacy Outsourcing Market d Transactions.  Limited to Information Technology Outsourcing.  Single U.SBased Provider	15-4 15-4 15-4
	[3] [4] [5] [6] [7]	Long-Term Contracts  Complicated Agreements  Asset and Human Resource Transfers  Exclusivity and Minimum Commitments  Long Negotiations	15-5 15-6 15-7 15-7 15-8
e 15.02	[8] [9] [10]	High Transaction Costs for Customers  Terminations Are Expensive and Risky  Rigid and Adversarial Process	15-9 15-9 15-10
§ 15.02		arketCustomers Are Outsourcing Many Areas of	15-12
	[2]	Their Businesses	15-12
	[3]	Competition	15-13
	[4]	Common and Present Challenges Shorter Terms	15-14 15-15
	[5]	Fewer Personnel and Asset Transfers, and	15-16
	[6]	Captives  No Exclusivity and Lower Minimum	
	[7]	Commitments	15-18
		Risky	15-18

			TABLI	E OF CONTENTS	xxxiii
	[8]	Robo	otic Pro	cess Automation and Cloud	
		C	omputir	ng Adoption	15-19
		[a]		tic Process Automation	15-19
	[9]	[b] Mod		Computing	15-20.1
	[-]			es to Outsource	15-20.1
§ 15.03	A М			h: New Processes, Contracts	13 20.1
y 13.03					15-20.2
	[1]			nd Flexible RFP Process	15-20.2
	[+]	[a]		dited RFP Process	15-21
		լայ	[i]	UseRFIs Differently or Not at	13 21
			[1]	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]		15-25
			[ix]	Engage Legal and Start Contract	
				Negotiations Earlier	15-26
		[b]	Flexil	ole RFP Process: Do Not Force	
		[-1		pples-to-Apples Results	15-26
			[i]	Consider Eliminating or	10 20
			[-]	Combining Parts of the	
				Legacy RFP Process	15-27
			[ii]	Create Individualized RFPs	15-27
			[iii]	Accept Different Pricing	13 27
			[111]	Solutions	15-27
			[iv]	Accept Service Provider	13-27
			[IV]	Off-the-Shelf Services	15-28
	[2]	Call	horotiv		13-20
	[2]			e, Focused and Managed	15 20
				ons	15-28
		[a]		a Reasonable, Constructive and	15.20
		F1. 1		llaborative Approach	15-29
		[b]		Customer Leadership	15 20
		F-3		volved	15-30
		[c]	iviana	ge as a Project	15-30

xxxiv		OUTS	SOURCING: LAW & BUSINESS		
	[3]		ensed and Modernized Outsourcing ontract Terms	15-31	
		[b]	Conditions: The Modern Form Customized Service Delivery	15-31	
			Contract	15-32	
		[c]	Simplified "Utility Model" Pricing	15-33	
		[d]	Targeted Service Levels	15-34	
		[e] [f]	Standard Services Descriptions Multi-Provider Service Levels, Confidentiality and Cooperation	15-34	
			Agreement	15-35	
	[4]	Targe	ated and Integrated Multi-Provider	13-33	
		_	overnance	15-36	
			CHAPTER 16		
		R	egulatory Environment		
§ 16.01	Regu	16-3			
	[1]	[1] Increasing Number of Legislative			
		Pro	ohibitions in the United States	16-3	
	[2]	Unite	d States and European Union Taking		
			fferent Approaches	16-4	
§ 16.02	Federal Regulation				
	[1]		ect Regulation of Outsourcing	16-5	
	[2]		Regulations	16-5	
	[3]	_	lations on Exports	16-6	
		[a]	Exports in Outsourcing		
			Arrangements	16-6	
		[b]	Governed by Several Federal		
			Agencies	16-6	
		[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]		er Adjustment and Retraining		
		No	otification Act	16-18	

		TABLE OF CONTENTS	XXXV
		[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	16-26.1
§ 16.03	State	Regulation	16-27
	[1]	Generally	16-27
	[2]	Constitutionality	16-27
		[a] Commerce Clause	16-27
		[b] Supremacy Clause	16-28
	[3]	Preferential Laws	16-29
		[a] Sample Preferential Laws	16-29
		[b] Government Outsourcing/	
		Procurement	16-29
	[4]	Economic Development Incentive	
		Clawbacks	16-30
	[5]	Other State Statutes and Regulations	16-31
		[a] Certified Public Accountants	16-31
		[b] Elections	16-31
		[c] International Trade	16-31
		[d] Medical	16-32
		[e] Payment Card Industry Data Security	4 < 0.0
	5.63	Standard	16-32
	[6]	Executive Orders	16-34
		[a] Generally	16-34
0.16.04	T /	[b] Executive Order Examples	16-34
§ 16.04		national Regulation	16-35
	[1]	North American Free Trade Agreement	16.25
	[0]	("NAFTA")	16-35
	[2]	World Trade Organization Agreement on	
		Government Procurement ("WTO AGP")	16.25
		(WIU AGP")	16-35

xxxvi		OUT	SOURCING: LAW & BUSINESS	
	[3]		ld Trade Organization General	
			greement on Trade in Services	16.26
		`	WTO GATS")	16-36
		[a]	Most Favored Nation Status	16-36
0.16.05	D	[b]	Non-Applicability	16-36
§ 16.05	_		ndustries	16-37
	[1]		rview	16-37
	[2]		ncial Services	16-37
		[a]	Generally	16-37
		[b]	Gramm-Leach-Bliley Financial Services Modernization Act	16.20
			of 1999 ("GLBA")	16-38
		[c]	Bank Secrecy Act of 1970	16-38
		[d]	Regulations Specific to Third-Party	16.00
			Arrangements	16-39
		[e]	Uniting and Strengthening America	
			by Providing Appropriate Tools	
			Required to Intercept and Obstruct	
			Terrorism Act ("U.S.A. Patriot	4 5 40
			Act")	16-40
		[f]	Fair Credit Reporting Act	
			("FCRA")	16-41
		[g]	Affiliated Institution Transactions	16-41
		[h]	OCC Guidance	16-42
	F2.7	[i]	International Banking Regulations	16-43
	[3]	Heal	th Care	16-44
		[a]	Outsourcing in Health Care	16-44
		[b]	Health Insurance Portability and	
			Accountability Act of 1996	
			("HIPAA")	16-47
		[c]	Other Specific Laws	16-48
	[4]	Ener	gy	16-49
	[5]	Tele	communications	16-50
	[6]	Law	Firms	16-50
		[a]	Generally	16-50
		[b]	Engagement	16-50
		[c]	Competency	16-51
		[d]	Confidentiality	16-51
		[e]	Reasonable Fees	16-51
		[f]	Unauthorized Practice of Law	16-52
			CHAPTER 17	
		G	overnmental Outsourcing	
§ 17.01 § 17.02			by Governmental Entities	17-1
3 17.02			ent	17-5

	TABLE OF CONTENTS	xxxvii		
	[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		
0 17 04	[2] Government Outsourcing/Procurement	17-9		
§ 17.04	Special Considerations in Governmental	17.10		
	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			
§ 18.03	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	Form: Master Outsourcing Services Agreement			
	(the Modern Form)	18-7		
§ 18.07	Form: Form of Service Delivery Contract	18-58		
§ 18.08	Form: Menu of Supplemental Provisions to the			
	Modern Form	18-62.1		
§ 18.08A	Form: Modern Form Term Sheet	18-82.5		
§ 18.09	Form: Outsourcing Cooperation and			
	Accountability Agreement	18-83		
INDEX		T_1		