### **Summary of Contents**

### Volume 1

### PART 1. PREPARING FOR THE OUTSOURCING TRANSACTION

- Chapter 1. Introduction to Outsourcing
- Chapter 2. Preparing for and Negotiating the Deal
- Chapter 3. Choosing the Right Service Provider: The Request for Proposal Process
- Chapter 4. Regulatory Guidelines: Outsourcing Risk Management
- Chapter 5. Documenting the Deal

### PART 2. THE OUTSOURCING TRANSACTION

- Chapter 6. The Master Agreement
- Chapter 7. Schedules to the Master and Services Agreements: An Analytical Framework
- Chapter 8. Services and the Service Level Agreements
- Chapter 9. Asset Transfer Issues
- Chapter 10. Pricing and Payment
  - Appendix 10A. Sample Clauses
- Chapter 11. Benchmarking and its Alternatives
- Chapter 12. Implementation, Governance and Administration
  - Appendix 12A. Sample Governance Schedule
  - Appendix 12B. Sample Change Control Process Schedule
- Chapter 13. Exit Strategies

# PART 3. SPECIAL ISSUES IN AN OUTSOURCING TRANSACTION: SECURITY; EMPLOYMENT AND LABOUR; PENSIONS; TAX

- Chapter 14. Information Security Compliance: Practical Implications for Outsourcing
- Chapter 15. Employment and Labour Issues
- Chapter 16. Pension Considerations
- Chapter 17. Tax Issues

Appendix 17A. Sample Clauses

### Volume 2

### PART 4. OUTSOURCING ISSUES IN PARTICULAR JURISDICTIONS

- Chapter 18. Contract Issues in Quebec
- Chapter 19. Special Canadian Issues in Cross-Border
  Outsourcing
  - Chapter 20. Offshore Outsourcing: Challenges and Opportunities
- Chapter 21. Outsourcing in Eastern Europe
- Chapter 22. Outsourcing in the United Kingdom
- Chapter 23. Outsourcing in India

#### PART 5. OTHER ISSUES IN OUTSOURCING

- Chapter 24. The Only Constant: Pricing for Change in Outsourcing Arrangements
- Chapter 25. Privacy Issues in Outsourcing: A Work in Progress
- Chapter 26. Has IT Outsourcing Become Ordinary Course of Business? *Re Stelco Inc.*
- Chapter 27. The Stay Back Team
- Chapter 28. Bankruptcy and Insolvency Issues in Outsourcing: A Wake-Up Call
- Chapter 29. Ensuring Coverage: Insurance Issues in Outsourcing Arrangements

- Chapter 30. Avoiding Project Mismanagement in Outsourcing Transactions
- Chapter 31. Allocation of Risk: A Cross-Jurisdictional Study
- Chapter 32. Current Trends in Limits of Liability and Indemnification in IT Contracts
- Chapter 33. Corporate Social Responsibility and Sustainability in Outsourcing
- Chapter 34. The Relationship Review: Maintaining and Strengthening Healthy Working Relationships
- Chapter 35. De Beers U.K. Ltd. v. Atos Origin IT Services U.K. Ltd.: Lessons from an Outsourcing
- Chapter 36. Overview of Intellectual Property Rights and IP Outsourcing Issues in Canada
- Chapter 37. Managing Multivendor Outsourcing
- Chapter 38. BSkyB Redux? Lessons from County of Orange v. Tata Consultancy Services Ltd. et al.
- Chapter 39. Anti-Spam Legislation and Outsourcing
- Chapter 40. The New ISO 37500 Outsourcing Standard: A Critical Analysis
- Chapter 41. Case Study: CIS General Insurance v IBM UK
  More Lessons Learned from Another Failed
  Agile Project
- Chapter 42. MillerCoors v HCL: Lessons Learned—Again— From a Failed SAP ERP Implementation Project
- Chapter 43. Understanding the Importance of Force Majeure/ Extraordinary Event Clauses in Outsourcing Agreements
- Chapter 44. Case Study: Lachman v Revlon Class Action -Lessons On When & How to Be Transparent to Shareholders in the Case of a Failed ERP Implementation

### **Appendices**

- Appendix A. Master Outsourcing Agreement
- Appendix B. Technology Services Agreement
- Appendix C. Employee Matters Agreement
- Appendix D. Asset Purchase Agreement

Appendix E. Basel Committee on Banking Supervision— Outsourcing in Financial Services

Appendix F. Office of the Superintendent of Financial Institutions Canada—Outsourcing of Business Activities, Functions and Processes Guideline

Appendix G. Study: Optimizing Value from Outsourcing

### **Table of Cases**

### Index

### **Table of Contents**

### Volume 1

# PART 1. PREPARING FOR THE OUTSOURCING TRANSACTION

# CHAPTER 1. INTRODUCTION TO OUTSOURCING

### I. INTRODUCTION

§ 1:1 Generally

### II. OUTSOURCING: A BRIEF HISTORY

- § 1:2 Outsourcing Yesterday
- § 1:3 IT and BPO Outsourcing
- § 1:4 Offshoring
- § 1:5 Other Developments in Outsourcing

### III. OUTSOURCING: A PRIMER

- § 1:6 The Two Elements of an Outsourcing
- § 1:7 Key Elements of Our Approach—Putting the Issues in Perspective: Understanding the Needs and Wants of Both Parties
- § 1:8 —The Starting Point: Know Thy Client
- § 1:9 —Outsourcing Does Not End After Execution
- § 1:10 —Building in Flexibility
- § 1:11 —Negotiation Style
- § 1:12 Applying the Approach: Key Issues in Outsourcing Arrangements
- § 1:13 —Defining Service Levels
- § 1:14 —Pricing
- § 1:15 —Benchmarking
- § 1:16 —Third Party Contract Management

### IV. USING THIS BOOK

§ 1:17 Generally

# CHAPTER 2. PREPARING FOR AND NEGOTIATING THE DEAL

- § 2:1 Introduction
- § 2:2 Preparation
- § 2:3 Choosing Your Team
- § 2:4 Choosing Legal Counsel
- § 2:5 Choosing the Service Provider: the RFP
- § 2:6 Multi-Party Negotiations—Parallel Negotiations
- § 2:7 —Multi-Vendor Pre-qualification
- § 2:8 Principled Negotiations
- § 2:9 Conclusion

### CHAPTER 3. CHOOSING THE RIGHT SERVICE PROVIDER: THE REQUEST FOR PROPOSAL PROCESS

- § 3:1 Introduction
- § 3:2 Making Sense of the Acronyms: RFIs, RFQs and RFPs
- § 3:3 Reasons to Issue an RFP
- § 3:4 RFPs Versus Formal Tenders
- § 3:5 Preparation
- § 3:6 Drafting the RFP
- § 3:7 —General Content of the RFP
- § 3:8 —Drafting to Avoid the Formal Tender Characterization
- § 3:9 —Key Legal Terms
- § 3:10 —Parameters of Communication During the RFP Process
- § 3:11 Disseminating the RFP
- § 3:12 Responding to the RFP
- § 3:13 Choosing the Winning Service Provider and Negotiating
- § 3:14 Conclusion

# CHAPTER 4. REGULATORY GUIDELINES: OUTSOURCING RISK MANAGEMENT

- § 4:1 Introduction
- § 4:2 The Basel Guidelines
- § 4:3 The OSFI Guideline
- § 4:4 Accountability and Control
- § 4:5 FRE Board of Directors Responsibilities
- § 4:6 FRE Management Responsibilites
- § 4:7 Chief Agent/Principal Officer Responsibilities

### Table of Contents

§ 4:8	Materiality Assessment
§ 4:9	Risk Management Program for Material Outsourcing Arrangements
§ 4:10	Due Diligence Processes
§ 4:11	Policies and Procedures to Manage Risks Associated with Material Outsourcing Arrangements— Contract for Services
§ 4:12	—Location of Records
§ 4:13	—Business Continuity Plan
§ 4:14	—Outsourcing in Foreign Jurisdictions
§ 4:15	The Memorandum on New Technology-Based Outsourcing Arrangements
§ 4:16	—Cloud Computing: Special Considerations
§ 4:17	—Confidentiality, Security, and Separation of Property
§ 4:18	—Cloud Computing and the Location of Records
§ 4:19	—Conclusion
§ 4:20	Monitoring and Oversight of Material Outsourcing Arrangements
§ 4:21	—Centralized List of all Material Outsourcing Arrangements
§ 4:22	—Monitoring the Outsourcing Arrangement
§ 4:23	—Monitoring the Service Providers
§ 4:24	Data Processing in Foreign Jurisdictions
§ 4:25	Conclusion
_	PTER 5. DOCUMENTING THE DEAL
§ 5:1	Introduction
§ 5:2	The Agreement Framework—Every Outsourcing Deal is Unique
§ 5:3	—Preparing the Documentation
§ 5:4	The Main Agreement—The Master/Framework Agreement
§ 5:5	—Services Agreement
§ 5:6	—Asset Purchase Agreement
§ 5:7	—Employment Agreement
§ 5:8	—Real Estate Agreement
§ 5:9	Conclusion

# PART 2. THE OUTSOURCING TRANSACTION

### CHAPTER 6. THE MASTER AGREEMENT

### I. INTRODUCTION

§ 6:1 Generally

### II. THE MASTER AGREEMENT

§ 6:2	Statement re Objectives of the Outsourcing
§ 6:3	Base Assumptions
§ 6:4	Scope
§ 6:5	Approval of Changes
§ 6:6	Pricing
§ 6:7	Outsourcing Overview
§ 6:8	Confidentiality
§ 6:9	Intellectual Property Ownership
§ 6:10	Representations and Warranties
§ 6:11	Limitation of
	Liability/Disclaimer/Indemnity/Insurance
§ 6:12	—Limitation of Liability
§ 6:13	—The Role of Insurance and Performance
	Guarantees
§ 6:14	—Exclusion of Indirect Damages
§ 6:15	—Indemnity
§ 6:16	Dispute Resolution
§ 6:17	Term and Termination
§ 6:18	Transition/Orderly Termination

# CHAPTER 7. SCHEDULES TO THE MASTER AND SERVICES AGREEMENTS: AN ANALYTICAL FRAMEWORK

### I. INTRODUCTION

§ 7:1 Generally

### II. DIFFERING PERSPECTIVES GENERALLY

- § 7:2 Introduction
- § 7:3 The Customer
- § 7:4 The Service Provider

### III. AGREEMENT AND SCHEDULE STRUCTURE

- § 7:5 Layout
- § 7:6 Internal Referencing
- § 7:7 The Role of Counsel

### IV. CONCLUSION

§ 7:8 Concluding Comments

# CHAPTER 8. SERVICES AND THE SERVICE LEVEL AGREEMENTS

### I. INTRODUCTION

§ 8:1 Generally

### II. THE SERVICES AGREEMENT

§ 8:2	Scope of Services
§ 8:3	Service Management
§ 8:4	Service Standards
§ 8:5	—Service Standards Generally
§ 8:6	—Compliance with Applicable Law
§ 8:7	—Service Levels
§ 8:8	—Service Level Measurement and Reporting
§ 8:9	—Root Cause Analysis and Resolution
§ 8:10	—Service Level Credits
§ 8:11	—Service Level Incentives/Credit Earn-Backs
§ 8:12	—Operational Auditing
§ 8:13	Achieving Savings and Gainsharing: Incentive or Distraction?
§ 8:14	Managing and Improving Technology through the Term
§ 8:15	Deliverables: Delivery, Installation, Acceptance and Warranty
§ 8:16	Compliance with Customer Policies: Data and Security Requirements
§ 8:17	—Access to Premises and Equipment
§ 8:18	—Access to Data
§ 8:19	—Compliance with Other Customer Policies
§ 8:20	Personnel Issues
§ 8:21	-Non-solicitation
§ 8:22	—Subcontractors
§ 8:23	Pricing and Payment
§ 8:24	Representations, Warranties and Covenants

### § 8:25 Specific Regulatory Requirements

### III. THE SERVICE LEVEL AGREEMENT

- § 8:26 What is a Service Level?
- § 8:27 What is a Service Level Credit?
- § 8:28 Developing the Service Levels—Setting the Baseline Service Levels
- § 8:29 —Prioritizing the Service Levels
- § 8:30 Describing the Service Levels
- § 8:31 Service Levels during the Transition-In Phase
- § 8:32 Calculating Service Level Credits: Examples

### CHAPTER 9. ASSET TRANSFER ISSUES

### I. INTRODUCTION

§ 9:1 Generally

### II. CUSTOMER'S PERSPECTIVE

- § 9:2 Pre-Contract Considerations
- § 9:3 Post-Contract Considerations

### III. SERVICE PROVIDER'S PERSPECTIVE

- § 9:4 Pre-Contract Considerations
- § 9:5 Post-Contract Considerations

### IV. DUE DILIGENCE

- § 9:6 Introduction
- § 9:7 Inspection and Review
- § 9:8 Searches
- § 9:9 Third Party Contracts

### V. CONTRACTS AND CONTRACTUAL RIGHTS

- § 9:10 Introduction
- § 9:11 Assignment/Novation of Contracts
- § 9:12 Managed Contracts
- § 9:13 Adjustments
- § 9:14 Assignment-Back

### VI. AGREEMENT OF PURCHASE AND SALE

- § 9:15 Introduction
- § 9:16 Description of Assets

lxvi

#### TABLE OF CONTENTS

- § 9:17 Pricing—Valuation
- § 9:18 —Allocation of Purchase Price
- § 9:19 Delivery
- § 9:20 Representations and Warranties
- § 9:21 —Power and Authority
- § 9:22 —Condition of Assets
- § 9:23 —Completeness
- § 9:24 —Title/Encumbrances
- § 9:25 —Contracts
- § 9:26 —Knowledge Qualifier
- § 9:27 —Disclaimer
- § 9:28 —Survival
- § 9:29 —Update
- § 9:30 —Non-Waiver
- § 9:31 Indemnities
- § 9:32 Governing Law

### VII. BULK SALES ACT

§ 9:33 Generally

### VIII. TAXES

§ 9:34 Generally

### IX. REGULATORY CONCERNS

§ 9:35 Generally

### X. CONCLUSION

§ 9:36 Concluding Comments

### CHAPTER 10. PRICING AND PAYMENT

- § 10:1 Introduction
- § 10:2 Customer's Perspective
- § 10:3 Service Provider's Perspective
- § 10:4 The Base Case
- § 10:5 Pricing Models
- § 10:6 —Fixed Price Models
- § 10:7 —Rate Based Models
- § 10:8 —Combinations
- § 10:9 —Cost-Plus Models
- § 10:10 —Percentage-of-Asset-Cost/Value Models
- § 10:11 —Time and Materials Models
- § 10:12 —Customer Representations

§ 10:13	Pricing Changes
§ 10:14	—Volume
§ 10:15	—Service Scope
§ 10:16	—Discontinued Services
§ 10:17	—Additional Services
§ 10:18	—Regulatory Changes
§ 10:19	—Inflation
§ 10:20	—Adjustments Based on Actual Costs
§ 10:21	—Pricing Reviews
§ 10:22	Development Projects
§ 10:23	Benchmarking and Service Level Price
ŭ	Adjustments
§ 10:24	Gainsharing
§ 10:25	Taxes, Insurance, Travel, Pass-Through Charges
	and Foreign Exchange—Taxes Applicable to the Services
§ 10:26	—Other Tax Considerations
§ 10:27	—Insurance Costs
§ 10:28	—Travel Expenses
§ 10:29	—Pass-Through Charges
§ 10:30	—Supplementary Documents
§ 10:31	—Currency Issues
§ 10:32	—Internal Costs
§ 10:33	Transfer Costs
§ 10:34	Most Favoured Customer Provisions
§ 10:35	Payments—Payment Terms
§ 10:36	—Invoices
§ 10:37	—Credits
§ 10:38	—Fees Calculated Monthly
§ 10:39	—Interest
§ 10:40	—Supporting Certificate
§ 10:41	Record Retention—Customer Records
§ 10:42	—Service Provider Records
§ 10:43	—Other Records Issues
§ 10:44	—OSFI Guideline
§ 10:45	Financial Audits
§ 10:46	—OSFI Guideline, Regulatory Audits and
Ü	Inspections
§ 10:47	—Other Audits
§ 10:48	-Service Provider's Internal Audit Function and
Ü	3416/5970 Audits
§ 10:49	—Officers' Certificates
§ 10:50	
§ 10:51	
§ 10:52	—Suspension or Continuation of Service
5 10.02	Suspension of Commutation of Service

#### TABLE OF CONTENTS

- § 10:53 —Set-Off
- § 10:54 —Guarantees and Indemnities
- § 10:55 Conclusion

Appendix 10A. Sample Clauses

# CHAPTER 11. BENCHMARKING AND ITS ALTERNATIVES

- § 11:1 Introduction
- § 11:2 Differing Perspectives—The Customer
- § 11:3 —The Supplier
- § 11:4 —Third Party Consultants
- § 11:5 Developing a Benchmarking Process—The Theory of Benchmarking
- § 11:6 —When to Benchmark
- § 11:7 —The Benchmarker
- § 11:8 —The Peer Group
- § 11:9 —The Data
- § 11:10 —Costs
- § 11:11 —Benchmarking Procedure
- § 11:12 —Remedies: Adjusting Fees and/or Service Levels, or Termination
- § 11:13 Alternatives
- § 11:14 Conclusion

### CHAPTER 12. IMPLEMENTATION, GOVERNANCE AND ADMINISTRATION

- § 12:1 Introduction
- § 12:2 Transition
- § 12:3 —Customer Concerns
- § 12:4 —Service Provider Concerns
- § 12:5 —The Transition Plan
- § 12:6 —Changes, Delays and Termination
- § 12:7 Governance—Goals of the Governance Model
- § 12:8 —Elements of the Governance Model
- § 12:9 —Key Positions
- § 12:10 —Committees
- § 12:11 Change Management
- § 12:12 —Scope of the Change Management Process
- § 12:13 —Elements of the Change Request Procedure
- § 12:14 Plans and Planning—Examples of Plans
- § 12:15 —Contract Terms Applicable to Plans
- § 12:16 Reports—Examples of Reports
- § 12:17 —Contract Terms Applicable to Reports

§ 12:19	Service Audits
§ 12:20	—OSFI Guideline
§ 12:21	—Other Audits
§ 12:22	Dispute Resolution
§ 12:23	—Management of Disagreements
§ 12:24	—General Obligation
§ 12:25	—Internal Dispute Resolution Procedure
§ 12:26	—Arbitration
§ 12:27	—Expedited Disputes
§ 12:28	—Continuation of Services During a Dispute
§ 12:29	Termination of Services and Reprocurement
Appendix	12A. Sample Governance Schedule
Appendix	12B. Sample Change Control Process Schedule
CHAP	TER 13. EXIT STRATEGIES
§ 13:1	Introduction
§ 13:1 § 13:2	
•	Introduction Exit Strategies Generally—What is an Exit
§ 13:2	Introduction Exit Strategies Generally—What is an Exit Strategy?
§ 13:2 § 13:3	Introduction Exit Strategies Generally—What is an Exit Strategy? —General Principles
§ 13:2 § 13:3 § 13:4	Introduction Exit Strategies Generally—What is an Exit Strategy? —General Principles The Transition Plan
§ 13:2 § 13:3 § 13:4 § 13:5	Introduction Exit Strategies Generally—What is an Exit Strategy? —General Principles The Transition Plan Transition Issues
§ 13:2 § 13:3 § 13:4 § 13:5 § 13:6	Introduction Exit Strategies Generally—What is an Exit Strategy? —General Principles The Transition Plan Transition Issues —Fees
\$ 13:2 \$ 13:3 \$ 13:4 \$ 13:5 \$ 13:6 \$ 13:7	Introduction Exit Strategies Generally—What is an Exit Strategy? —General Principles The Transition Plan Transition Issues —Fees —Transfer of Assets
§ 13:2 § 13:3 § 13:4 § 13:5 § 13:6 § 13:7 § 13:8	Introduction Exit Strategies Generally—What is an Exit Strategy? —General Principles The Transition Plan Transition Issues —Fees —Transfer of Assets —Transfer of Employees
\$ 13:2 \$ 13:3 \$ 13:4 \$ 13:5 \$ 13:6 \$ 13:7 \$ 13:8 \$ 13:9	Introduction Exit Strategies Generally—What is an Exit Strategy? —General Principles The Transition Plan Transition Issues —Fees —Transfer of Assets —Transfer of Employees —Consents, Approvals and Other Issues
\$ 13:2 \$ 13:3 \$ 13:4 \$ 13:5 \$ 13:6 \$ 13:7 \$ 13:8 \$ 13:9 \$ 13:10	Introduction Exit Strategies Generally—What is an Exit Strategy? —General Principles The Transition Plan Transition Issues —Fees —Transfer of Assets —Transfer of Employees —Consents, Approvals and Other Issues —Costs Incidental to Termination

§ 13:14 —Termination for Insolvency

§ 13:17 Expiration—Expiration of Term

§ 13:15 —Partial Termination

§ 13:16 Covenants

§ 13:18 Conclusion

§ 12:18 —OSFI Guideline

# PART 3. SPECIAL ISSUES IN AN OUTSOURCING TRANSACTION: SECURITY; EMPLOYMENT AND LABOUR; PENSIONS; TAX

# CHAPTER 14. INFORMATION SECURITY COMPLIANCE: PRACTICAL IMPLICATIONS FOR OUTSOURCING

### I. INTRODUCTION

§ 14:1 Generally

### II. TYPES OF DATA TO BE SECURED: CONFIDENTIAL AND PERSONAL INFORMATION

- § 14:2 Generally
- § 14:3 Confidential Information
- § 14:4 Personal Information
- § 14:5 Personal Information in the Private Sector
- § 14:6 Personal Information in the Public Sector
- § 14:7 Duty to Notify for Breach of Security

## III. TORT LIABILITY AND INFORMATION SECURITY

- § 14:8 Generally
- § 14:9 United States
- § 14:10 Canada

### IV. MANAGING COMPLIANCE

- § 14:11 Overview
- § 14:12 Reasonableness
- § 14:13 Physical Measures
- § 14:14 Organizational Measures
- § 14:15 Technological Measures
- § 14:16 Information Technology Standards
- § 14:17 Audit
- § 14:18 The Outsourcing Contract

# CHAPTER 15. EMPLOYMENT AND LABOUR ISSUES

§ 15:1 Overview

	Outsour
§ 15:2	Due Diligence Steps for Employment Issues
§ 15:3	Unionized Employees
§ 15:4	Non-Unionized Employees
§ 15:5	General Considerations
CHAPTER 16. PENSION CONSIDERATIONS	
I. IN	TRODUCTION
§ 16:1	Generally

# II. OPTIONS FOR STRUCTURING THE OUTSOURCING TRANSACTION

§ 16:2	Introduction
§ 16:3	Service Provider Does Not Provide Pension Plan
§ 16:4	—Group Registered Retirement Savings Plan
§ 16:5	—Unvested Pension Benefits
§ 16:6	Service Provider Provides Pension Plan
§ 16:7	Pension Plan for Future Service
§ 16:8	Transfer of Assets to Service Provider's Pension Plan
§ 16:9	Wrap-Around Arrangement
§ 16:10	Assumption of Customer's Pension Plan

### **CHAPTER 17. TAX ISSUES**

### I. INTRODUCTION

§ 17:1 Generally

### II. CUSTOMER'S PERSPECTIVE

§ 17:2 Commodity Tax Issues	
§ 17:3 —Canadian Value-Added Taxes—GST/HST and G	TZ
§ 17:4 —Sales and Use Taxes	
§ 17:5 —Foreign Sales Taxes	
§ 17:6 Income Tax Issues	

### III. SUPPLIER'S PERSPECTIVE

§ 17:7	Commodity Tax Issues
§ 17:8	—Registration Requirements
§ 17:9	—Application of Commodity Taxes to Inputs to
	Outsourced Function

#### § 17:10 Income Tax Issues

### IV. KEY FRICTION POINTS

- § 17:11 Introduction
- § 17:12 Withholding Taxes
- § 17:13 Section 167 Elections
- § 17:14 RST Clearance Certificates
- § 17:15 How is the Purchase Price Allocated Between and Among Any Assets Being Purchased by the Supplier from the Customer?

Appendix 17A. Sample Clauses

### Volume 2

# PART 4. OUTSOURCING ISSUES IN PARTICULAR JURISDICTIONS

# CHAPTER 18. CONTRACT ISSUES IN QUEBEC

### I. INTRODUCTION

§ 18:1 Generally

### II. GENERAL PRINCIPLES

- § 18:2 Introduction
- § 18:3 Limitation of Actions
- § 18:4 Good Faith
- § 18:5 Consideration
- § 18:6 Frustration and Force Majeure
- § 18:7 Stipulations of Inalienability
- § 18:8 Unconscionability and the Contract of Adhesion
- § 18:9 Public Order and Illegality

### III. TERMS AND CONDITIONS OF A CONTRACT

- § 18:10 Misrepresentation or Fraud
- § 18:11 Exclusion Clauses and Limitation Clauses
- § 18:12 Penalty Clauses
- § 18:13 Implied Terms

### IV. BREACH AND REMEDIES

§ 18:14 Breach

§ 18:15	Putting a Party in Default ("Mise en Demeure")
§ 18:16	Remedies
§ 18:17	—Specific Performance
§ 18:18	-Resolution or Resiliation of Contracts and
	Reduction of Obligations
§ 18:19	—Damages
§ 18:20	—Restitution
§ 18:21	—Nullity

### V. CERTAIN NOMINATE CONTRACTS

§ 18:22	Introduction
§ 18:23	Sale—Contract of Sale
§ 18:24	—Warranties of the Seller
§ 18:25	Contract of Enterprise or for Services—Nature and
	Scope
§ 18:26	—Rights and Obligations of the Parties
§ 18:27	—Warranties
§ 18:28	—Resiliation of the Contract of Enterprise or For
	Services

### VI. LICENCE AGREEMENT

§ 18:29 Generally

### VII. CONCLUSION

§ 18:30 Concluding Comments

# CHAPTER 19. SPECIAL CANADIAN ISSUES IN CROSS-BORDER OUTSOURCING

### I. INTRODUCTION

§ 19:1 Generally

### II. REGULATORY PATCHWORK

§ 19:2 Generally

### III. THE OSFI GUIDELINE FOR OUTSOURCING

§ 19:3 Generally

### IV. DATA MANAGEMENT AND PRIVACY ISSUES

§ 19:4 The Canadian Privacy Patchwork

lxxiv

#### TABLE OF CONTENTS

- § 19:5 The Patriot Act and Restrictions on Outsourcing to U.S.-Linked Service Providers: New British Columbia Laws are Only the Beginning—New Restrictions on British Columbia Public Sector Entities Outsourcing to U.S.-Linked Service Providers
- § 19:6 —Pending Restrictions on Federal Public Sector Entities Outsourcing to Foreign Service Providers
- § 19:7 —Future Restrictions on Private Sector Entities Outsourcing to Foreign Service Providers?

### V. HUMAN RESOURCES ISSUES

- § 19:8 Employment and Labour
- § 19:9 Pensions
- § 19:10 Immigration
- § 19:11 Moral Rights

### VI. OTHER ISSUES

- § 19:12 Tax
- § 19:13 Quebec

### VII. CONCLUSION

§ 19:14 Concluding Comments

### CHAPTER 20. OFFSHORE OUTSOURCING: CHALLENGES AND OPPORTUNITIES

### I. INTRODUCTION

§ 20:1 Generally

### II. WHY CONSIDER OFFSHORING?

§ 20:2 Generally

### III. POSSIBLE SCENARIOS FOR OFFSHORING

- § 20:3 Introduction
- § 20:4 Outsourcing Directly to a Third Party Vendor Overseas
- § 20:5 —Contractual Issues
- § 20:6 —Regulatory Issues
- § 20:7 —Privacy Issues
- § 20:8 —Intellectual Property Issues

§ 20:9	—Cultural Differences
§ 20:10	—Disruption to Domestic Employees
§ 20:11	—Other Issues
§ 20:12	Outsourcing a Service to the Domestic Office of a Global Vendor
§ 20:13	Establishing a Wholly Owned Subsidiary Overseas
§ 20:14	Planning for a Successful Offshoring Project
§ 20:15	—Choosing Counsel
§ 20:16	—Due Diligence
§ 20:17	—Drafting the Agreement
§ 20:18	—Enforcing the Agreement
§ 20:19	—Coping with Domestic Employees
§ 20:20	—Tax Issues

### IV. CONCLUSION

§ 20:21 Concluding Comments

# CHAPTER 21. OUTSOURCING IN EASTERN EUROPE

### I. INTRODUCTION

§ 21:1 Generally

### II. CASE STUDY

§ 21:2 Generally

# III. OVERVIEW OF POLITICAL AND ECONOMIC ENVIRONMENTS

§ 21:3	The Czech Republic
$\S 21:4$	Bulgaria
$\S 21:5$	Hungary
§ 21:6	Russia

### IV. QUESTIONS AND ANSWERS

§ 21:7	HR—Staff Augmentation Phase—Transfer of
	employees to Canada
§ 21:8	HR—Outsourcing Phase—Transfer of customer
	employees to service provider
§ 21:9	HR—Enforceability of Non-Competition Clauses
§ 21:10	IP Development in Host Country
§ 21:11	Privacy
§ 21:12	Bankruptcy—Escrow

lxxvi

#### TABLE OF CONTENTS

- § 21:13 Bankruptcy—Enforceability of Licence
- § 21:14 Disputes—Liquidated damages provisions
- § 21:15 Dispute Resolution
- § 21:16 Other
- § 21:17 Final question

### V. CONCLUSION

§ 21:18 Concluding Comments

# CHAPTER 22. OUTSOURCING IN THE UNITED KINGDOM

### I. INTRODUCTION

- § 22:1 The History of Outsourcing in the UK
- § 22:2 The Laws of the UK
- § 22:3 Choice of Law

### II. EMPLOYMENT AND PENSIONS

- § 22:4 TUPE Overview
- § 22:5 —Application of TUPE to Outsourcing
- § 22:6 —Public Sector and Not-for-Profit Transfers
- § 22:7 —Transfers Within Public Administration
- § 22:8 —The Territorial Application of TUPE to Outsourcing Situations
- § 22:9 The Effects of TUPE—Automatic Transfer of Employment Under TUPE
- § 22:10 —Opt Out
- § 22:11 —Who Transfers?
- § 22:12 Duty to Inform and Consult Employee Representatives
- § 22:13 —Election of Employee Representatives
- § 22:14 —Information to be Provided to Affected Employees
- § 22:15 Penalties for Non-Compliance
- § 22:16 Notification of Employee Liability Information
- § 22:17 —Remedy for Failure to Notify Employee Liability Information
- § 22:18 Data Protection Issues
- § 22:19 Special Protection for Employees Against Dismissal in Connection with a TUPE Transfer
- § 22:20 Changing Terms and Conditions of Employment
- § 22:21 Clauses to be Considered for Inclusion in Outsourcing Contracts

§ 22:22	Pension Considerations
§ 22:23	Immigration Considerations—Introduction
§ 22:24	—Immigration and TUPE
§ 22:25	—European Economic Area
§ 22:26	—The Points Based System ("PBS")
§ 22:27	—Business Visitor
III. L	IMITATION OF LIABILITY
§ 22:28	Introduction
§ 22:29	Appropriateness
§ 22:30	Types of Limitation
§ 22:31	Enforceability
§ 22:32	Unfair Contract Terms Act 1977
§ 22:33	Consumer Rights Act 2015 ("CRA")
§ 22:34	Construction
§ 22:35	Severance
§ 22:36	Insurance
IV. E	VIDENCE
§ 22:37	Generally
v. FI	NANCIAL SERVICES
§ 22:38	Introduction
§ 22:39	Outsourcing by "Common Platform Firms"
§ 22:40	SYSC 8
§ 22:41	MiFID Connect Guidance
§ 22:42	International Guidance
§ 22:43	Outsourcing by "Insurers"
VI. C	ORPORATE GOVERNANCE
§ 22:44	UK Corporate Governance Code and Others
§ 22:45	Overlap between the Code and the Disclosure and Transparency Rules
VII. I	DATA PRIVACY: INTRODUCTION
§ 22:46	Introduction
§ 22:40 § 22:47	Data Protection Act—Scope of Application
§ 22:48	
§ 22:48 § 22:49	Obligations under the DPA Outsourcing Arrangements
§ 22:49 § 22:50	Transfers of Personal Data Outside the EEA
§ 22:50 § 22:51	Adoption of Policies Relating to Data Management
2 22.01	and Privacy

#### TABLE OF CONTENTS

- § 22:52 Consequences of Breach of the DPA
- § 22:53 Reform of the Data Privacy Regime
- § 22:54 Human Rights Act
- § 22:55 Regulation of Investigatory Powers Act
- § 22:56 Freedom of Information Act

### VIII. DISPUTE RESOLUTION

§ 22:57 Generally

### IX. LATE PAYMENT

§ 22:58 Generally

### X. COMPETITION LAW

- § 22:59 Introduction
- § 22:60 European System—Institutions
- § 22:61 —Legislation
- § 22:62 —Competition Law System
- § 22:63 —Anti-Competitive Agreements
- § 22:64 —Block Exemption Regulations
- § 22:65 —Vertical Agreements
- § 22:66 —Technology Transfer Agreements
- § 22:67 —R&D Agreements
- § 22:68 —Specialization Agreements
- § 22:69 —Horizontal Agreements
- § 22:70 —Notice on Subcontracting
- § 22:71 —Abuses of a Dominant Position
- § 22:72 —Penalties
- § 22:73 —Mergers
- § 22:74 UK System
- § 22:75 —Legislation
- § 22:76 —Public Procurement

### XI. CONTRACT ISSUES IN ENGLAND AND WALES

- § 22:77 Introduction
- § 22:78 Common and Civil Law
- § 22:79 Consideration
- § 22:80 Good Faith
- § 22:81 EU Harmonized Contract Law
- § 22:82 Making the Contract
- § 22:83 Offer and Acceptance
- § 22:84 Completeness and Certainty

$\S 22:85$	Consideration
§ 22:86	Intention to Create Legal Relations
§ 22:87	Substance of the Contract
§ 22:88	Negotiation Statements
§ 22:89	Implied Terms
§ 22:90	Types of Contractual Provisions
§ 22:91	Conditions
§ 22:92	Warranties
$\S 22:93$	Intermediate Terms
§ 22:94	Indemnities
$\S 22:95$	Breach
§ 22:96	Damages
§ 22:97	Force Maieure

### XII. UK INSOLVENCY

§ 22:98	Introduction
$\S~22:99$	Administration
$\S~22:100$	Liquidation
$\S~22:101$	—Voluntary Liquidation
$\S 22:102$	—Compulsory Liquidation
$\S~22:103$	Anti-Avoidance Provisions in the Insolvency
	Legislation
§ 22:104	Issues for Company Directors in Insolvency
	Situations

### XIII. TAXATION

§ 22:105 Generally

### XIV. CONCLUSION

§ 22:106 Concluding Comments

### CHAPTER 23. OUTSOURCING IN INDIA

### I. HISTORY OF OUTSOURCING IN INDIA

§ 23:1 Generally

# II. INTRODUCTION TO THE INDIAN LEGAL AND LEGISLATIVE SYSTEM

§ 23:2 Generally

### III. CONTRACT LAW PRINCIPLES IN INDIA

§ 23:3 Introduction

lxxx

#### Table of Contents

§ 23:4	Offer
§ 23:5	Acceptance
§ 23:6	Capacity
§ 23:7	Consideration
§ 23:8	Free Consent
§ 23:9	Representations and Warranties
§ 23:10	Performance
§ 23:11	Breach and Compensation
§ 23:12	Indemnity
§ 23:13	Limitations on Liability

# IV. CHOICE OF LAW AND DISPUTE RESOLUTION

- § 23:14 Choice of Law
- § 23:15 Dispute Resolution

### V. EMPLOYMENT ISSUES IN OUTSOURCING

$\S 23:16$	Introduction
§ 23:17	Contract Labour Issues in Outsourcing
§ 23:18	Redundancy in Cases of Outsourcing
§ 23:19	Immigration and Social Security Considerations in
	Outsourcing Arrangements

# VI. TAXATION ISSUES IN OUTSOURCING TO INDIA

§ 23:20	Introduction
§ 23:21	Evolution of Tax Laws in Respect of Outsourcing by Foreign Entities
§ 23:22	Permanent Establishments
§ 23:23	Exceptions to the Rule of Permanent Establishment
§ 23:24	The Morgan Stanley Case—Taxation of Captive Outsourcing Entities
§ 23:25	Service Tax Implications in Outsourcing

### VII. COMPETITION LAW ISSUES

§ 23:26	Introduction
§ 23:27	Anti-Competitive Agreements
§ 23:28	Horizontal Agreements
§ 23:29	Vertical Agreements

# VIII. PRIVACY AND DATA PROTECTION CONSIDERATIONS

§ 23:30	Introduction
§ 23:31	Information Technology Act, 2000
§ 23:32	Data Protection Rules
§ 23:33	Clarification Issued on the Applicability of the IT
	Rules

# IX. OUTSOURCING BY SPECIFIED FINANCIAL INSTITUTIONS

§ 23:34	Introduction
§ 23:35	Banks
§ 23:36	Securities Market Intermediaries
§ 23:37	Insurers

### X. CONCLUSION

§ 23:38 Concluding Comments

# PART 5. OTHER ISSUES IN OUTSOURCING

### CHAPTER 24. THE ONLY CONSTANT: PRICING FOR CHANGE IN OUTSOURCING ARRANGEMENTS

§ 24:1	Introduction
§ 24:2	Pricing During Development and Implementation—Changes in Business
	Requirements
§ 24:3	—Extraordinary Changes in Costs
§ 24:4	Pricing During the Services Phase
§ 24:5	—Changes in Service Demand: Volume-Based Pricing
§ 24:6	—Changes in Scope of Services
§ 24:7	—Changes in Costs as Services Mature
§ 24:8	—Changes in Regulatory Framework
§ 24:9	—Changes in Assumptions: Extraordinary Events
§ 24:10	Conclusion

# CHAPTER 25. PRIVACY ISSUES IN OUTSOURCING: A WORK IN PROGRESS

### I. INTRODUCTION

§ 25:1 Generally

### II. PRIVACY ISSUES IN OUTSOURCING GENERALLY

- § 25:2 The Canadian Privacy Patchwork
- § 25:3 General Privacy Issues re Processing by a Service Provider

### III. CANADIAN MODELS FOR EXTRA-JURISDICTIONAL PROCESSING AND STORAGE

- § 25:4 Introduction
- § 25:5 Regulatory Approaches to Extra-Jurisdictional Processing: An Analytical Framework
- § 25:6 Public Sector: Restrictions on Extra-Jurisdictional Processing
- § 25:7 Private Sector: Restrictions on Extra-Jurisdictional Processing

### IV. PRIVACY BREACH NOTIFICATION

- § 25:8 Towards a Notification Model
- § 25:9 The Introduction of Federal and Alberta Notification Models

### V. ASSESSING THE OPTIMAL REGIME

- § 25:10 Introduction
- § 25:11 Prohibition Approach
- § 25:12 Qualified States Approach
- § 25:13 Notification/Consent Approach
- § 25:14 Contractual Approach: The Optimal Approach?

## VI. RECENT CHANGES TO CANADIAN PRIVACY LAW

§ 25:15 2015 Additional Key Amendments to PIPEDA

### VII. CLASS ACTIONS & PRIVACY LITIGATION

§ 25:16 Generally

### VIII. FEDERAL COMMISSIONER DECISION ON CREDIT-BASED INSURANCE SCORES

- § 25:17 Introduction
- § 25:18 Summary of PIPEDA Report of Findings #2012-005
- § 25:19 Analysis

### IX. CONCLUSION

§ 25:20 Concluding Comments

# CHAPTER 26. HAS IT OUTSOURCING BECOME ORDINARY COURSE OF BUSINESS? RE STELCO INC.

### I. INTRODUCTION

§ 26:1 Generally

### II. CASE COMMENT

- § 26:2 Introduction
- § 26:3 Facts
- § 26:4 Superior Court of Justice
- § 26:5 Court of Appeal
- § 26:6 Conclusion

### CHAPTER 27. THE STAY BACK TEAM

- § 27:1 Introduction
- § 27:2 What Does the Stay Back Team Do?
- § 27:3 Stay Back Team Size and Budget
- § 27:4 Stay Back Team Composition
- § 27:5 When Do You Get the Stay Back Team Assigned and Involved?
- § 27:6 Success and the Stay Back Team
- § 27:7 Conclusion

# CHAPTER 28. BANKRUPTCY AND INSOLVENCY ISSUES IN OUTSOURCING: A WAKE-UP CALL

### I. INTRODUCTION

§ 28:1 Generally

lxxxiv

§ 28:12

### II. INSOLVENCY BASICS

Summary

§ 28:2	General Structure of the Canadian Insolvency Regime
§ 28:3	—Bankruptcy and Insolvency Act
§ 28:4	—Companies' Creditors Arrangement Act
§ 28:5	—Receiverships
§ 28:6	Canadian Insolvency Law
§ 28:7	—Disclaimers and Assignments: Trustee Rights as a Sword
§ 28:8	—Trustee Rights as a Shield: The Role of Stays
§ 28:9	United States Law
§ 28:10	—US Law as a Sword
§ 28:11	—US Law as a Shield

# III. IMPACT OF INSOLVENCY EVENTS ON ELEMENTS OF AN OUTSOURCING TRANSACTION

§ 28:13	Introduction
§ 28:14	Avoiding the Stay: Early Warning Mechanisms
§ 28:15	Avoiding the Assignment: Making the Agreement More "Personal"
§ 28:16	Avoiding the Disclaimer: Provision of and Payment for Transition Services
§ 28:17	Limitations of the IP Licence Carve-Out from the Right to Disclaim
§ 28:18	Limitations of Source Code Escrow Agreements
§ 28:19	Employee, Asset and Real Estate Issues— Employee Matters: Non-Solicitation and Confidentiality Provisions
§ 28:20	—Asset Matters: Return of Assets to Customer
§ 28:21	—Real Estate Matters: Return of Real Estate to Customer
§ 28:22	Special Issues: Dealing with Likely Service Provider Insolvency

# IV. DEVELOPING AN INSOLVENCY CRITICAL RESPONSE PLAN

§ 28:23 Generally

### V. CONCLUSIONS

§ 28:24 Concluding Comments

# CHAPTER 29. ENSURING COVERAGE: INSURANCE ISSUES IN OUTSOURCING ARRANGEMENTS

### I. INTRODUCTION

§ 29:1 Generally

### II. THE ROLE OF INSURANCE IN OUTSOURCING ARRANGEMENTS

§ 29:2 Generally

### III. COVERAGE ISSUES: INCLUSIONS AND EXCLUSIONS

§ 29:3	Generally
§ 29:4	First Party—Inclusions
§ 29:5	—Exclusions
§ 29:6	Third Party—Inclusions
§ 29:7	—Exclusions
§ 29:8	Certificate Rights vs. Additional (Named) Insureds
	and Loss Payees
§ 29:9	—Certificate Holder
§ 29:10	—Additional Insured
§ 29:11	—Additional Named Insured
§ 29:12	—Loss Payee Provisions
§ 29:13	Creating Controls Before the Claim

# IV. KEY ISSUES: DOVETAILING THE CONTRACTS, CERTIFICATES OF INSURANCE, WAIVERS OF SUBROGATION AND MULTI-JURISDICTIONAL INSURANCE ISSUES

§ 29:14	Dovetailing Insurance Contracts and Commercial
	Contracts
§ 29:15	The Insurance Certificate—A False Reliance
§ 29:16	Waivers of Subrogation
§ 29:17	Multi-Jurisdictional Outsourcing Issues
§ 29:18	—Excise Taxes

## V. SPECIAL ISSUES: IP INFRINGEMENT INSURANCE AND PERFORMANCE BONDS

§ 29:19 Patent Enforcement and Infringement

lxxxvi

2 25.20 I CHOI Mance Donus	ξ	29:20	Perf	ormance	Bond	$\mathbf{s}$
----------------------------	---	-------	------	---------	------	--------------

§ 29:21 Political Risks

### VI. CONCLUSION

§ 29:22 Concluding Comments

### CHAPTER 30. AVOIDING PROJECT MISMANAGEMENT IN OUTSOURCING TRANSACTIONS

- § 30:1 Introduction
- § 30:2 Mistake 1: Unclear Roles and Accountabilities
- § 30:3 Mistake 2: Poor Communication Between Executives and Project Management
- § 30:4 Mistake 3: No Clear Direction for the Project Team
- § 30:5 Mistake 4: No Clear Vision of the Future Organization
- § 30:6 Mistake 5: Poor Risk Management
- § 30:7 Conclusion

# CHAPTER 31. ALLOCATION OF RISK: A CROSS-JURISDICTIONAL STUDY

### I. INTRODUCTION

§ 31:1 Generally

### II. ALLOCATING RISK GENERALLY

- § 31:2 Introduction
- § 31:3 Canada
- § 31:4 —Common Law Provinces
- § 31:5 —Quebec
- § 31:6 United States
- § 31:7 France
- § 31:8 India
- § 31:9 United Kingdom

### III. LIABILITY CAPS

- § 31:10 Introduction
- § 31:11 Canada—Common Law Provinces
- § 31:12 —Quebec
- § 31:13 United States
- § 31:14 France

§ 31:15	India—In the Case of Fundamental Breach
§ 31:16	—Exclusion Clauses
§ 31:17	—Indian Practice
§ 31:18	United Kingdom—In the Case of Fundamental
	Breach
§ 31:19	—Exclusion Clauses
§ 31:20	—The Approach of English Courts
§ 31:21	—English Practice

### IV. DAMAGE DISCLAIMERS

§ 31:22	Introduction
§ 31:23	Canada
§ 31:24	—Common Law Provinces
§ 31:25	United States
§ 31:26	France
§ 31:27	India
§ 31:28	United Kingdom

### V. PENALTIES VS. LIQUIDATED DAMAGES

§ 31:29	Introduction
§ 31:30	Canada—Common Law Provinces
§ 31:31	—Quebec
$\S 31:32$	United States
§ 31:33	France
§ 31:34	India
§ 31:35	United Kingdom

# VI. CONTRACTUALLY REDUCING LIMITATION PERIODS

§ 31:36	Introduction
§ 31:37	Canada
§ 31:38	United States
§ 31:39	France
§ 31:40	India
§ 31:41	United Kingdom

### VII. INDEMNITIES

§ 31:42	Introduction
§ 31:43	Canada
§ 31:44	United States
§ 31:45	France
§ 31:46	India

lxxxviii

### § 31:47 United Kingdom

### VIII. BEST VS. REASONABLE EFFORTS

- § 31:48 Introduction
- § 31:49 Canada
- § 31:50 —Best Efforts
- § 31:51 —Reasonable Best Efforts
- § 31:52 —Reasonable Efforts
- § 31:53 —Commercially Reasonable Efforts
- § 31:54 United States
- § 31:55 France
- § 31:56 India
- § 31:57 United Kingdom

### IX. CONCLUSION

§ 31:58 Concluding Comments

### CHAPTER 32. CURRENT TRENDS IN LIMITS OF LIABILITY AND INDEMNIFICATION IN IT CONTRACTS

### I. INTRODUCTION

§ 32:1 Generally

### II. SOME NEW TRENDS

§ 32:2 Generally

### III. LIMITATION OF LIABILITY CLAUSES

- § 32:3 Making them Mutual
- § 32:4 Differentiating between Different Types of Liability
- § 32:5 Seeking to Exclude Breach of Privacy Claims from the Limit on Liability

### IV. INDEMNIFICATION CLAUSES

- § 32:6 Making them Apply to Breach of Contract Claims
- § 32:7 Making them Apply to Breach of Privacy Claims
- § 32:8 Limiting the Geographic Scope of IP Clauses
- § 32:9 Seeking to Exclude Infringement of Patent Claims Entirely
- § 32:10 Making the Optional Actions Clause Mandatory

### V. CONCLUSION

§ 32:11 Introduction

§ 32:12	Sample Limitation of Liability Clause
§ 32:13	Sample Indemnification Clause

# CHAPTER 33. CORPORATE SOCIAL RESPONSIBILITY AND SUSTAINABILITY IN OUTSOURCING

§ 33:1	Introduction
§ 33:2	What Is CSR?
§ 33:3	What Is Sustainability?
§ 33:4	Why Are CSR and Sustainability Important in Outsourcing?
§ 33:5	—Challenge #1: Environmental Issues
§ 33:6	—Challenge #2: Social Issues
§ 33:7	Key CSR and Sustainability Issues in Outsourcing—Global Standards
§ 33:8	—ISO 26000
§ 33:9	—Carbon Disclosure Project
§ 33:10	—United Nations Global Compact
§ 33:11	Guidance to Customers, Providers and Advisors—Customers
§ 33:12	—Providers
§ 33:13	—Advisors
§ 33:14	Conclusion

### CHAPTER 34. THE RELATIONSHIP REVIEW: MAINTAINING AND STRENGTHENING HEALTHY WORKING RELATIONSHIPS

## I. THE IMPORTANCE OF RELATIONSHIP HEALTH

§ 34:1 Generally

### II. AN EVOLVING RELATIONSHIP

§ 34:2 Generally

### III. THE RELATIONSHIP REVIEW

§ 34:3	Introduction
§ 34:4	Vendor Performance
§ 34:5	—Service Performance
§ 34:6	—Customer Satisfaction with Service Quality

#### Table of Contents

$\S 34:7$	—Access to Required Capability and Best Practices
§ 34:8	Business Outcomes
§ 34:9	Governance
§ 34:10	—Contract Management Issues
§ 34:11	—The Importance of Managing Change—Cultural
	and Operational
34:12	Relationship

### IV. SUMMARY

§ 34:13 Generally

# CHAPTER 35. DE BEERS U.K. LTD. V. ATOS ORIGIN IT SERVICES U.K. LTD.: LESSONS FROM AN OUTSOURCING

§ 35:1	Introduction
§ 35:2	The Case—Background—a Supply Chain
	Management System
§ 35:3	—Repudiation of Contract
§ 35:4	—High Court Verdict
§ 35:5	—IAP
§ 35:6	—Failure to Pay
§ 35:7	—Suspension of Work
§ 35:8	—Change in Scope vs. Scope Creep
§ 35:9	Comment
§ 35:10	Application to other Projects Generally

### CHAPTER 36. OVERVIEW OF INTELLECTUAL PROPERTY RIGHTS AND IP OUTSOURCING ISSUES IN CANADA

### I. INTRODUCTION

§ 36:1 Generally

### II. OVERVIEW OF IP RIGHTS IN CANADA

§ 36:2	Registrable IP Rights—Patents
§ 36:3	—Registered Trade-marks
§ 36:4	—Registered Copyright
§ 36:5	—Industrial Designs
§ 36:6	—Domain Name Registrations
§ 36:7	Unregistered IP Rights
§ 36:8	—Confidential Information

### III. OWNERSHIP OF IP

- § 36:9 Introduction
- § 36:10 Patent and Industrial Design Rights
- § 36:11 Copyright

### IV. IP TRANSFERS—ASSIGNMENTS AND LICENCES

- § 36:12 Generally
- § 36:13 Patents—Assignment
- § 36:14 —Voluntary Licence
- § 36:15 Copyright—Assignment
- § 36:16 —Licence
- § 36:17 Trade-Marks—Assignment
- § 36:18 —Licence
- § 36:19 Confidential Information

### V. IP AUDIT

§ 36:20 Generally

### VI. IP REPRESENTATIONS AND WARRANTIES

- § 36:21 Generally
- § 36:22 Defining the IP
- § 36:23 Ownership
- § 36:24 —Corporate Families
- § 36:25 —Employee Inventions and Ownership
- § 36:26 Waiver of Moral Rights
- § 36:27 Validity
- § 36:28 Infringement—Generally
- § 36:29 —Open Source Code/Software

### CHAPTER 37. MANAGING MULTIVENDOR OUTSOURCING

### I. INTRODUCTION

§ 37:1 Generally

### II. DEVELOPMENT TOWARDS MULTISOURCING

§ 37:2 Generally

### III. SOME KEY CHALLENGES OF MULTISOURCING MODELS

§ 37:3 Customer Organizational Challenges

xcii

§ 37	:4	Lack	of Pro	per	Service	Int	egrati	on	and	Gov	ernanc	e

§ 37:5 Challenge of Monopolistic Behaviour by Service Providers

### IV. CONTRACT SOLUTIONS

- § 37:6 Overview
- § 37:7 Service Integration—Introduction
- § 37:8 —The Creation of an "Ecosystem"
- § 37:9 —Common Governance Regime
- § 37:10 —Co-operation Model
- § 37:11 —Service Definitions
- § 37:12 —Mechanisms Fostering Collaboration

### V. IMPLEMENTING THE MULTISOURCED ECOSYSTEM

§ 37:13 Generally

### VI. CONCLUSION

§ 37:14 Concluding Comments

# CHAPTER 38. BSKYB REDUX? LESSONS FROM COUNTY OF ORANGE V. TATA CONSULTANCY SERVICES LTD. ET AL.

### I. INTRODUCTION

- § 38:1 BSkyB v. HP (2010)
- § 38:2 Changes in Practices post-BSkyB?
- § 38:3 Introduction to County of Orange v. Tata Consultancy Services Ltd. et al.

#### II. BACKGROUND

- § 38:4 General Background—Preparation
- § 38:5 —Negotiations
- § 38:6 —Development
- § 38:7 —Amendments
- § 38:8 —Termination
- § 38:9 The Orange County "Story"
- § 38:10 The TCS Counterclaim
- § 38:11 The TCS "Story"
- § 38:12 Summary of the Case

### III. SUMMARY OF THE COUNTY'S CLAIMS

§ 38:13 Introduction

§ 38:14	Misrepresentations—Performance
	Misrepresentation
§ 38:15	—Timeline Misrepresentation
§ 38:16	—Cost Misrepresentation
§ 38:17	—Amendment Misrepresentations
§ 38:18	—Quality Misrepresentation
§ 38:19	—Personnel Misrepresentation
§ 38:20	—Experts Misrepresentation
§ 38:21	Breach of Contract
§ 38:22	Fraudulent Concealment

### IV. DAMAGES

§ 38:23 Generally

### V. STRATEGIES OF THE CASE

§ 38:24 Generally

### VI. LESSONS LEARNED

§ 38:25	Introduction
§ 38:26	Customer Counsel
§ 38:27	Provider Counsel

### VII. CONCLUSION

§ 38:28 Generally

### VIII. POSTSCRIPT

§ 38:29 Generally

# CHAPTER 39. ANTI-SPAM LEGISLATION AND OUTSOURCING

§ 39:1	Introduction
§ 39:2	Comparison of Canadian, U.S. and U.K.
	Legislation Generally—Canada: CASL
§ 39:3	—U.S.: CAN-SPAM
§ 39:4	—U.K.: Privacy and Electronic Communications
	(EC Directive) Regulations 2003
§ 39:5	Definition of "Electronic Message"
§ 39:6	—Canada: CASL
§ 39:7	—U.S.: CAN-SPAM
§ 39:8	—U.K.: Privacy and Electronic Communications
	(EC Directive) Regulations 2003
§ 39:9	Consent
•	

### Table of Contents

§ 39:10	"Opt-In" Versus "Opt-Out" Provisions
§ 39:11	—"Natural Persons" Versus "Legal Persons"
§ 39:12	—Additional Exemptions
§ 39:13	Content
§ 39:14	—Canada: CASL
§ 39:15	—U.S.: CAN-SPAM
§ 39:16	—U.K.: Privacy and Electronic Communications
•	(EC Directive) Regulations 2003
§ 39:17	Enforcement—Canada: CASL
§ 39:18	—U.S.: CAN-SPAM
§ 39:19	—U.K.: Privacy and Electronic Communications
	(EC Directive) Regulations 2003
§ 39:20	Jurisdiction—Canada: CASL
§ 39:21	—U.S.: CAN-SPAM
§ 39:22	—U.K.: Privacy and Electronic Communications
	(EC Directive) Regulations 2003
§ 39:23	Compliance Challenges
§ 39:24	—Low Threshold for Application
§ 39:25	—More Than Just E-mail—Electronic Messages
§ 39:26	——Software Installation
§ 39:27	——"Periods of Validity" of Contact Information
§ 39:28	——Importance of Relationship with Recipient
§ 39:29	— —Limited Utility of Recognition of other
	Jurisdiction Anti-Spam Laws
§ 39:30	——Express Consent Must be Opt-In; Consent
	Must be Unbundled
§ 39:31	——Multilayered Enforcement Mechanisms
§ 39:32	——Personal Liability

### CHAPTER 40. THE NEW ISO 37500 OUTSOURCING STANDARD: A CRITICAL ANALYSIS

§ 40:1	Introduction
§ 40:2	Background to the Outsourcing Standard
§ 40:3	Risks of Outsourcing
§ 40:4	Overview of the Outsourcing Standard—Objectives and Model
§ 40:5	—Outsourcing Governance Framework
§ 40:6	—Phase 1: Outsourcing Strategy Analysis
§ 40:7	—Phase 2: Initiation and Selection
§ 40:8	—Phase 3: Transition
§ 40:9	—Phase 3: Deliver Value
§ 40:10	Critical Analysis of the Outsourcing Standard—
	Strengths of the Outsourcing Standard

§ 40:11	—Limitations of the Outsourcing Standard
§ 40:12	——Excessive Management Speak
§ 40:13	— — Misunderstanding the Role of the Business
	Case Baseline
§ 40:14	——Lack of Realism re Exit Options
§ 40:15	——Idealistic View of Role of Providers
§ 40:16	— — Understating the Role of the Agreement
§ 40:17	——Absence of Key Concepts
§ 40:18	Conclusions

### CHAPTER 41. CASE STUDY: CIS GENERAL INSURANCE V IBM UK MORE LESSONS LEARNED FROM ANOTHER FAILED AGILE PROJECT

### I. INTRODUCTION

§ 41:1 Generally

### II. BACKGROUND

- $\$  41:2 Business Transformation Project
- § 41:3 Three Phases, Three Agreements

### III. ISSUES

§ 41:4	Who caused the Delays in Deployment?
§ 41:5	—Example: Release 1
§ 41:6	—Example: Release 2
§ 41:7	Did IBM breach any MSA Representation and Warranty?
§ 41:8	—Due Diligence: Was it Sufficient?
§ 41:9	—Did the Solution meet the twin requirements of being "Out of the Box" and UK Compatible?
§ 41:10	The Invoice
§ 41:11	—IBM's Rights of Termination
§ 41:12	—The Additional Invoicing Steps: When can a Governance Committee come to an agreement which is binding on the Parties?
§ 41:13	—Did the IBM Invoice fail to meet the Formality Requirements?
§ 41:14	—Was the amount on the Invoice in Dispute?
§ 41:15	—Did IBM Meet the Requirements of the Milestone Document Sign Off Process?
§ 41:16	—Was IBM required to Exercise their Right of

- Termination Literally "Immediately" or have it Expire?
- § 41:17 —Did improperly issuing an Invoice constitute Wilful Default and Recklessness?

### IV. LESSONS LEARNED

- § 41:18 Introduction
- § 41:19 Governance Lesson #1: When is a Committee decision intended to bind the Parties?
- § 41:20 Governance Lesson #2: When is a Dispute a Formal "Dispute"?
- § 41:21 Ambiguities re Milestone Payments
- § 41:22 Ironclad Provisions for Termination for Non-Payment: Not so Ironclad.
- § 41:23 Yet another failed agile project: How to get clients to understand what agile projects demand of them?
- § 41:24 What does "out of the box" Software Really Mean?
- § 41:25 Does the Right to Terminate Need to be Immediately Exercised or it Expires?

### CHAPTER 42. MILLERCOORS V HCL: LESSONS LEARNED—AGAIN—FROM A FAILED SAP ERP IMPLEMENTATION PROJECT

#### I. INTRODUCTION

§ 42:1 Generally

### II. BACKGROUND

- § 42:2 The Project
- § 42:3 The Agreements

### III. ISSUES

- § 42:4 Issue: MillerCoors Claim of HCL Inadequate Staffing
- § 42:5 Issue: MillerCoors Claim of HCL Inadequate Leadership
- § 42:6 Issue: Whose Responsibility is it to Learn the Business?
- § 42:7 —Failed Delta Blueprint Process
- § 42:8 —Failure of MillerCoors to Understand Their Own Business

§ 42:9	—Failure of Knowledge Transfer as a Recurring Theme: De Beers vs. Atos Origin
§ 42:10	Issue: Defects
§ 42:11	Issue: Scope Creep
§ 42:12	Issue: Negligence and Wilful Misconduct (According to the Customer)
§ 42:13	Issue: Was MillerCoors' Termination Wrongful?— MillerCoors Rights to Terminate
§ 42:14	—HCL's Argument for Wrongful Termination

### IV. LESSONS LEARNED

§ 42:15	Introduction
§ 42:16	Importance of Key Personnel Provisions
§ 42:17	Defining "Leadership"
§ 42:18	Defining an KT Process which has an Exit
§ 42:19	SLAs for Defects
§ 42:20	Change Requests and Scope Creep
§ 42:21	Specifically define material breach

### V. CONCLUSION

§ 42:22 Concluding Comments

# CHAPTER 43. UNDERSTANDING THE IMPORTANCE OF FORCE MAJEURE/EXTRAORDINARY EVENT CLAUSES IN OUTSOURCING AGREEMENTS

### I. INTRODUCTION

§ 43:1 Generally

### II. BACKGROUND

§ 43:2 Generally

### III. FORCE MAJEURE EVENTS

§ 43:3	Definition of Force Majeure Event—Definition
§ 43:4	—Carve Outs from the Definition
§ 43:5	Reciprocity
§ 43:6	—Obligation to Purchase
§ 43:7	—Obligation to Pay
§ 43:8	—Customer Obligations (e.g. in RACI charts)
§ 43:9	Process for Asserting Force Majeure

- § 43:10 Process for Ending the Force Majeure Period
- § 43:11 Scope of Obligation to Continue to Try to Perform
- § 43:12 Right to Terminate

### IV. EXTRAORDINARY EVENTS: THE FLIP SIDE OF FORCE MAJEURE EVENTS

- § 43:13 Generally
- § 43:14 Process for Asserting an Extraordinary Event
- § 43:15 Measures Triggered by an Extraordinary Event
- § 43:16 Extraordinary Event Period
- § 43:17 Extraordinary Event Fees

### V. CONCLUSION

§ 43:18 Generally

# CHAPTER 44. CASE STUDY: LACHMAN V REVLON CLASS ACTION - LESSONS ON WHEN & HOW TO BE TRANSPARENT TO SHAREHOLDERS IN THE CASE OF A FAILED ERP IMPLEMENTATION

- § 44:1 Introduction
- § 44:2 The Customer Shareholder Perspective
- $\S$  44:3 Overview of Legal Proceeding in Lachman v.

  Revlon
- § 44:4 The ERP Implementation
- § 44:5 The SEC Filings
- § 44:6 —First Three Filings Form 10-K For 2014, 2015 And 2016
- § 44:7 —Shift To "Actual" Risk 2017 Form 10-K
- § 44:8 —It Hits The Fan 2018 Form 10-K
- § 44:9 The Class Action
- § 44:10 The Lessons Learned—Lesson: Disclosing The Risks In Advance
- § 44:11 —Lesson: Economic Harms Caused By The Erp Implementation
- § 44:12 —Lesson: Why Did The ERP Implementation Fail?
- § 44:13 Conclusion

### **APPENDICES**

- Appendix A. Master Outsourcing Agreement
- Appendix B. Technology Services Agreement

### Outsourcing Transactions

Appendix C. Employee Matters Agreement

Appendix D. Asset Purchase Agreement

Appendix E. Basel Committee on Banking Supervision— Outsourcing in Financial Services

Appendix F. Office of the Superintendent of Financial

Institutions Canada—Outsourcing of Business Activities, Functions and

Processes Guideline

Appendix G. Study: Optimizing Value from Outsourcing

**Table of Cases** 

Index