



# ICLG

The International Comparative Legal Guide to:

## Outsourcing 2017

### 2nd Edition

A practical cross-border insight into outsourcing

Published by Global Legal Group, with contributions from:

ALRUD Law Firm

Anderson Mōri & Tomotsune

Angara Abello Concepcion Regala &  
Cruz Law Offices (ACCRALAW)

Baohua Law Firm

Bird & Bird LLP

BTS&Partners

Caiado Guerreiro, Sociedade de Advogados, SP, RL

Centre for Outsourcing Research and Education  
(CORE)

Dittmar & Indrenius Attorneys Ltd.

Hannes Snellman Attorneys Ltd

Kromann Reumert

LMBE AVOCATS

Mani Chengappa & Mathur

Noerr LLP

Osler, Hoskin & Harcourt LLP

Pestalozzi Attorneys at Law Ltd

Pinheiro Neto Advogados

Portolano Cavallo

SAMANIEGO Law

Spada Partners

Switch Legal

TAHOTA Law Firm

Wiggin and Dana LLP





global legal group

**Contributing Editors**  
Simon Shooter & Mark Leach, Bird & Bird LLP

**Sales Director**  
Florjan Osmani

**Account Director**  
Oliver Smith

**Sales Support Manager**  
Paul Mochalski

**Senior Editors**  
Suzie Levy, Rachel Williams

**Chief Operating Officer**  
Dror Levy

**Group Consulting Editor**  
Alan Falach

**Publisher**  
Rory Smith

**Published by**  
Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

**GLG Cover Design**  
F&F Studio Design

**GLG Cover Image Source**  
iStockphoto

**Printed by**  
Ashford Colour Press Ltd  
August 2017

Copyright © 2017  
Global Legal Group Ltd.  
All rights reserved  
No photocopying

ISBN 978-1-911367-67-3  
ISSN 2397-6896

**Strategic Partners**



## General Chapters:

1	<b>Structuring a Multi-Jurisdictional Outsourcing Deal</b> – Mark Leach, Bird & Bird LLP	1
2	<b>CORE: Key Trends and Best Practices Affecting the Outsourcing Industry</b> – Ron Babin & Jim Eckler, Centre for Outsourcing Research and Education (CORE)	5

## Country Question and Answer Chapters:

3	<b>Australia</b>	Switch Legal: Chris Broadbent & Melanie Noble	11
4	<b>Brazil</b>	Pinheiro Neto Advogados: José Mauro Decoussau Machado & Pamela Gabrielle Meneguetti	19
5	<b>Canada</b>	Osler, Hoskin & Harcourt LLP: Simon Hodgett & Wendy Gross	28
6	<b>China</b>	Baohua Law Firm and TAHOTA Law Firm: Runqing (John) Dong & Richard Xie	35
7	<b>Denmark</b>	Kromann Reumert: Jan Ussing Andersen & Christel Teglers	41
8	<b>Finland</b>	Dittmar & Indrenius Attorneys Ltd.: Kai Erlund & Kaisa Päivinen	47
9	<b>France</b>	LMBE AVOCATS: Raphaël Dana & Martin Leny	54
10	<b>Germany</b>	Noerr LLP: Prof. Dr. Joachim Schrey	61
11	<b>India</b>	Mani Chengappa & Mathur: Utham Chengappa & Aditi Roy	67
12	<b>Italy</b>	Portolano Cavallo and Spada Partners: Marco Blei & Luca Zoani	73
13	<b>Japan</b>	Anderson Mōri & Tomotsune: Takashi Nakazaki	82
14	<b>Philippines</b>	Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW): Emerico O. de Guzman & Erwin Jay V. Filio	89
15	<b>Portugal</b>	Caiado Guerreiro, Sociedade de Advogados, SP, RL: Jorge Ribeiro Mendonça & Cátia Morgado Ascenso	97
16	<b>Russia</b>	ALRUD Law Firm: Maria Ostashenko & Ksenia Erokhina	104
17	<b>Spain</b>	SAMANIEGO Law: Javier Fernández-Samaniego	111
18	<b>Sweden</b>	Hannes Snellman Attorneys Ltd: Elisabeth Vestin	116
19	<b>Switzerland</b>	Pestalozzi Attorneys at Law Ltd: Lorenza Ferrari Hofer & Michèle Burnier	122
20	<b>Turkey</b>	BTS&Partners: Tuğrul Sevim & Ecem Gündüz	129
21	<b>United Kingdom</b>	Bird & Bird LLP: Simon Shooter & Sarah Kilner-Morris	136
22	<b>USA</b>	Wiggin and Dana LLP: Mark Heaphy & Tamia Simonis	144

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

### Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

# Canada

Simon Hodgett



Wendy Gross



Osler, Hoskin & Harcourt LLP

## 1 Regulatory Framework

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

There are no laws in Canada applicable to all sectors that are specifically directed at outsourcing as a regulated subject matter. The OSFI Guideline B-10 (referred to below) regulates outsourcing in the financial services sector and is viewed as a useful guideline for risk management for outsourcing in other sectors.

### 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?

#### Federally regulated financial institutions

The Office of the Superintendent of Financial Institutions Canada (OSFI) and its Guideline B-10 re: Outsourcing of Business Activities, Functions and Processes provide a set of practices, procedures and standards that are expected to be applied by federally regulated entities or “FREs” (as defined by OSFI in its Guidelines B-10) to an outsourcing arrangement. Guideline B-10 is not a set of strictly worded legislative requirements, but rather sets expectations related to risk management and the inclusion of certain terms in the outsourcing agreement.

OSFI acknowledges that some of the items listed may not be applicable in all circumstances, but FREs are expected to address all issues relevant to managing the risks associated with each outsourcing arrangement. Guideline B-10 mandates that agreements include the following:

- a description of the nature and scope of the outsourcing arrangement, including the physical location from which the service provider will provide service;
- performance measures (e.g. service levels);
- requirements for dispute resolution;
- termination, including provision for continuation of service in the event of termination, the FRE is in bankruptcy or OSFI takes control of the FRE;
- clear terms on ownership and access to assets;
- contingency planning, and business continuity planning (including a plan for failure of the service provider, which should be included in the FRE’s BCP plan);

- audit rights, including audits of controls and rights of access for OSFI to carry out regulatory audits;
- restrictions on and requirements to include certain terms in subcontracts;
- requirements to maintain certain records in Canada; and
- broadly stated confidentiality and security requirements, including an obligation for the service provider to isolate data from the service provider’s other customers.

Guideline B-10 also requires the FRE to enhance its risk management programme to address any concerns linked to the outsourcing of services to a foreign jurisdiction, including concerns linked to the economic and political environment, technological sophistication and the legal and regulatory risk profile of the foreign jurisdiction.

OSFI, in a *Memorandum re new technology-based outsourcing arrangements* (Feb 29, 2012), has stated that the OSFI B-10 Guidelines will apply where cloud computing offerings qualify as a material outsourcing. Industry is working through the implications of this regulatory view, since certain of the obligations in Guideline B-10 (e.g. location of services and audit) present challenges for the cloud computing model. As the pervasiveness of public cloud providers such as AWS, Google and Microsoft as the infrastructure provider for other service providers to FREs and sub-contracted “fourth party” basis grow, the OSFI B-10 Guideline compliance challenges associated with public cloud arrangement is becoming an increased focus for FREs.

In 2013, OSFI issued a memorandum entitled *Cyber Security Self-Assessment Guidance*, which included a template and suggested rating system for FREs to assess the adequacy of their cyber security framework. As part of this, FREs are expected to assess the adequacy of their management of third party service providers with respect to cyber security.

#### Public sector

The public sector in Canada comprises the federal government, provinces and territories, and the municipal sector. Outsourcing is impacted by procurement laws which generally contain requirements that competitive procurements be carried for the procurement of services over a prescribed value. In addition, certain provinces prescribe procurement requirements for entities in the broader public sector based on certain criteria; for example, the entity receiving government funding above a prescribed amount. Some of these procurement requirements result in policies that limit the ability to freely negotiate variations in terms from those included in the RFP.

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

While not directed specifically at outsourcing, certain highly regulated sectors are governed by regulatory requirements which shape the parties' obligations with respect to outsourcing in the sector. These include:

- pharmaceuticals and medical devices – subject to regulations with respect to process for contract manufacturing and services;
- gaming – subject to provincial and federal laws related to the gaming sector;
- health care – subject to regulations relating to funding agreements, personal health information and procurement;
- pensions – regulated as to prudent risk management and maintenance of records, by OSFI and provincial pensions regulators;
- utilities – subject to pricing restrictions and approval of terms by provincial utilities boards; and
- telecommunications – any tariffed services are subject to pricing and approval of terms by the Canadian Radio-Television and Telecommunications Commission (CRTC).

### 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?

There is no requirement in law for local law to apply to outsourcings in Canada. As an almost universal matter of practice, the jurisdiction of the agreement is usually where the customer is receiving the services.

## 2 Legal Structure

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

Most outsourcings in Canada are carried out by the service provider's local affiliate, contracting directly with the customer's principal operating company. Usually, agreements include provision of services to affiliates of the customer or allow customers to enter into separate agreements, a tower agreement or statements of work, which incorporate the terms of the main agreement.

Typically, foreign affiliates of the customer will enter into local country agreements that incorporate terms and regulatory requirements applicable to the non-Canadian jurisdiction.

For servicing entities that wish to retain services as a group, for example separate health care institutions, shared services entities that provide services to multiple unaffiliated or affiliated entities have often been used to contract with the service provider.

## 3 Procurement Process

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

While a small number of outsourcings use a sole source model, this is relatively rare and not viewed as a best practice. Most outsourcings

are procured through a competitive procurement process, usually a request for proposals (RFP). RFPs, which generally provide the level of flexibility appropriate for complex outsourcing, are different from tenders, which, in Canadian law, are much less flexible. Practice relating to RFPs varies widely, especially with respect to the degree and detail of terms included in the RFP for response by the suppliers.

In the public sector, provincial and federal laws generally require competitive procurement for nearly all outsourcings, since they generally exceed the dollar value thresholds for competitive procurement requirements.

## 4 Term of an Outsourcing Agreement

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

No, it does not.

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

No, it does not.

## 5 Charging

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

A wide variety of charging and pricing methods are used in outsourcing contracts in Canada, including:

- unit pricing based on defined units of service;
- consumption-based pricing using a baseline, dead band and Additional Resource Charges (ARCs) and Reduced Resource Credits (RRCs);
- fixed fee pricing based on a defined scope;
- resource-based pricing based on staff numbers, especially for staff augmentation services; and
- time and materials for project-related services or changes.

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

Other key terms relating to costs include the following:

- formal change management terms, which include pricing principles;
- clauses to ensure that, even if not explicitly stated, everything inherent in the service is included in the scope and price ("sweeps clauses");
- disputed fees provisions; and
- bench-marking and most favoured customer clauses.

## 6 Transfer of Assets

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

Where tangible assets, such as computer equipment, are transferred from the customer, separate assignments and bills of sale are utilised.

Searches for any registrations under applicable provincial personal property security acts must be carried out in order to transfer assets free and clear of any liens.

## 6.2 What are the formalities for the transfer of land?

Transfers of leased land can be carried out by written assignment. Assignment of ownership in land in all provinces and territories of Canada must be carried out by written agreement and registration in the applicable land registry, including payment of applicable land transfer taxes.

## 6.3 What post-completion matters must be attended to?

Assignments are generally completed at the point of transfer designated in the outsourcing agreement with registration in the applicable land registries.

## 6.4 How is the transfer registered?

Registration in the applicable provincial or territorial land registry, including payment of applicable land transfer taxes.

Transfer of personal property is generally not registered in Canada, but if any security interests are taken in personal property they should be registered in the applicable personal property security act registries to maintain priority of claims.

# 7 Employment Law

## 7.1 When are employees transferred by operation of law?

The answer depends on a variety of factors, including if the outsourcing is a share or asset transaction, whether Québec law applies, whether employees are non-union or union, and whether the outsourcing is a “sale of a business” under applicable legislation.

If the outsourcing is structured as a share transaction, under employment law, there is no change in the identity of the employer. In the context of a share transaction, the status of all employees, whether union or non-union, remains the same. From a practical perspective, what this means is that all employees, as well as employee liabilities, obligations and responsibilities, flow through to the supplier without change.

If the transaction is an asset transaction, it is important to determine the applicable jurisdiction. Because of Canada’s constitutional division of powers between the federal and provincial governments, most employers are covered by provincial legislation, but some are covered by federal legislation. The nature of the employer’s business is critical in determining whether federal or provincial legislation applies to the employer. For most employers engaged in manufacturing, construction, retail, and the service sector, provincial employment and labour laws apply. For those employers engaged in certain activities of an inter-provincial nature, such as shipping, railways, airlines, radio and television broadcasting, as well as banking, federal employment and labour laws apply.

### Non-Union

In Québec, the *Civil Code of Québec* contains a form of transfer by operation of law; it provides for a continuity of employment contracts to the purchaser of the business. Section 2097 of the *Civil Code of Québec* stipulates that a contract of employment is not terminated by a sale of a business or any change to its legal structure

by way of an amalgamation or otherwise, and the contract of employment is binding on the successor of the employer or supplier.

In all other Canadian jurisdictions, even if the outsourcing is characterised as a sale of a business, non-unionised employment is not transferred by operation of law. There needs to be some sort of offer of employment and acceptance by the employee.

### Unionised Employees

Depending upon whether the outsourcing is a “sale of a business” under applicable labour laws and whether “all” or “part” of the business is sold, the employees may be automatically transferred to the supplier along with the union collective agreement.

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

Where employment is transferred by operation of law, it would be on the existing terms, unless agreement with the employees or union, if applicable, is made.

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

Typically, information shared includes the material terms of employment so that an appropriate offer of employment can be made.

Privacy legislation applicable varies depending upon whether or not the employees are covered by federal, Québec or other provincial privacy legislation; such legislation regulates the sharing of personal information.

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

### Non-Union

Generally speaking, an outsourcing scenario would not preclude either the customer or supplier from terminating an employee. The Québec situation is different because of the provisions of the *Civil Code*, referred to question 7.1, and there, the case law is divided.

The general approach is that non-unionised employees may be terminated at any time without cause, provided the required notice is given and terms of any written employment contract are followed. All jurisdictions in Canada have some important qualifiers to this general rule. For example, anti-discrimination or human rights legislation restricts the ability to terminate employment if one of the reasons for the termination is directly or indirectly connected to a protected ground or characteristic. There is also anti-reprisal or “whistle-blower” protection rules under employment legislation, such as employment standards and occupational health and safety legislation.

Federally regulated employers are subject to special scrutiny when terminating employment. Non-managerial employees with at least one year of service may take their dismissal to adjudication under the *Canada Labour Code* and seek reinstatement. There are, however, important exceptions that preclude reinstatement, such as a genuine layoff. There is a similar provision in Québec.

### Union

Union collective agreements typically prevent employee terminations, except for misconduct amounting to cause, although they often permit layoffs due to changed business environment. The union collective agreement may contain provisions which limit, regulate or otherwise prohibit an outsourcing arrangement.

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

### Non-Union

Yes, except in Québec, the *Labour Code* “sale of a business” provisions may be raised in opposition to such an initiative. The case law is divided as to the ability of the supplier (purchaser) to change material terms of employment.

Typically, suppliers make the harmonised terms clear when they are hiring the employees (in the context of an asset transaction). Otherwise, if a material change is made without the employee’s consent, the employee may be able to quit and sue for constructive dismissal or claim damages for breach of contract. Written agreements may also contain provisions which specifically address amendments.

### Union

Changes to the provisions of the union collective agreement would require the agreement of the union.

## 7.6 Are there any pensions considerations?

The applicable pension considerations will be driven by the nature of the benefits provided by the outsourcing company and whether there is a collective bargaining agreement in place with the outsourced employees.

If the outsourcing company provides a defined benefit pension plan, complexities will arise. For example, if the outsourcing is time limited, will the employees cease accruals in the defined benefit plan during the outsourcing period, then re-commence accruals at the end of the period? This will likely have an impact on their pension (as years of pensionable service will be affected).

The issue is further complicated if there is a collective agreement in place that covers pensions. For example, if the employees participate in a defined benefit pension plan that is incorporated into the collective agreement, they will have to continue to participate in the DB plan (if possible) or accrue benefits in a mirror DB plan during the time of the outsourcing.

## 7.7 Are there any offshore outsourcing considerations?

Use of actual employees subjects the work carried out to labour and intellectual property laws of the foreign jurisdiction. In the public sector, procurement policies often include restrictions on offshoring certain types of work, particularly where offshoring occurs to the detriment of employees subject to a collective agreement.

## 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?

**Canadian Privacy Statutes.** There are four private sector privacy statutes that govern the collection, use, disclosure and management of personal information in Canada: (i) the *Federal Personal Information Protection and Electronic Documents Act*, (“PIPEDA”); (ii) *Alberta’s Personal Information Protection Act*; (iii) British Columbia’s *Personal Information Protection Act*, S.B.C. 2003, ch.

63; and (iv) Québec’s *An act respecting the protection of personal information in the private sector*, R.S.Q. ch. P-39.1 (collectively, “Canadian Privacy Statutes”).

PIPEDA governs the inter-provincial and international collection, use, and disclosure of personal information.

Under Canadian Privacy Statutes, organisations are responsible for personal information in their custody or control, including personal information transferred to a third party for processing. In general, Canadian Privacy Statutes permit the transfer of personal information without consent for data management purposes/ processing purposes where the transferring organisation remains in control of the personal information in the custody of the third party service provider. Hence, provision of personal information for the purposes of outsourcing does not require consent from individuals for the provision of personal information to a service provider under a properly drafted agreement.

Where personal information is to be transferred outside Canada, outsourcing agreements include provisions to ensure that the data transferred is afforded an equivalent level of protection to that under Canadian Privacy Statutes.

**Public Sector.** Public sector privacy laws apply to the federal government and most provincial and municipal entities. When engaging in outsourcing with the provincial or municipal public sector in Canada, note that some provincial public sector privacy laws restrict public sector bodies and their service providers from permitting access to or disclosure of personal information from or to a place outside Canada. British Columbia and Nova Scotia have such legislation. Alberta and Québec public sector privacy laws also limit disclosure of personal information to law enforcement bodies outside Canada. Even when not specifically required by statute, many public sector procurements include either a prohibition or strict restrictions on personal information being accessed or hosted outside Canada.

**Data Security.** Although Canadian Privacy Statutes contain some general standards relating to maintenance of the security of personal information, Canada does not have laws which specifically regulate practices relating to data security.

## 9 Tax Issues

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

Value added taxes (HST, GST QST (described below)), and in some cases provincial sales taxes, apply to the transfer of assets which would apply in the context of an outsourcing; however, there are elections on the transfer of a business which may exempt the certain eligible transfers.

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

Canada has a goods and services tax (GST) that is collected by the Federal government. In addition, the provinces of Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island have a harmonised sales tax (HST) which blends provincial value added taxes with the GST. The province of Québec has sales tax that is levied essentially on the same basis as GST/ HST. Since these taxes capture services, they apply to outsourcing services. Where a customer is in an industry where it provides “exempt supplies” in relation to GST, HST and QST, it will not

be able to recover the taxes paid to the service provider through applying input tax credits to taxes it would otherwise have collected if not an exempt supply. Industries affected include health care, education, financial services, charities and other non-profit entities.

### 9.3 What other tax issues may arise?

If personnel from a non-resident service provider provide services to a customer in Canada, under Part XIII of the *Income Tax Act* (Canada), the customer is required to withhold and remit tax related to the income earned in Canada. The amount of the withholding tax varies depending on the tax treaty in force between Canada and the home country of the service provider. Customers who fail to withhold and remit such tax face significant penalties, so this issue should be dealt with clearly in the outsourcing agreement.

## 10 Service Levels

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

Outsourcing agreements in Canada generally include comprehensive service levels, including credits with a defined amount at risk for failure to meet the performance standards. Failure to meet service levels usually requires that the service provider take remedial steps, including, when appropriate, root cause analysis, to resolve performance deficiencies. Serious non-performance of certain service levels often gives the customer a right to terminate for breach.

## 11 Customer Remedies

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

Under general law of contract in Canada, a customer has a remedy of damages for breach of the outsourcing contract. For certain breaches, for example, a failure to perform transition out services, injunctive relief and specific performance may be available based on the general test for equitable remedies.

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

In addition to a general right to seek damages and equitable remedies, contracts generally include:

- holdbacks and credits for failure to achieve certain milestones;
- service levels and service level credits; and
- rights to terminate for material breach of the agreement for occurrence of specific events, such as insolvency or bankruptcy.

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

The warranties included in outsourcing agreements vary widely but generally include representations and warranties:

- with respect to quality of deliverables and personnel, and provision of services in accordance with industry standards applicable to top-tier service providers (or another indicator of high standards);

- that services and deliverables will comply with applicable laws;
- that no disabling code is included in any deliverable or undisclosed open source software;
- that no undisclosed third party intellectual property is incorporated into deliverables;
- that the performance of the services and the deliverables will not infringe any third party intellectual property rights; and
- that the supplier has all permits and consents to operate its business in the jurisdiction from which the services are provided.

Service agreements generally include the following indemnities:

- an indemnity against any death, bodily injury, sickness, disease or injury of any kind arising from provision of the services;
- an indemnity with respect to damage, loss or destruction of any tangible, real or personal property;
- an indemnity for any taxes which are properly the responsibility of the supplier;
- indemnities with respect to salaries, wages, benefits and other employment-related costs related to any transferred employees, if applicable; and
- an indemnity against any claims by third parties that the services or deliverables infringe any intellectual property rights of any person.

## 12 Insurance

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

Outsourcing agreements generally include commitments for the supplier to hold comprehensive insurance policies that include the following:

- an obligation to maintain workers' compensation insurance or coverage under the applicable provincial or territorial workplace safety and insurance board coverage;
- commercial general liability insurance;
- commercial crime insurance for loss or damage in connection with fraudulent or dishonest acts;
- automobile liability insurance; and
- all risk property insurance.

For certain types of services, some customers require cyber security insurance, although this classification of insurance is not universally adopted nor are the products well understood.

## 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 agreements generally include termination rights for breach and for convenience in favour of the customer. Termination for such matters in accordance with the agreement generally does not give rise to damages. Termination for convenience provisions, however, often includes termination fees and compensation for suppliers for unrecoverable costs. Certain provisions, such as those related to *force majeure* and insolvency, may also contain a right to terminate without the terminated party receiving compensation.

### 13.2 Can the parties exclude or agree additional termination rights?

The parties are free to agree on termination rights within the outsourcing contract.

### 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?

Canada has a comprehensive regime of intellectual property rights which under the division of powers are legislated by the Federal government, the most relevant to outsourcing being the *Patent Act* (Canada) and the *Copyright Act* (Canada). In addition, there are common law rules related to certain types of intellectual property.

Outsourcing agreements will generally have comprehensive provisions dealing with intellectual property rights, including assignments of intellectual property, waivers of moral rights under copyright, and comprehensive licences for the service provider to use the customer's materials during provision of service and for the customer to utilise the supplier's materials in its business to the extent not otherwise assigned. Such customer rights generally subsist for the term of the agreement and any transition out period, and rights for certain items embedded in deliverables and used in the customer's business may be perpetual.

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

Canada does not have specific trade secret legislation. Trade secrets and other confidential information are protected in outsourcing agreements by comprehensive contractual confidentiality provisions and, to a lesser extent, by common law rules of breach of confidence.

### 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?

Generally, licensing rights provided in the outsourcing agreement are definitive, but in certain circumstances where an agreement is silent, implied licence rights can arise by usage and acquiescence.

### 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?

Know-how, as opposed to the tangible expression of an idea under copyright or an invention protected by patent, is not restricted under Canadian legislation, but confidentiality provisions generally would catch information viewed as know-how so continued use of such confidential information, including for the purposes of repatriating services and re-procuring services from a third party, should be

specifically dealt with in the relevant provision of the outsourcing agreement.

## 15 Liability

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

Under Canadian law, there is generally freedom of contract with respect to the limitation and exclusion of liability, subject to the court-defined doctrine of unconscionability set out by the Supreme Court of Canada. It is normal practice to have a comprehensive limitation liability, disclaimer of consequential damages, with exceptions for certain types of conduct.

Carefully considering categories of damages in disclaimers is of importance, particularly if the parties involved wish to exclude lost profits. A disclaimer which excludes consequential damages "including lost profits" may not be effective to entirely limit lost profits claims, as Canadian courts have found lost profits to equally be a category of direct damages.

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

Under Canadian law, the parties are free to agree on a financial cap and this is almost universally the practice.

Limitations of liability and exceptions to such limitations are usually a point of considerable negotiation in outsourcing agreements. Exceptions and stretch caps on the following are common points of negotiation: breach of confidentiality; breach of security provisions; requirements relating to personal information; indemnities for intellectual property infringement; damages arising from bodily injury and damages to tangible property; fraud and wilful misconduct; and wilful cessation of services.

## 16 Dispute Resolution

### 16.1 What are the main methods of dispute resolution used?

Typically, some form of informal dispute resolution will be used as an attempt to resolve disputes with a comprehensive arbitration clause or resort to the courts for unresolved disputes. Arbitration provisions should be detailed since provincial arbitration Acts generally do not specify full procedural details for 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 the province of Québec, there has been a long-time recognised duty of good faith that extends to the formation and performance of contracts (codified in Articles 6, 7 and 1375 of the *Civil Code of Quebec*). In 2014, in the landmark case of *Bhasin v. Hrynew*, [2014] 3 SCR 494, the Supreme Court of Canada confirmed that there is an organising principle of good faith that requires contracts to be performed honestly, extending the principle to the rest of Canada.



**Simon Hodgett**

Osler, Hoskin & Harcourt LLP  
100 King Street West  
1 First Canadian Place  
Suite 4600, P.O. Box 50  
Toronto ON M5X 1B8  
Canada

*Tel:* +1 416 862 6819  
*Email:* [shodgett@osler.com](mailto:shodgett@osler.com)  
*URL:* [www.osler.com](http://www.osler.com)

Simon Hodgett's practice concentrates on technology outsourcing, other complex services arrangements and procurement. He advises enterprises whose businesses rely on technology and complex services. He also advises technology suppliers ranging from large established software providers to early stage technology companies. Simon has been lead counsel on projects in the banking, pension, investment, healthcare, energy and other sectors. His practice includes data agreements, outsourcing arrangements, software licensing, government contracting, e-commerce and payment systems. Simon writes and lectures on various areas of technology law, both in public forums and client education venues.

Simon is a past President of the Canadian Information Technology Law Association (IT.Can).

**Wendy Gross**

Osler, Hoskin & Harcourt LLP  
100 King Street West  
1 First Canadian Place  
Suite 4600, P.O. Box 50  
Toronto ON M5X 1B8  
Canada

*Tel:* +1 416 862 6737  
*Email:* [wgross@osler.com](mailto:wgross@osler.com)  
*URL:* [www.osler.com](http://www.osler.com)

Wendy Gross is a partner and Co-Chair of Osler's Technology Group. Wendy's practice focuses on outsourcing and other complex, strategic commercial transactions and joint ventures relating to technology and leading-edge business initiatives. Wendy has expertise in commercial transactions and regulatory issues relating to emerging payment systems and loyalty programmes, including mobile payments. She advises many of Canada's largest financial services, retail, and e-commerce companies in outsourcing, joint ventures and other strategic relationships. In addition, Wendy advises on regulatory matters relating to data governance, privacy, security and e-commerce.

# OSLER

Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Ottawa, Vancouver and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative “one firm” approach draws on the expertise of over 400 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For over 150 years, we have built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them. It is law that works.

Osler's Technology practice is internationally recognised for applying strong legal and business skills to find common-sense business solutions. We are counsel to many of the leading vendors and largest purchasers of technology-related products and services. As well, we represent mid-sized and emerging enterprises as they look to develop and enhance their market position.

## Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

**glg** global legal group

59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [info@glgroup.co.uk](mailto:info@glgroup.co.uk)

[www.iclg.com](http://www.iclg.com)