

MAYER • BROWN

# Current Critical Issues When Outsourcing

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Critical Issues in Sourcing

BUSINESS & TECHNOLOGY SOURCING WEBINAR SERIES

# Speakers



**Paul Roy** is a partner in the Business & Technology Sourcing practice in Mayer Brown's Chicago office. He represents clients in a broad range of onshore, nearshore, and offshore information technology and business process outsourcing transactions. He regularly advises clients on the outsourcing of IT infrastructure services and support, application development and maintenance, network management and support and help desk/call center services. Paul also advises clients on the outsourcing of finance and accounting functions, HR/employee services, CRM and financial services operations, among other business process functions.

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**Brad Peterson** is a partner in the Business & Technology Sourcing Practice in our Chicago office. He has represented clients in dozens of large outsourcing transactions and hundreds of software license and services agreements. In the past year, he has represented leading companies in entering into mission-critical agreements for information technology, finance & accounting and human resources services and in replacing critical information technology. With both an MBA from the University of Chicago and a JD from Harvard Law School, he provides practical, business-focused advice and completes transactions efficiently and effectively.

# Business & Technology Sourcing Practice

**"An excellent team of people for outsourcing agreements globally - pragmatic in their approach, with a wealth of experts they can call on."**  
—*Chambers Global 2014*

**"Mayer Brown is universally regarded as a leading player in the technology and outsourcing arena, with market commentators commending the ease with which its lawyers integrate with clients, delivering business-focused advice and guidance."** — *Chambers Global 2013*

**"Their knowledge in this area is tremendous. They know us so well they blend into our deal teams and become a natural extension to our in-house team."**  
— *Chambers USA 2014*

**Mayer Brown is universally regarded as a leading player in the technology and outsourcing arena, with market commentators commending the ease with which its lawyers integrate with clients, delivering business-focused advice and guidance."**  
— *Chambers USA 2013*

- More than 50 lawyers around the world focused on helping clients improve their business operations by sourcing services and technology
- Advised on more than 300 significant outsourcing transactions valued at an aggregate of more than \$100 billion

## RECOGNIZED MARKET LEADER



"Band 1" ranking  
in IT/Outsourcing for  
ten consecutive years  
(Chambers 2004-2014)



Named "MTT  
Outsourcing Team of the  
Year" in 2014 and ranked  
in the top tier from 2010  
thru 2014



Ranked as one of the  
top law firms in 2009  
thru 2014 on The World's  
Best Outsourcing  
Advisors list for The  
Global Outsourcing 100™

# Agenda

<b>1.</b> Negotiating efficiently <i>and</i> effectively	<b>2.</b> Challenges in applying traditional dragnet provisions	<b>3.</b> Integrating contracts across service providers	<b>4.</b> The double- edged sword of short term deals	<b>5.</b> Allocating IP rights when outsourcing based on supplier technology
<b>6.</b> Securing “big data” rights and services	<b>7.</b> Retaining the right to protect your business	<b>8.</b> Minimizing risk, cost and surprise on exit	<b>9.</b> Governance and follow- through (and follow-through, follow-through, follow-through)	<b>10.</b> Resolving disputes while preserving (or even building) the relationship

# 1. Negotiating Efficiently and Effectively



- Broad scale outsourcing to a single provider are giving way to strategic and specialized sourcing to multiple providers
- Smaller deals still involve mission critical services
- Getting good results requires tools, processes and experience :
  - Market-tested contract and schedule templates
  - Checklists
  - Guides to help the business team collect needed information
  - Processes designed to fit various transaction types and reduce the number of cycles to get to closure
  - Experience both with the tools and processes as well as with the counter parties and similar transactions

## 2. Challenges in Applying Traditional Dragnet Provisions

- Traditional outsourcing model assumed the provider was taking responsibility for an existing internal function
  - E.g., traditional dragnet clause: provider performs all the functions previously performed by customer at the same or better levels of quality, unless a function is explicitly excluded
- As more customers move to second-or-later-stage transactions, they need new approaches, including more robust service descriptions



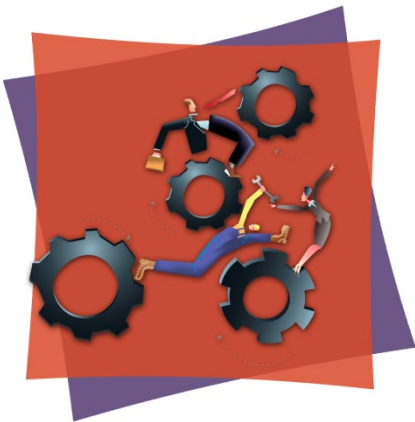
### 3. Integrating Contracts Across Providers



- Customers have an increasing number of providers
- Customers increasingly need to integrate and ensure close working relationships among providers
- To build a working provider ecosystem, customers need to establish rules and relationships that protect the vital interests of each provider and reward collaboration
- Consistent contract terms allow more efficient and effective governance and cross-functional activities
- Outcomes are best when customers address this requirement early in the sourcing process and follow through in governance

## 4. The Double-edged Sword of Short Term Deals

- In the face of increased uncertainty and dramatic changes, customers have sought to increase flexibility with shorter terms
- While customers may believe shorter term contracts protect them, the reality is that exit is often costly, time consuming and disruptive
  - Protect your company by including long-term contract protections even if the nominal term of the contract is short





## 5. Allocating IP Rights When Outsourcing Based on Supplier Technology

- Customers are increasingly outsourcing to use provider technology instead of to use a lower-cost workforce to operate customer technology
  - E.g., SaaS and cloud transactions
- Customers retain rights in their data, but the bigger issue is the cost and risk of replacing the systems that process that data
- Mitigate risks by obtaining:
  - Options to license some or all of the provider's technology for an extended period
  - Commitments to provide replacement systems
  - Transition support at predictable costs for substantial periods



## 6. Securing “Big Data” Rights and Services



- Advances in “big data” technologies have allowed companies to create spectacular value with secondary uses of data
- Traditional and even current service contracts often permit these secondary uses without compensation
  - E.g., contracts often permit providers to retain aggregate and anonymized copies of customer data which allows the providers to benefit from data
- Customers should also look for opportunities to partner with their providers to gain the benefit of insights that be generated from the provider’s broader market data

## 7. Retaining the Right to Protect Your Business

- Customers face risks of providers becoming financially, operationally or otherwise unable or unwilling to perform specific mission-critical functions
- Traditional “step in” rights increasingly are only false comfort because providers increasingly use global service delivery models integrated with provider processes and technology
- Mitigate risk with options to take specific work back quickly, including rights to take over assets and license materials
- For these options to be effective, customer must obtain commitments from supplier to provide information on an ongoing basis



## 8. Minimizing Risk, Cost and Surprise on Exit

- As transactions reach end-of-life, customers are too often surprised by their vulnerability on exit
- Common complaints include:
  - Exit rights designed for the technology at the signing date not fitting the technology at exit,
  - Incomplete or poorly organized data, and
  - Inadvertent waivers of exit rights needed to transition the services
- Mitigate these risks with:
  - flexible exit rights, including rights to key data,
  - Conducting regular audits of the data, and
  - Using financial incentives for the provider to properly maintain that data



## 9. Governance and follow-through (and follow-through, follow-through, follow-through)

- Like internal operations, outsourcing agreements must be persistently managed to retain and build value
- Customers can, and frequently do, lose value by failing to monitor compliance, document deficiencies, demand corrective action and exercise remedies if failures continue
  - Good personal relationship vs. good commercial relationship
  - Operational management vs. supplier management
- Customers also lose value by allowing contracts to be modified by course of dealing instead of deliberate mutual agreement
- Investments in governance can produce high returns, but those can be difficult to track



## 10. Resolving Disputes while Preserving (or Even Building) the Relationship



- Disagreements in outsourcing agreements are inevitable, but resolving them is not
- Disputes that accumulate and remain unresolved can fester, weaken trust and destroy an otherwise productive relationship
- Finding ways to quickly and efficiently force a resolution is the best way to maintain and build, trust and a strong working relationship
- Strategies for accomplishing this ranging from novel governance structures to using third parties identified in advance to finally resolve disputes within specified dollar ranges

# Summary

- Today, we see current critical issues arising from:
  - Increasing numbers and types of critical sourcing contracts
  - Increasing reliance on new provider technologies
  - Increasing prominence of exit
- Customers can reduce risk and increase value by securing commitments, options and incentives designed for this new environment and investing in effective, efficient governance and dispute resolution.

# QUESTIONS

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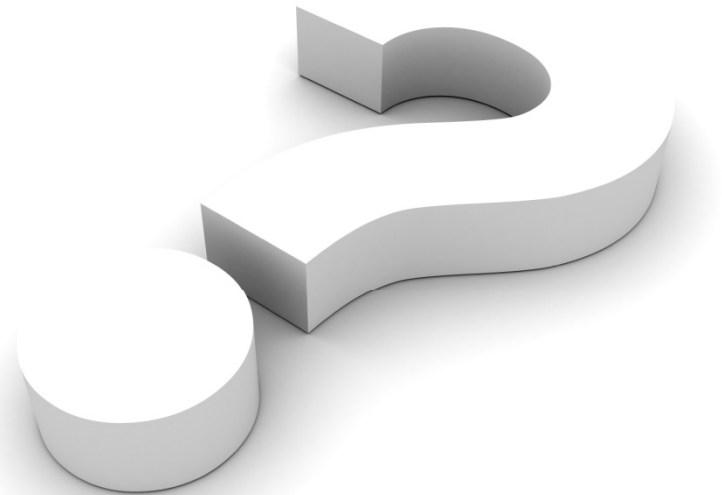
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- A recording and link to the materials from this program will be distributed by email to in the next day or two.
- For those applying for CLE credit, please note that certificates of attendance will be distributed within 30 days of the program date.
- Watch for our next webinar invitation coming in the next week or so.
- To submit topic ideas for future programs, please email us at [BTS@mayerbrown.com](mailto:BTS@mayerbrown.com)

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