

Outsourcing contract and IT contracts

New legal and regulatory requirements to be integrated; legal aspects to be covered in contractual clauses

- > FINMA Circular Outsourcing, New FADP, FINMA Circular on Operational Risks and Resilience
- > Analysis of certain standard contractual clauses, updating of contractual documentation
- > Impact of Artificial Intelligence on this type of contracts
- > Cloud Contracts: importance of reversibility clauses; key points to negotiate in case of contract termination, etc.



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8:30 Introduction

- Definition of «contract management»
- Reminder of contractual freedom
- Legal and regulatory requirements
- Wide variety of contracts in the financial sector
- Focus on certain contracts: outsourcing contracts, IT contracts
- Impact of new technologies in the contractual field: artificial intelligence (AI)

OUTSOURCING CONTRACTS

8:40 Definition of Outsourcing Contracts

- Essential outsourced function
- Examples of outsourcing
- Transfer of large amounts of CID ("Mass CID") to the service provider
- Definition of the concept of «large amounts of CID»

8:55 Requirements of FINMA Circular 2018/3 Outsourcing Applicable to Outsourcing Contracts - Reminder of requirements and latest developments

- Inventory of outsourced functions
- Requirements for the service provider
- Professional capabilities
- Guarantee of sustainable performance of the function / orderly reintegration of the outsourced function or transfer to another provider (reversibility)
- Distribution of competences and responsibilities between the financial institution and the service provider
- Regular monitoring of the service provider
- > Periodic assessment of the efficiency of security controls established by the provider
- > Periodic evaluation of service levels agreed upon in the «Service Level Agreements» (SLA)
- Audit and supervision: by FINMA; by the financial institution; by the financial institution's audit firm
- Security requirements
- Adequacy of measures
- Continuity of the outsourced function in case of emergency («Business continuity / Disaster recovery»)
- Transfer of an essential function abroad
- Guarantee of access and inspection rights abroad
- Guarantee of restructuring and resolving the Bank
- > Access to necessary information at all times
- Requirements concerning subcontracting
- Obligation to inform the bank in case of use or change of subcontractors performing essential functions
- Possibility for the bank to terminate the outsourcing contract in case of refusal to use or change subcontractors
- Transfer to the subcontractor of the necessary obligations and guarantees to comply with the outsourcing circular
- Confidentiality obligation

9:40 Federal Data Protection Act (FADP) of September 25, 2020

Reminder of some requirements and latest developments regarding the new FADP in the context of outsourcing involving CID transfer

- Obligations of the data controller
- Duty to inform (art. 19 and 20 FADP)
- Data protection impact assessment (art. 22 and 23 FADP): conditions, exceptions
- Notification of data security breaches (art. 24 FADP)
- Security and data protection (art. 7 and 8 FADP and art. 3 OPDo) - Implementation of appropriate organizational and technical measures
- Data protection by design and by default
- Data access and identity management: authorization systems, selection of individuals with access to data, «need-to-know» principle, authentication
- Data encryption, pseudonymization, and anonymization
- Requirements of the new FADP concerning subcontracting (art. 9 FADP)
- Verification by the data controller of the subcontractor's ability to guarantee data security
- Prior authorization required from the data controller for the subcontractor to further subcontract data processing to a third party
- Compliance by the subcontractor with the same general obligations as the data controller
- Transmission of personal data abroad
- Transfer to a country with «adequate» data protection legislation
- Transfer to a country without «adequate» data protection legislation

10:25 Coffee Break

10:45 FINMA Circular 2023/1 Operational Risks and Resilience - Banks

Overview of certain requirements of this Circular in the context of outsourcing involving CID transfer

- Critical data
- Critical functions
- Strategies, policies, and internal procedures: Board of Directors, Executive Board, departments
- ICT risk management: establishing an inventory
- Cyber risk management: critical processes
- Critical data risk management: additional data protection measures when transferring or storing data abroad and outsourcing
- Business continuity management (BCM): requirements concerning the "disaster recovery plan" (DRP) in case of outsourced critical processes
- Guarantee of operational resilience: coordination of the components of comprehensive risk management, including outsourcing management

11:10 Content of Internal Guidelines and Procedures to Be Implemented for Outsourcing

- Internal roles and responsibilities
- Service provider selection
- Risk assessment
- Monitoring of outsourced function

- Description of the information to be included in an outsourcing contract
- Data protection
- Appendices to guidelines and procedures: inventory of outsourced functions and "incident report"

11:25 Specific Requirements Concerning Financial Institution Clients

- Lifting of banking secrecy (Article 47 LB)
- Duty of transparency

11:35 Documentation / Evidence Required by Auditors

- ISAE, ISO, and SOC reports (ISAE 3402, ISO 27001, SOC 1, etc.)
- Risk mapping
- Inventory of outsourced functions
- Documentation/clause stating subcontractors comply with regulatory requirements
- Documentation/clause stating regulatory security measures are respected

IT CONTRACTS

11:55 Definition of IT Contract

- No legal definition

12:00 Categories of IT Contracts

- Standard contracts: maintenance, license, software development, integration.
- Cloud Computing-Based Contract Categories: description, examples, points of concern
 - Cloud Deployment Models: Public Cloud, Private Cloud, Hybrid Cloud, Community Cloud
 - SaaS Contract (Software as a Service)
 - IaaS Contract (Infrastructure as a Service)
 - PaaS Contract (Platform as a Service)
 - FaaS Contract (Function as a Service)
 - DaaS Contract (Desktop as a Service)
 - SaaS Contract (Storage as a Service)

12:35 Lunch Break

14:00 Structure of an IT Contract

- Contractual framework
- Different phases:
 - Implementation/Development Phase
 - Testing Phase (User Acceptance Testing, UAT)
 - Pre-Production Phase ("Staging")
 - Production Phase or "Go Live"
- Analysis of typical clauses:
 - Clause on the Scope of Services Provided
 - Clause on Fees
 - Clause on Intellectual Property Rights
 - Clause on Liability and Indemnification

- Clause on Confidentiality and Data Protection
- Duration and Termination of the Contract
- > General Principles
- > Specifics of Terminating Cloud Contracts: Types of Terminations, Reversibility Clauses (Extent of Data Access Rights, Data Portability, Transfer Modalities)
- Applicable Law and Jurisdiction

15:00 Coffee Break

COMMON ISSUES

15:00 Impact of Artificial Intelligence in the Contractual Field and Specifically in Outsourcing and IT Contracts

- Contracts with AI Service Providers
- Importance of Certain Clauses in an AI Contract
 - Data Protection Clauses: Protection via a Data Processing Agreement (DPA)
 - Clauses Related to Confidentiality Obligations
 - Intellectual Property Rights (IPR) Clauses: Ownership of IPR, IPR on the Results ("Output") Generated by the AI System, Use of Data for AI Training, Indemnification Clause, Background IP, Foreground IP, etc.
 - Contractual Obligations Related to AI Regulation and General Terms of Use of AI Service Providers
- > Impact of the "EU AI Act"
- > Requirements under Swiss Law
- > General Terms of AI Service Providers

15:50 Implications and Coordination of Departments/ Services Concerned Within the Financial Institution in the Context of Outsourcing and IT Contracts

- Legal Department
- Compliance Department
- IT Department: Cybersecurity Department, Chief Information Security Officer (CISO)
- Risk Department
- Data Protection Officer (DPO)
- Operations Department
- Vendor Management Department

16:05 Updating, Modifying, and Archiving Contractual Documentation

- Contract Deadlines: Contract Renewal, Contract Termination
- Contract Modifications: Formal and Material Changes
- Archiving of Contractual Documentation: Retention Period, Form of Retention

16:30 End of the Seminar

ZURICH, TUESDAY 13 MAY 2025, 8.30-16.30, ZURICH SHERATON HOTEL / ONLINE

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I will attend in the conference room I will attend online on Zoom.

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