

INSIGHT

BE A CONTINUOUS LEARNER

Wherever you are in your career as a director, IoD Bermuda values and supports ongoing professional development and education. Being a continuous learner is important to ensuring you are constantly absorbing new information, keeping informed about current trends and following potential new theories. Furthermore, continuous learning provides the opportunity to enhance personal knowledge and improve your personal brand.

Continuous learning not only benefits the individual but also the organisations they are involved with and can generate new ideas and perspectives, boost morale and improve overall performance within the organisation.

Of course, there are number of avenues to pursue for the continuous learner. Let's take a look at the different ways an employee can engage in this important aspect of their careers.

FORMAL LEARNING

Formal learning includes educational initiatives that are pre-determined, organised and implemented for a specific learning purpose or goal and can include:

- A university or college course.
- Training programmes within an organisation.
- External workshops or conferences.
- E-learning.
- Mobile learning courses.

SOCIAL LEARNING

Social learning includes the ways a person interacts, discusses, collaborates and learns from others to increase knowledge or learn new skills. This can be both formal and informal, including:

- Discussion and collaboration on social media.
- Using blogs or other resources to gain deeper insights.
- Working and collaborating with co-workers.
- Coaching and mentoring.
- On-the-job training.

SELF-DIRECTED LEARNING

Obtaining a new skill or improving your knowledge is not restricted to formal training or working with others. Self-directed learning can include:

- Researching and reading to gain a deep understanding of a topic.
- Listening to relevant podcasts or watching instructional videos.
- Experimentation and exploration of an activity, issue or subject.

At IoD Bermuda we offer our members a number of ways to continue their learning, equipping our directors with tools and techniques for best practice and helping them excel in the boardroom and become the best director they can be. We accomplish these goals through:

- Webinars and professional development courses.
- Certification courses.
- Networking events.

To learn more about how IoD can support you through your journey of continuous learning visit <https://www.iod.bm/learning>

- DANIELLE RIVIERE,
IOD BERMUDA, EXECUTIVE DIRECTOR

TRENDS

GOVERNANCE DEMANDS ON OUTSOURCING CONTRACTS

By Duncan Card

Many offshore enterprises, including in Bermuda, outsource their critical operational, information technology and all other back-office infrastructure either to a third-party service provider or to an affiliated enterprise onshore. Those services are often as critical to the operations and business of those offshore enterprises as the contracts to structure, implement and manage the delivery of the services are legally and commercially complex. Regardless of whether or not the outsourcing service provider is internal or external to your organisation, those transactions are often fraught with material deficiencies that can have extremely detrimental risk management, regulatory compliance and corporate governance implications. As both an independent director and as a lawyer specialising in outsourcing contracts for over 25 years, here are three suggestions to dramatically improve the success of your organisation's outsourcing arrangements.

Transfer Pricing

When an offshore entity outsources any aspect of its operations to an onshore affiliate, the onshore tax authorities usually insist that the related service fees are fair, reasonable and consistent with fair market value and normal industry practice. Such fair-market pricing requires a transfer-pricing assessment that is based on comparisons with similar arms-length commercial outsourcing transactions. It comes as no surprise to anyone, including transfer pricing professionals, that commercial outsourcing contracts comprehensively, if not exhaustively, address all aspects of those transactions, including: service performance specifications; allocation of risk and liability; the service provider's regulatory compliance obligations and; relationship management obligations.

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MEET THE TEAM

NATALIE NETO, EXECUTIVE COMMITTEE MEMBER



Natalie is a partner in the corporate and finance practice at Walkers Bermuda where she advises on a wide range of Bermuda-based and international corporate and regulatory matters. She has significant transactional experience advising on M&A transactions for public and private companies, including takeovers, tender offers and squeeze outs, amalgamations, mergers and schemes of arrangement.

Natalie advises a wide range of clients with respect to digital asset legal and regulatory framework, including the establishment, licensing and ongoing compliance obligations of digital asset businesses. She also advises on private equity investments, debt and equity capital markets transactions, banking and finance matters and has a wide depth of knowledge with respect to complex restructuring projects involving Bermuda companies, LLCs and partnerships including redomiciliation.

At the Board level, Natalie consults with companies and directors in respect of corporate governance and regulatory matters, including directors' fiduciary duties and responsibilities.

Natalie has completed the Certificate in Company Direction (CICD) through the IoD.

GOVERNANCE DEMANDS ON OUTSOURCING CONTRACTS

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Those complex commercial agreements can easily be, if not usually, over 75 pages in length and also include many pages of attached exhibits. Commercial outsourcing vendors will readily confirm that their service pricing is directly, and inextricably, a correlative function of the full and onerous nature of their contractual performance obligations, the risks and liabilities they have assumed and how the relationship will otherwise be managed. Simply stated, arms-length transfer-pricing for intercompany outsourcing transactions usually assumes that affiliated parties have entered into an outsourcing contract that is commercially normal. So, if your intercompany outsourcing service agreement is only 20 pages and inconsistent with truly arms-length contracting practices, then the transfer-pricing of that transaction may not accurately reflect the pricing that a commercial, arms-length, outsourcing vendor would have charged in the context of that (commercially unusual) 20-page contract.

Outsourcing Regulatory Compliance

The scrutiny of offshore regulators in the management of outsourcing transactions is profound, and it is dramatically increasing. As well, legislation regulating cyber risk management and the protection of personal information, with application across all sectors, is also having a direct and material impact on the prescribed terms and conditions of outsourcing contracts, both for commercial and intercompany outsourcing. If you are a part of Bermuda's critical infrastructure, then you are awaiting the introduction of expected new Bermuda legislation related to the management of cyber risk, which is expected to address outsourcing circumstances. All organisations in Bermuda are now preparing for the proclamation into full force of Bermuda privacy laws, which also expressly prescribe outsourcing contract practices. If you are an insurance or reinsurance enterprise in Bermuda, then you are already well aware of the important outsourcing contract implications related to cyber risk management. Many other financial institutions in Bermuda must also adhere to the outsourcing transaction and contract compliance prescriptions of the Bermuda Monetary Authority. Ensuring that all of those many onerous outsourcing risk management and governance requirements are addressed (intercompany and arms-length) is an essential aspect of all corporate governance best practices.

Avoiding Outsourcing Litigation

It is widely accepted that the leading, if not dominating, cause of dispute and litigation related to commercial outsourcing transactions arises due to the failure of the parties to comprehensively, clearly and accurately specify and describe all of the service performance obligations, practices, processes, technical and operational specifications and service level requirements that the customer requires the service provider to perform and deliver. Those obligations should never be stipulated as a service provider's "reasonable commercial efforts to perform", in just the same way that a customer's payment

obligations are never stipulated as "commercially reasonable efforts to pay". The more comprehensively you specify all of the outsourcing service obligations in the contract, the more able you will be to price those services, to monitor and verify service performance, to know when the service provider has breached its service obligations, to verify your regulatory compliance and to manage your relationship with the vendor. The failure to do so will dramatically increase the risk and likelihood of outsourcing service performance misunderstanding, dispute and even litigation.

SUCCESS

LAUNCHING THE FIRST COHORT PROGRAMME

This month IoD Bermuda formally launches the Cohort Professional Development Programme, a comprehensive, group-focused approach to achieving the Certificate in Company Direction (CICD) qualification. This first-ever initiative will see a total of 28 members come together to complete course work and exams, while also participating in networking and information sharing sessions.

Twelve of the participants will be completing all four CICD courses, with the remainder taking the various courses they need to complete the certification.

The benefits of joining the Cohort Professional Development Programme include:

- *A community experience with opportunities for shared learning experiences.*
- *Creating supportive relationships that can provide motivation and sustain the drive to complete the process.*
- *Building long-term professional networks that can open doors in the future.*

Providing innovative professional development opportunities for our members is at the core of IoD Bermuda, and we are sure this new approach will bring value to those who participate - and the Boards they sit on.

Please note, if you have begun the CICD qualification and still need to complete the Roles of the Director and the Board course there are two spots available within the Cohort Programme. The course is being held January 30th - 31st, 2023 so please let us know ASAP. All other sessions are closed.

The next cohort will begin October 2023. If you are interested, please email info@iod.bm to learn more.

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FOR UPCOMING EVENTS!**