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Outsourcing

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Cross-border

Country Q&A

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Lawyer profiles

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Ireland

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GENERAL

1. To what extent does national law specifically regulate outsourcing transactions?

Other than in the financial services sector, there is no specific regulation of outsourcing transactions. However, depending on the sector and services involved, parts of the outsourcing transaction may be regulated by various elements of national law, such as:

- Data protection.
- IP rights protection.
- Health and safety regulations.

Transfers of employees are regulated under national rules implementing Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Acquired Rights Directive).

2. What additional regulations may be relevant on:

- **A financial services outsourcing?**
- **A business process outsourcing?**
- **An IT outsourcing?**
- **A telecommunications outsourcing?**
- **A public sector outsourcing?**
- **Other outsourcings?**

Financial services

The Irish Financial Services Regulatory Authority (Financial Regulator) regulates the financial services sector in Ireland, and is responsible for supervisory and prudential oversight of, among other things:

- Banks.
- Credit institutions.
- Investment services providers.
- Insurers.
- Insurance, investment and other financial services intermediaries.
- Other financial institutions.

Outsourcing by regulated financial institutions has come under increasing scrutiny over the last few years, not least as a result of the implementation in Ireland of Directive 2004/39/EC on markets in financial instruments (MiFID) in November 2007. This sets out specific rules relating to outsourcing in the context of investment-related financial services.

The Committee of European Banking Supervisors (CEBS) published Guidelines on Outsourcing (CEBS Guidelines) in December 2006, which apply to the full range of services that credit institutions provide and not just investment-related financial services, and which have been deliberately designed to be consistent with MiFID. While the Financial Regulator has not published general guidelines on outsourcing in the financial services sector, in practice it consistently applies the CEBS Guidelines to financial services outsourcings which do not fall under MiFID. It also applies sector specific guidance, including guidance published by the Joint Forum, the International Organisation of Securities Commissions and the International Association of Insurance Supervisors.

Both MiFID and the CEBS Guidelines include specific rules relating to:

- The notification of material outsourcings to the Financial Regulator. Any outsourcing of activities is considered a material outsourcing if the failure of those activities could significantly impair the institution's:
  - ability to meet its regulatory responsibilities;
  - financial performance;
  - ability to remain in business;
  - risk management.
- An obligation to execute a clear written outsourcing contract, which includes:
  - a clear definition of the services to be provided and the performance standards to be achieved;

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- provision for ongoing monitoring, assessment and auditing rights for the customer; and
- protection of the Financial Regulator's ability to continue to properly oversee and regulate the outsourced activity.

Any outsourcing contract must not prejudice the Financial Regulator's ability to audit and access information relating to the outsourcing and the premises from which the outsourced services are provided, or require termination of the outsourcing contract where it deems necessary. The Financial Regulator may also impose minimum termination notice periods for certain financial services contracts (*see Question 24*).

Business process

There are no regulations specific to business process outsourcing. However, additional regulation can arise in industry-specific contexts.

IT

There are no IT regulations specific to outsourcing. However, additional regulation can arise in industry-specific contexts.

Telecommunications

There are no telecommunications regulations specific to outsourcing. However, when structuring any outsourcing in the telecommunications sector, the parties must comply with general telecommunications regulatory requirements.

The provision of telecommunications networks and services falls under the electronic communications networks and services regulatory regime. While in general there is no requirement to obtain a licence, to provide such networks and services the provider of the network or service must:

- Notify the Commission for Communication Regulation (ComReg) before providing any networks or services.
- Comply with the terms of the general authorisation published by ComReg.

Depending on the services being outsourced, there may be additional requirements for wireless telegraphy licences.

Public sector

When a public-sector body enters into outsourcing activities:

- It must comply with public procurement rules (*see Question 4*).
- Its authority to outsource the activity in question must be considered.

Otherwise, there are no outsourcing regulations specific to the public sector. However, additional regulation can arise in specific contexts (such as data protection, or regulations applying to the transfer of employees).

Other

The regulation of outsourcing transactions under Irish law depends less on the nature of the outsourced service (for example, IT or business process) than on the sector in which the outsourcing takes place (for example, financial services or the health sector). In any regulated industry or sector, the proposed outsourcing's scope and structure must be considered in the context of the relevant regulatory regime, to ensure that all licences and authorisations are obtained and other requirements are met.

LEGAL STRUCTURES

3. In relation to the legal structures commonly used on an outsourcing, please describe how each structure works, and its potential advantages and disadvantages.

A variety of outsourcing structures are used, both in arm's-length relationships and in intra-group arrangements.

Bilateral contract

The most common outsourcing structure remains the bilateral contract between the customer and supplier. Apart from the complexity of the contract itself, this is in many ways the most straightforward structure to implement from a legal perspective.

However, this structure does have the perceived disadvantage of not properly reflecting the "partnership" characteristics of an outsourcing relationship, which the parties to an outsourcing often emphasise. This perception of partnership is one of the most important practical issues to be addressed in terms of the governance and implementation of an outsourcing, and arises irrespective of the structure used.

Prime contractor model

Where the customer seeks to outsource a broadly defined service, which in reality consists of a series of interconnected functions and services, the outsourcing usually involves a need to manage a number of suppliers and services. In such cases, the customer generally requires a prime contractor model. The prime contractor takes legal responsibility for the whole outsourced function, including putting in place and managing any necessary subcontractor relationships. This means that the customer only has to deal with a single entity, which reduces its management time.

However, in a prime contractor model, the customer does not have a direct contractual relationship with some of the suppliers, which may reduce its control over certain aspects of the services. In addition, it may be harder for the customer to retain and transfer its knowledge in the long term.

Multi-supplier contracts

Where a customer outsources major interconnected functions, it may opt to enter into contracts with several suppliers, either through individual contracts or in a multi-supplier agreement.

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This allows the customer to retain greater control over the outsourcing, by establishing a contractual framework that obliges the various suppliers to interact and work cohesively. However, it can make governance and management of the outsourcing more challenging for the customer.

Joint venture company

Suppliers often bid for outsourcing contracts having organised themselves into joint ventures, whether through a single joint venture vehicle or through contractual arrangements. This means that the customer benefits from the expertise of a number of a suppliers who are tied into the joint venture vehicle, while only having to deal with a single legal entity (*see also above, Prime contractor model*).

Joint venture companies are often used as outsourcing suppliers to the joint venture partners (which may or may not be related entities) in circumstances where:

- The joint venture partners require the same services.
- There are advantages and economies of scale to be achieved by obtaining the services from a single joint venture entity.

As an alternative, a captive subsidiary can be used as a supplier.

Partnerships

Partnerships, in the legal sense, between the customer and supplier remain relatively rare as outsourcing structures in Ireland, mainly because they can give rise to joint and several liability. An exception to this is where two or more entities, often in a group situation, set up a partnership to provide common services to the partners.

Build, operate and transfer models

These remain relatively uncommon in Ireland, other than in the context of public/private partnerships for large infrastructure projects. They are, however, becoming more common in offshore outsourcings.

PROCUREMENT

4. Please briefly describe the procurement process that is usually used to select a supplier of outsourced services (including due diligence and negotiation).

The procurement process used to select a supplier varies depending on:

- Whether the outsourcing is public, utility or private sector.
- The value and complexity of the services to be outsourced.

Private sector

In private-sector outsourcings, there is generally a request for proposal (RFP) process. The customer sends out a proposal to potential suppliers, detailing the outsourcing it wishes to undertake. Based on responses to the RFP, the customer chooses its preferred bidder and negotiates the contract with this bidder or, in some circumstances, may engage in parallel negotiations with two or more bidders.

Other than complying with general competition law rules, the RFP process does not need to equate to a public tender process. However, many customers take guidance from the public procurement structures to ensure that the RFP process is transparent, non-discriminatory and undertaken in good faith.

Potential suppliers may carry out due diligence of the customer's business as part of the RFP process. This can happen after the customer has rejected a number of potential suppliers based on their responses to the RFP, or in parallel with the negotiation of the contract when a preferred supplier has been chosen.

Public-sector and utility entities

Legislation. Public-sector bodies and utility entities are subject to public procurement rules when they outsource. These rules arise under both EC and national rules, and require that most contracts be subject to a public tender process.

If the procurement of works, supplies and services is above certain thresholds (*see below, Thresholds*), it is subject to the EC public procurement regime. Other rules may still apply if the thresholds are not met (*see below, Other public sector rules*). The EC regime consists of:

- For utilities, Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (implemented in Ireland by the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007).
- For public bodies, Directive 2004/18/EC on the co-ordination of procedures for the award of public works, supply and service contracts (implemented in Ireland by the European Communities (Award of Public Authorities' Contracts) Regulations 2006) (2006 Regulations).

Thresholds. The thresholds over which the EC public procurement regime applies are subject to periodic review by the European Commission.

The current thresholds for the public sector are:

- EUR133,000 (about US$187,000) for supplies and most services procured by central government bodies.
- EUR207,000 (about US$291,000) for supplies and services procurement by other public-sector bodies.
- EUR5.15 million (about US$7.2 million) for works contracts procured by all public-sector bodies.

The current thresholds for utilities are:

- EUR412,000 (about US$579,000) for supplies and services contracts.

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- EUR5.15 million for works contracts.

Procedures. Under the EC public procurement regime, public bodies must award contracts through one of the following procedures:

- **Open procedure.** This is a process where all interested parties can submit tenders in response to a published contract notice.
- **Restricted procedure.** This is where, following publication of the contract notice, potential suppliers have expressed an interest in providing works, supplies or services, and only those that the customer invites (or those who are pre-qualified) can submit tenders.
- **Negotiated procedure.** This procedure can only be used in exceptional circumstances and involves the customer consulting pre-qualified suppliers and negotiating the terms of the contract with them.

In addition, the 2006 Regulations make specific provision for two initiatives which are likely to be significant in the context of public procurement outsourcing contracts:

- **Competitive dialogue procedure.** In particularly complex contracts, a competitive dialogue procedure can be used instead of the open or restricted procedures. The interested parties pre-qualify for this procedure on the same basis as for the restricted procedure. In contrast to the restricted procedure, the contracting authorities then enter into dialogue with them before finalising a formal invitation to tender. This is designed to provide more flexibility in the tendering process.
- **Framework contracts.** These establish the terms that govern contracts to be awarded during a given period (for example, with regard to price and quantity), so that individual contracts can be called off under the framework agreement without the need to re-advertise.

Utility entities have more flexibility in their choice of procedure and can use one of the open, the restricted or the negotiated procedures without restriction.

Other public sector rules

Public contracts that fall below the EC thresholds are dealt with at national level. This procedure has been codified in the Department of Finance Public Procurement Guidelines (Green Book). The Green Book is a guidance document only and is not legally binding on public contracting authorities. It sets out the general principle that a procedure based on competitive tendering should be used for all government contracts, save in exceptional circumstances when the approval of the Department of Finance is required. The guidelines in the Green Book apply to:

- All government departments and offices.
- Local and regional authorities.
- State-sponsored bodies in the procurement of public building and civil engineering contracts.
- Public supply contracts and public service contracts.
- The disposal of public property.

In addition, public sector bodies must ensure that all procurement, whether above or below the EC thresholds, complies with certain general principles derived from the EC Treaty, such as:

- Non-discrimination.
- Equality of treatment.
- Transparency.
- Proportionality.
- Mutual recognition.

TRANSFERRING OR LEASING ASSETS

5. What formalities are required to transfer the following assets on an outsourcing:

- **Immovable property?**
- **IP rights and licences?**
- **Movable property?**
- **Key contracts?**

Immovable property

The following formalities are required:

- If the land is registered, the transfer of immovable property requires a written deed of transfer, which must then be registered in the Land Registry.
- If the land is unregistered, the transfer of immovable property requires a conveyance, which must then be registered in the Registry of Deeds.
- Where the property is leasehold property, the transfer of the leasehold interest requires a formal deed of assignment.

There may also be tax issues arising on the transfer of immovable property (*see Question 31*).

IP rights and licences

The following formalities are required:

- The transfer of an IP right requires a written assignment. In the case of a registered IP, the assignment must be registered on the relevant register to perfect title.
- The transfer of an IP licence requires a written assignment or novation agreement. In the case of a registered IP, the assignment or novation of the licence should be recorded on the appropriate register to avoid enforcement issues. Whether consent to the assignment from the other party to the IP licence is required depends on the terms of the IP licence.

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Movable property

Movable property is transferable by delivery, and there are no formalities that need to be considered when effecting such a transfer. A list of movable property to be transferred by delivery usually forms part of the outsourcing contract.

Key contracts

The transfer of key contracts requires a written assignment or novation agreement:

- In the case of assignment, whether consent to the assignment from the other party to the key contract is required depends on the terms of the key contract. Where the contract is silent, the general principle is that the benefit, but not the burden, of the contract can be assigned without consent.
- In the case of novation, the other party to the key contract must also be a party to the novation agreement.

6. What formalities are required to lease or license the following assets on an outsourcing:

- **Immovable property?**
- **IP rights and licences?**
- **Movable property?**
- **Key contracts?**

Immovable property

The following formalities are required:

- Leases of immovable property must be recorded in writing. If the lease has a term of over 21 years, it must be registered with the Land Registry if it is registered, or the Registry of Deeds if it is unregistered. Tax issues can also arise on the grant of the lease (*see Question 31*).
- Licences of immovable property are generally licences at will, do not create any rights under landlord and tenant legislation, and do not involve any formalities.

IP rights and licences

The formalities to lease or license IP rights are as follows:

- IP licences should be in written form, as a matter of good practice.
- Licences of registered IP should be recorded on the appropriate register to avoid enforcement issues.

Movable property

There are no strict formalities to be observed when licensing or leasing movable property. It is a matter of contract between the parties as to the rights that attach to the licence or lease.

Key contracts

Key contracts are not generally leased or licensed. If the customer wishes to retain the contractual relationship under the key contract, the customer generally appoints the supplier as its agent for the purposes of managing the key contract, rather than assigning or novating it. This approach does not involve any formalities, but as a matter of practicality requires acceptance by the third party.

TRANSFERRING EMPLOYEES

7. In what circumstances (if any) are employees transferred by operation of law:

- **To an incoming supplier on an initial outsourcing?**
- **To an incoming supplier on a change of supplier?**
- **Back to the customer on termination of an outsourcing?**

Initial outsourcing

The European Communities (Protection of Employees and Transfer of Undertakings) Regulations 2003 (Regulations) implement the Acquired Rights Directive in Ireland. The Regulations give employees certain rights when the whole or part of an undertaking or business is transferred from one employer (transferor) to another employer (transferee) as a result of a legal transfer or merger (*see Question 8, General terms*). The Regulations frequently apply when a customer outsources a service and the outsourcing:

- Involves a transfer of assets (whether tangible or intangible).
- Relates to a labour-intensive part of the business, and involves a transfer of a significant part of the workforce (whether in terms of numbers or skills).

Where a customer initially outsources a service or function, the Regulations operate between the customer as transferor and the supplier as transferee.

Change of supplier

Where a customer changes its supplier, and the handover constitutes a transfer, the Regulations usually operate so that the incoming contractor is the transferee and the outgoing contractor is the transferor. The Regulations should not therefore affect the customer. However, a change in service provider does not automatically trigger the application of the Regulations (as is the case in the UK). The facts of the situation are examined to determine whether or not there is a transfer of an undertaking (or part of one).

However, where the customer brings back in-house services that were previously outsourced, and the handover again constitutes a transfer, the customer is the transferee, and the Regulations apply to it.

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Termination

Where a customer terminates an outsourcing and brings back in-house services that were previously outsourced, in circumstances that constitute a transfer, the customer is the transferee, and the Regulations apply to it.

8. Please describe the terms on which employees would transfer by law, including any effect on pensions, employee benefits or other matters (including collective agreements) that the transfer may have.

General terms

When the whole or part of an undertaking or business is transferred as a result of a legal transfer or merger, the Regulations guarantee that the transferor's employees retain the right:

- To transfer, and not to be dismissed for a reason connected to the transfer.
- To have the transferee maintain employment rights and obligations that were previously the responsibility of the transferor.
- Not to have existing terms and conditions of employment varied because of the transfer.
- To information and consultation on the implications of the transfer and on any measures envisaged in relation to the employees, with a view to reaching an agreement.

Therefore, all employees (irrespective of the length of their service) wholly or mainly assigned to the transferring business are entitled to transfer automatically to the transferee, on the same terms and conditions of employment, with their continuity of service intact.

A transfer is defined as the transfer of an economic entity. This is an organised grouping of resources which:

- Has the objective of pursuing an economic activity.
- Retains its identity.

Each case must be looked at on its own merits to assess whether rights arise under the Regulations.

Pensions

The Regulations do not apply to employees' rights to old age, invalidity, or survivor's benefits under company pensions schemes that fall outside the scope of the Social Welfare Acts 2005 to 2006. If these benefits are provided for under a company pension scheme that is an occupational pension scheme within the meaning of the Pensions Acts 1990 to 2003, their accrued rights are protected under those Acts. However, this is not the responsibility of the transferee under the Regulations.

Employee benefits

Subject to the rules on pensions (*see above, Pensions*), employees are entitled to have any benefits which form part of their terms and conditions of employment continue after the transfer.

Other matters

Where there are collective agreements in force between the transferor and the employees, and the Regulations apply, the transferee must continue to observe the collective agreement's terms and conditions, on the same terms as were applicable to the transferor, until either:

- Its date of termination or expiry.
- A new collective agreement comes into force.

The transferee must also preserve the status and function of employee representatives (including trade unions) on the same terms as existed with the transferor.

9. What information must the transferor or the transferee provide to the other party in relation to any employees?

Subject to compliance with data protection legislation, the transferor must supply all relevant employment-related information to the transferee, including information about any outstanding claims that employees have against the transferor. This is so the transferee can comply with its obligations under the Regulations. When the transferee incurs liability because the transferor failed to provide this information, the transferee may be in a position to offset that liability against the transferor.

The transferee is not specifically required to provide any information to the transferor. However, as the transferor must advise the affected employees of any measures envisaged in relation to them, it can ask the transferee to help by providing any necessary information (*see Question 10*).

10. What information and consultation obligations arise for the transferor and the transferee in relation to employees or employees' representatives?

Both the transferor and transferee must inform the representatives of their respective employees affected by the transfer of:

- The date or proposed date of the transfer.
- The reasons for the transfer.
- The legal, social and economic implications for the employees of the transfer.
- Any measures envisaged in relation to the employees.

This information must be given to the employees' representatives, where reasonably practicable, not later than 30 days before the transfer is carried out, and otherwise in good time before the transfer is carried out.

Consultation must take place in respect of measures envisaged in relation to employees. The time frame for consultation is the same as that for providing information. The Regulations do not

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specify that an agreement must be reached on all issues, but simply require that the employer consult with a view to reaching an agreement.

11. To what extent can a transferee harmonise terms and conditions of transferring employees with those of its existing workforce?

The transferee can only harmonise terms to the extent that they put the transferring employees in the same or a better position than their existing terms. This is because when conformity of the transferring employees' terms and conditions with those of the existing employees would result in a situation which is, or becomes, less favourable for the transferring employees than their entitlement under the Regulations, the transferring employees' terms are modified to conform with the minimum entitlement.

In addition, employees cannot agree to waive benefits or entitlements which they previously enjoyed, even if paid compensation, unless the compensation is of equal or greater value.

12. To what extent can dismissals be implemented before or after the outsourcing?

The parties can dismiss transferring employees in cases of genuine redundancy. This is because the Regulations allow the transferor or transferee to implement dismissals for economic, technical or organisational (ETO) reasons requiring changes in the workforce (defined in relevant case law as redundancy). However, dismissals that occur because of the transfer which are not genuine redundancies or are otherwise lawful give rise to a risk of unfair dismissal and wrongful dismissal claims against the transferor and/or transferee. Generally, post-transfer dismissals on ETO grounds are easier to justify than pre-transfer dismissals (as a court or tribunal may determine that employees were dismissed to make a business look more attractive, and are therefore transfer connected).

13. In what circumstances (if any) is it possible for the parties to structure the employee arrangements of an outsourcing as a secondment?

In certain asset-intensive services, the parties can structure the employee arrangements as a secondment. If the transferor retains the assets, goodwill, customer lists and other assets of the business, and only seconds its employees, then arguably it can avoid the Regulations.

However, this type of arrangement may be undesirable because there is a risk of the customer and supplier being held to be co-employers of the employees, and because it makes it harder to deal with the employees on a daily basis.

In addition, if assets are transferred there is nothing to stop employees claiming that there has been a transfer of the whole or part of a business, to which they are assigned, and therefore to which the Regulations automatically apply (*see Question 8, General terms*). In addition, a provision in any agreement which tries to exclude or limit any provision of the Regulations, or which is inconsistent with any of its provisions, is void. Structuring the arrangement as a secondment might therefore not affect the employees' rights if it is a transfer within the meaning of the Regulations, and is rarely used for that purpose.

DATA PROTECTION

14. What data protection issues may potentially arise on an outsourcing and how are they typically dealt with in the contract documentation?

Data protection issues arise in a number of contexts in most outsourcing arrangements:

- The transfer of employees inevitably gives rise to data protection issues.
- Where the outsourced services involve the processing of personal data, the Irish Data Protection Acts 1988 and 2003 require the customer, as the data controller, to put in place a written contract with the supplier which includes:
  - contractual protections around security of and access to data; and
  - restrictions on processing without the controller's consent.
- In cross-jurisdictional deals, different regulatory regimes protecting the use and flow of personal data may have to be observed. Those applicable laws must be examined in the context of the outsourcing to determine their effect on the delivery and structure of the services. For example, where the supplier is located outside the European Economic Area (EEA), the transfer of personal data is prohibited unless:
  - the jurisdiction in which the supplier is located offers an adequate level of protection for personal data (as determined by the European Commission through a Community finding to this effect); or
  - the transfer can be brought within one of a limited number of exemptions, which include transfers made on the basis of:
    - the consent of the data subject. There are, however, inherent difficulties in relying on consent as a justification for transfers of personal data outside the EEA, particularly where the transfers are done on a systematic basis;
    - European Commission approved model clauses;
    - intra-group binding corporate rules.

In contractual terms, data protection issues are usually dealt with through comprehensive contractual obligations which detail the standards of protection and security to be met, and are often reinforced through indemnity protection if loss arises from a breach.

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SERVICES

15. How is the services specification typically drawn up and by whom?

The timing of, and responsibility for, drafting the services specification varies from transaction to transaction, and from sector to sector.

The best time for the customer to consider the services definition is at the very start of the process, as part of the RFP stage. This is because having a comprehensive statement of the required services, and any associated transformation requirements, means that comparable and realistically costed bids can be obtained. However, it is common for the RFP to contain only a high-level description of the customer's requirements, with the detailed drafting of the services description forming part of the contract negotiations. This is often the case where the customer is outsourcing a service for the first time, and where either:

- It does not already have clearly defined processes and procedures around the functions to be outsourced and the boundaries between those functions and retained functions.
- The outsourcing aims to obtain innovative service solutions from suppliers and an overly prescriptive RFP would be counterproductive.

Where the outsourcing is particularly complex, it is common for the customer to engage specialist third party advisers to provide the scope of and define the services specification, based on a due diligence of the customer's business and requirements. In some cases, the drafting of the services specification is an iterative process between the customer and the supplier, as the supplier becomes more familiar with the customer's business through its own due diligence. In certain industry sectors, the services specification may be an industry standard offering, with price being the real differential between suppliers.

16. How are the service levels and the service credits scheme typically dealt with in the contract documentation?

Service levels, key performance indicators and service credit schemes vary considerably from contract to contract, depending on the industry sector and the importance to the customer's business of the outsourced services. For example, the Financial Regulator generally requires clear quantitative and qualitative service levels in any material financial service outsourcing (*see Question 2, Financial services*).

Generally, where service levels are objectively measurable (for example, availability, or response times), they are set out in detail in the agreement. Where they are not objectively measurable, more general service quality warranties are included. These can be more difficult to enforce, particularly in the context of service credits.

In some cases, specific service levels are combined with continuous improvement obligations. It is also common to see requirements for regular reviews, at which service levels are considered.

Service credit schemes are commonly linked to service levels, and can be approached in a variety of ways, including:

- Straightforward percentage or fixed amount credits for any service level failure.
- Adoption of different levels of service credit depending on the:
    - criticality of the service level; and/or
    - severity or length of the service level breach.
- Balanced scorecard mechanisms.

Very complex outsourcings usually give rise to complex service level and service failure regimes.

CHARGING

17. Please describe the charging methods that are commonly used on an outsourcing (for example, risk or reward, fixed price, cost or cost plus, pay as you go, resourced-based charges, use of minimum charges and so on).

The charging methods on outsourcings contracts are as varied as the outsourcings themselves, and include:

- Fixed price.
- Time and materials.
- Utility (pay as you go) billing.
- Cost plus models (including resource based charging).
- Risk and reward models (these can be particularly complex to define and implement).
- A combination of the above.

18. Please briefly describe any other key terms used in relation to costs, such as charge variation mechanisms and indexation.

Because of the nature and length of typical outsourcings, commercial, business process and technological change over the term inevitably impact on cost and cost competitiveness. Therefore, the pricing structure may not remain static for the duration of the arrangement, and cost review mechanisms are generally included. These usually include pre-defined mechanisms to vary costs, which are designed to enable maintenance of price competitiveness over the term. The mechanisms can include:

- Use of pricing bands to address changes in the outsourcing's scope, combined with a renegotiation of price if the volumes exceed or fall below pre-defined thresholds.
- Pre-agreed time and materials rates.

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- Index-linked increases to cover general increases in the cost of doing business.

- Benchmarking of the supplier's charges for the services against other suppliers or contracts in the market. However, true comparators, in terms of service definition, standards and risk allocation, are often difficult or impossible to identify, which can make benchmarking difficult.

CUSTOMER ISSUES

19. If the supplier fails to perform its obligations, what relief is available to the customer under general law?

When the supplier fails to perform its obligations, the remedies available to a customer under general law can include:

- Damages.

- An order for specific performance.

- Injunctive relief.

- A right to terminate the contract.

20. What customer protections are typically included in the contract documentation to supplement relief available under general law?

Outsourcing contracts usually include a variety of additional protections for the customer, designed to identify and help in remedying performance issues before they become significant, or to incentivise good performance. Typical protections include:

- Requiring the supplier to implement comprehensive governance structures, including:
  - regular reporting and meetings;
  - periodic reviews.

- Retention of appropriate audit rights (both operational and financial). In financial services outsourcings, audit rights must extend to the Financial Regulator (*see Question 2, Financial services*).

- Service level and service credit regimes (*see Question 16*).

- Contractual obligations to craft and implement agreed remedial plans where service levels are inadequate.

- The more draconian remedy of step-in rights, which enable the customer or a third party acting on its behalf to step into the supplier's role at the supplier's cost.

- The ultimate sanction of termination (*see Question 26*).

- Reward systems, such as bonus payments, to encourage strong performance by the supplier. However, these must be carefully defined in advance.

- A balanced scorecard approach, which nets bonus points against service credit points. This can be a useful mechanism if any form of bonus scheme is being considered.

- Disaster recovery and business continuity planning.

- In appropriate circumstances, withdrawal of exclusivity or reductions in minimum payment commitments. This can operate as a strong incentive to the supplier to meet its quality commitments.

- Parental company guarantees.

Some outsourcing contracts also provide for the benchmarking of performance against industry standards, with the responsibility and cost of meeting those standards resting with the supplier.

WARRANTIES AND INDEMNITIES

21. What warranties and/or indemnities are typically included in the contract documentation?

A broad range of general warranties is typically included in outsourcing contracts, covering matters such as:

- Authority to enter into the contract.

- General performance standards.

- Skill and availability of employees.

- IP rights.

- Compliance with the law.

Specific warranties dealing with systems performance and data protection are included in appropriate contracts.

Under Irish sale of goods and supply of services legislation, certain conditions are also implied into every outsourcing contract, although it is possible to exclude or limit the application of most of these in non-consumer contracts.

Indemnity protection is generally more limited, and more heavily negotiated, and often depends on the specific risks and issues that are identified during the negotiation process. But there is usually a full indemnity for:

- Third party IP claims.

- Employment-related claims (the indemnity often also addresses the costs arising in respect of transfer-related issues).

- Actions in relation to assigned contracts.

- Breach of confidentiality and data protection obligations.

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There has been a recent trend in outsourcing contracts for the customer to seek indemnity protection in respect of a much broader range of issues, including in respect of:

- Liabilities that would traditionally not have been capped, but in respect of which indemnity protection would not have been granted (such as fraud).
- In some cases, losses arising from a breach or default in respect of specific and identified service obligations (for example, transaction processing errors).

As most customers also require any indemnity to be given on the basis of unlimited liability (*see Question 30*), this represents a significant expansion of risk for the supplier, if conceded.

22. What limitations are imposed by national law on fitness for purpose and quality of service warranties?

Irish law does not impose any limitations on fitness for purpose and quality of service warranties. Certain conditions are implied into every outsourcing contract under sale of goods and supply of services legislation, although it is possible to exclude or limit the application of most of these in non-consumer contracts. Otherwise, it is up to the parties to agree the extent of such warranties.

TERM AND NOTICE PERIOD

23. Does national law impose any maximum or minimum term on an outsourcing? If so, can the parties vary this by agreement?

In general, the parties agree on the term of any outsourcing and can subsequently vary this by agreement. However, where framework agreements are used in public sector outsourcings, they are subject to a maximum term of four years, unless there are duly justified exceptional circumstances warranting a longer term.

In addition, the Financial Regulator sets a maximum fixed term in certain financial services agreements (for example, where fund administration or custodian services are outsourced). Material outsourcing contracts must include provision for termination where mandated by the Financial Regulator (*see Question 2, Financial services*).

24. Does national law regulate the length of notice period required (maximum or minimum)? If so, can the parties vary this by agreement?

In general, the parties agree on the length of the termination notice period required. They can subsequently vary this by agreement.

In the case of a contract of indefinite duration, which does not specify any notice period, the contract can be terminated by mutual agreement, or by either party on reasonable notice. Various factors are taken into account in determining what is reasonable in the circumstances, including the length of the relationship and industry norms.

For certain financial services contracts, the Financial Regulator requires minimum termination notice periods, and in some situations may not allow termination until an alternative approved supplier has been appointed.

Detailed transition provisions and exit plans are typically included in outsourcing contracts, to assist the customer in moving the services back in-house or to a third party service provider.

TERMINATION AND TERMINATION CONSEQUENCES

25. What events are considered sufficient under national law to justify termination of an outsourcing rather than a claim in damages (for example, fundamental breach, repudiatory breach, insolvency events and so on)?

Under Irish contract law, a contract can be terminated where:

- The parties to the contract agree to terminate it (*see Question 26*).
- It has been frustrated (that is, it has become incapable of being performed without default of the parties due to an unanticipated event).
- There is a fundamental or repudiatory breach of contract.

In limited circumstances, a contract can be held to have been void from the start in the case of mistake.

26. In what circumstances can the parties exclude or agree additional termination rights (for example, for breach, change of control, convenience and so on)?

The parties can determine the circumstances in which the contract can be terminated.

- The parties usually agree termination rights where:
  - there is a breach (which can be limited to a material breach, and/or persistent breach, and/or linked to breach of specific clauses of the outsourcing contract or failure to meet measurable performance levels); or
  - one of the parties becomes insolvent or suffers an insolvency-related event.
- The parties often agree termination rights where there is a change of control of the supplier (although this can be limited to change of control involving competitors).

The parties are taken to have intended that the contract would not terminate even if certain adverse circumstances occur, unless the parties have specified those circumstances as triggers for termination. However, general rules concerning frustration, fundamental breach and mistake override this principle (*see Question 25*).

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Where termination for convenience is agreed, associated termination charges are generally provided for in the outsourcing contract.

27. What implied rights are there for the supplier to continue to use licensed IP rights post-termination? To what extent can these be excluded or included by contract?

The licensing of IP rights both during and after the outsourcing is a matter of contract. There are no implied rights to continue using licensed IP rights post-termination, other than to a limited extent where an implied right is necessary to benefit from express rights that survive termination. For example, if there is a limited right to retain information post-termination for audit purposes, there will be a limited implied licence to use any embedded licensed IP for those purposes.

28. 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 is generally protected as a form of trade secret or confidential information rather than a form of IP. Therefore, it is not protected by statutory and common law rights, but by contractual agreement between the parties. Where the supplier's know-how is retained by employees of the customer, it can be used post-termination. This is subject to:

- Any confidentiality or other constraints that have been pre-agreed by the parties in relation to post-termination use of confidential information and know-how.
- Any copyright protection that exists in respect of documented know-how.
- Where a supplier wishes to protect its know-how post-termination, it needs to address the issue upfront in the outsourcing contract.

LIABILITY

29. What liability can be excluded? In particular, is it possible for the supplier to exclude liability for indirect and consequential loss and also any loss of business, profit or revenue?

It is not possible to exclude liability in respect of fraud or, in practice, liability for death and personal injury caused by negligence. Liability in respect of statutorily implied conditions in non-consumer services contracts can be limited where it is fair and reasonable to do so, but liability for breach of the implied condition as to title cannot be limited or excluded.

Otherwise, the parties can agree on the extent to which they can exclude liability. This includes the types of loss to be excluded, such as:

- Indirect or consequential loss.
- Categories of loss (such as loss of business or profits), which can be partly direct and partly indirect.

30. Are the parties free to agree a cap on liability? If so, how is this usually fixed?

The parties are free to agree a cap on liability, except for the following, which cannot be limited:

- Liability in respect of fraud.
- Liability for breach of the implied condition as to title.

In practice, liability for death and personal injury caused by negligence is also not limited. Customers generally seek unlimited liability in respect of claims under indemnities, and are increasingly seeking broader indemnity protections (*see Question 21*). It is possible, however, to agree a cap on liability under some or all of the agreed indemnity provisions.

Typically, the supplier seeks to limit its liability by reference to the value of the contract, while the customer focuses on the potential damage it would suffer if the supplier breaches the contract or acts negligently. The parties may agree different limits in respect of different types of loss (for example, damage to tangible property may be subject to a higher cap than other losses) and limits may reflect available insurance cover.

TAX

31. What are the main tax issues that arise on an outsourcing in relation to:

- **Transfers of assets to the supplier?**
- **Transfers of employees to the supplier?**
- **Value added tax (VAT) or the equivalent sales tax on the service being supplied?**
- **Other significant tax issues?**

Transfers of assets to the supplier

On a transfer of assets from one company to another, the main tax issues that arise are as follows:

- **Stamp duty.** This can arise on:
  - a transfer of real property by the supplier to the outsourcing partner;
  - a transfer of other assets including, for example, goodwill of a business carried on in the state. Generally, plant and machinery and similar equipment transfers by delivery and therefore stamp duty does not become an issue;
  - assignments of contracts. The stamp duty is based on the value of the contract.
- **Capital gains tax.** Assuming that the outsourcing partner is an unrelated third party, any disposal of the assets by the

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supplier is a disposal for capital gains tax purposes. Therefore, the supplier must account for the tax on the chargeable gain that arises. The outsourcing party acquires the asset at its market value at the date of acquisition.

- **Capital allowances.** If the assets constitute plant and equipment in respect of which capital allowances are available, the disposal of the assets can trigger a balancing charge or balancing allowance, depending on the difference between the proceeds received on disposal and the tax written-down value as at the date of disposal.

- **Corporation tax - losses carried forward.** If the business being transferred constitutes a separate business of the supplier, then any losses carried forward in respect of that trading activity may no longer be available, as the company is no longer carrying on that activity. However, if what is being outsourced is merely the provision of services internally within the group, this should not be an issue.

- **Consideration received on transfer of the assets.** If the consideration due on the transfer of the assets is left outstanding and carries a right to interest, then the interest is likely to be subject to withholding tax at 20%. The supplier, on receipt of the interest, is subject to tax at 25%. It is entitled to credit for any taxes withheld at source by the outsourcing party on the payment of the interest.

Transfers of employees to the supplier

The only critical taxation issues in relation to the transfer of employees are to ensure that the:

- Supplier is registered for pay as you earn.
- Customer issues employees with Form P45s, as appropriate.
- Employees are registered as employees of the supplier.

VAT or sales tax

Generally, outsourced services are subject to VAT. However, Ireland, as with all EU member states, must exempt certain categories of services from VAT. The specific VAT exemptions are set out in Article 135 of Directive 2006/112/EC on the common system of value added tax. These cover transactions, including negotiation, concerning:

- Deposit and current accounts.
- Payments.
- Transfers.
- Debts.
- Cheques and other negotiable instruments (but excluding debt collection and factoring).
- Management of special investment funds as defined by member states (activities that are regularly outsourced).

VAT applies unless the scheme is exempted. Although the European Court of Justice (ECJ) has on a number of occasions affirmed the narrowness of VAT exemptions, it has in cases such as *Card Protection Plan Ltd v Customs & Excise Commissioners (Case C-349/96) [1999] STC 270 ECJ* and *Sparekassernes Datacenter (SDC) v Skatteminieeriet (Case C-2/95) [1997] STC 932* confirmed that companies employed in outsourcing services can benefit from the same exemption enjoyed by the customers that have outsourced the VAT-exempt services to those suppliers (such as insurance companies, banks and funds). In *SDC*, the ECJ set out the broad criteria needed for this exemption to apply. Effectively, the services being provided must be viewed broadly as a whole, when analysing whether they fulfil in practice the specific, essential function of the service.

Other

There are no other significant tax issues in relation to an outsourcing arrangement.

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