Sourcing World

This is a work of significant value to businesses from all industries which are considering their outsourcing options.

This second edition of *Sourcing World* serves as a single starting point of reference for corporations and their advisers. It provides valuable insights and guidance to international sourcing transactions, covering both contractual and commercial arrangements and their regulation.

Written by outsourcing experts, every chapter gives a detailed overview of the legal and regulatory framework within each jurisdiction and of the terms and conditions relevant to finalising an outsourcing deal. This is one of the first works to also cover commercial practices on key negotiation items, such as financial terms and pricing models. Further, this second edition contains a comparative chapter with an overview of common trends and local variations thereof, so that readers can build outsourcing arrangements on the lessons learned from many outsourcing transactions in multiple countries.

SECOND EDITION 2015

Sourcing World

General Editors:
Lukas Morscher Lenz & Staehelin
Ole Horsfeldt Gorrissen Federspiel

THE EUROPEAN LAWYER REFERENCE

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Jurisdictional comparisons **Second edition 2015**

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Comparative overview Ole Horsfeldt Gorrissen Federspiel

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Foreword

**Lukas Morscher, Lenz & Staehelin
and Ole Horsfeldt, Gorrissen Federspiel**

Today, outsourcing is an effective and, in most countries, mainstream management tool used to both reduce costs and achieve strategic goals. It is seen across many business activities in all industries, from back-office functions (such as finance & accounting, HR/payroll, facility management or call centres) to core processes (like research & development, production or banking transactions in securities trading) and infrastructure outsourcings (IT and telecoms including network communication and security services or application development and support).

Most businesses have long ventured beyond outsourcing of simple, commoditised services and rely deeply on well-designed value chains across nations and their outsourcing partners' ability and will to fulfil contractual arrangements that underpin strategic objectives, whether they operate onshore, nearshore or offshore.

Outsourcing arrangements, pricing models and the associated governance are becoming increasingly complex. While some globally accepted commercial models and practices have evolved, local regulations and customs still play a large role when negotiating deals. So how can firms be confident that they remain in charge of their own business and in control of their key risks?

The objective of this publication on sourcing law and practice across the globe is to create a single starting point of reference for practitioners – customers, vendors and advisers – involved in sourcing transactions covering both the contractual and commercial arrangements and the regulatory side to things.

The first edition of *Sourcing World* was published in 2012 and covered 19 jurisdictions. We are pleased that this second edition has been expanded and now covers 24 countries.

The format of the chapters, each from leading lawyers in that jurisdiction, follows a common order, thus enabling readers to make quick and accurate comparisons. While covering legal topics, the country contributions are strongly business-oriented and include valuable insights into local commercial practices, in particular related to financial terms and conditions, pricing models and key negotiation issues with price impact.

As local and regional commercial practices and risk allocation models vary significantly – even among countries that are all mature outsourcing markets – we have created a new comparative chapter in this second edition. It is intended to establish an overview and to enable practitioners to be inspired by recent common trends and local variations thereof, and on that basis to craft outsourcing arrangements that are on the cutting edge and build on the lessons learned from many outsourcing transactions in multiple countries.

We would like to acknowledge the work and support of the legal experts who each have contributed with new or updated country-specific chapters.

Lukas Morscher, Partner and Head of IT, Telecoms & Media, Lenz & Staehelin
Ole Horsfeldt, Partner and Head of Outsourcing, Gorrissen Federspiel

Zurich and Copenhagen, November 2014

Comparative overview

Gorrissen Federspiel Ole Horsfeldt

1. INTRODUCTION

When embarking on an international outsourcing project, the contract drafting process often starts out with a few fundamental choices. What will the structure of the agreement look like? Will it be a framework agreement with local service agreements, central to central, central to local, etc? Very often, tax considerations will drive such structural choices. The other fundamental structural issue is choice of law (and the associated dispute resolution model).

In respect of choice of law, there are fundamentally two alternatives: either the main agreement and all local service agreements and service/ work orders are governed by the same choice of law, or the main agreement is governed by the law of the jurisdiction of the customer's and the local service agreements are governed by local law. Irrespective of the choice of model, mandatory local law will apply in many aspects.

This book will assist you in assessing how the choice of a particular local law will work and which mandatory local laws will have to be complied with.

Generally, deciding between a single central law model or a local law model is not difficult, and depends on:

- the local service agreement and the structures of the local parties;
- how the governance model and dispute resolution model are intended to work;
- enforceability issues; and
- the choice of venue.

The real difficulty when negotiating international outsourcing agreements is in assessing and dealing with relevant local commercial practices. If a contract is negotiated in England between international parties but the service delivery is pan-European or pan-Asian, should English commercial practices prevail and how should local practices be taken into consideration? Is there such a thing as a common international outsourcing practice?

The short reply is that there are recognised international practices on a number of key negotiation items, that there are regional variations and that practices vary, based on the maturity of the outsourcing market in a particular region or country.

Based on the country chapters in this book, this comparative chapter identifies such common trends and practices on a number of key commercial issues.

2. AVERAGE DURATION OF PROCUREMENT PROCESSES

2.1 The average duration of procurement processes in months

It used to be that procurement exercises for large-scale outsourcing projects would take 12–18 months. Driven by a maturing professional advisor community and by customers' need for rapid implementation of business change and cost consciousness, the average procurement time now is only 6–8 months. See Figure 1.

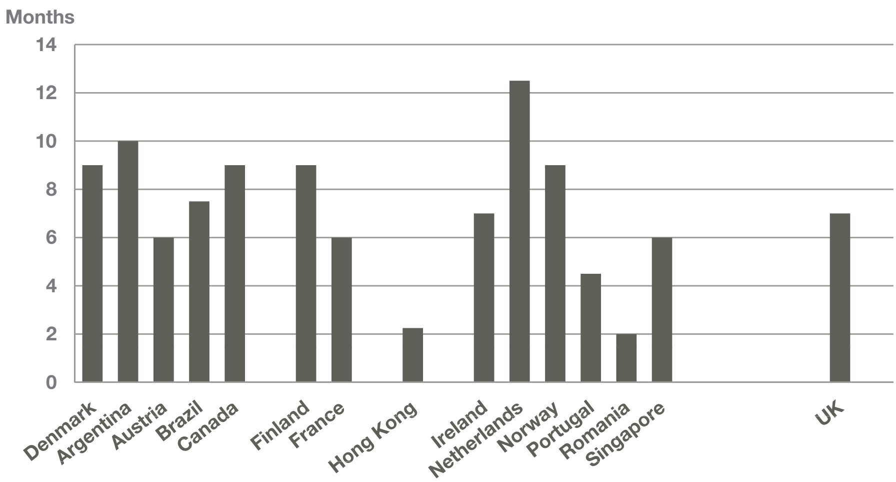

Figure 1: Average duration of the procurement processes

3. MANDATORY STATUTORY REGULATION ON OUTSOURCING

3.1 Mandatory statutory regulation of outsourcing

Very few countries have general legislation pertaining to the practice of outsourcing. However, just about every country has sector-specific regulation relevant to the outsourcing of business processes or IT infrastructure. In particular, the telecoms and banking industries are subject to mandatory legal requirements when outsourcing. See Figure 2.

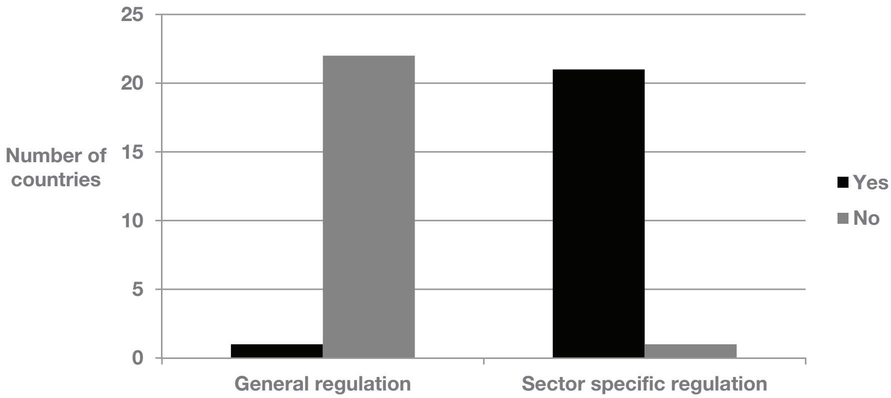

Figure 2: Number of countries with statutory regulation on outsourcing

4. PERSONAL DATA

4.1 Mandatory statutory regulation of processing of personal data

The EU's Directive on the Processing of Personal Data has set global standards (while of course only being relevant to processing of data within the EEA and export of data outside of the EEA). Countries such as Argentina, Turkey, Singapore and Hong Kong now have legislation that must be observed when considering the data flows that will apply under an outsourcing arrangement.

5. TRANSFER OF EMPLOYEES AS PART OF AN OUTSOURCING TRANSACTION

5.1 Mandatory statutory regulation of transfer of employees as part of an outsourcing transaction

Another EU-based concept, as presented in the Acquired Rights Directive, is the rights of employees when a part of a business is outsourced. This directive appears to be a European speciality – legislation or practices with similar effects will not generally be found outside the EEA.

6. TRUE-UP AND BASELINING

6.1 Is true-up or baselining a common commercial practice?

True-up or baselining is the practice associated with conducting a verification post-signing of the information and baselines compiled as part of the pre-signing negotiations. Mostly, such verification exercises work on the one hand as a reasonable safeguard to the benefit of the chosen vendor, while on the other hand as an opportunity to renegotiate at a time when the customer has lost all negotiation leverage.

In many mature markets, true-up exercises have been replaced by more elaborate pre-agreement due diligence and due diligence cut-off provisions. However, as illustrated in Figure 3, the true up or baselining practice is still in use in many countries.

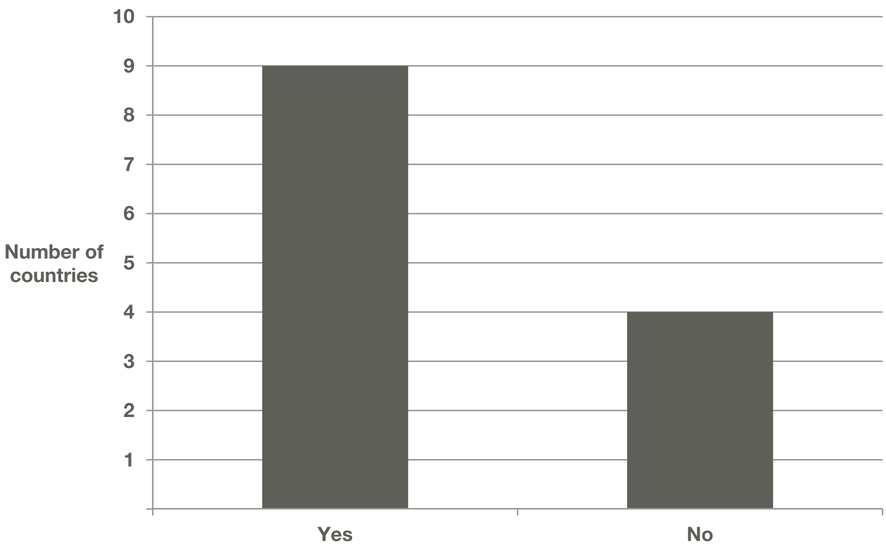

Figure 3: Is true-up or baselining a common commercial practice?

7. BENCHMARKING

7.1 Is it common commercial practice to benchmark at unit level, tower level or any other level?

The efficiency (from a customer perspective) of a benchmarking clause can be measured on two counts:

- the increments which are subject to benchmarking (fees per resource units, fees per tower or total fees); and
- whether automatic adjustment has been agreed or not. If not, any adjustment will be subject to negotiation and the customer's protection is weak.

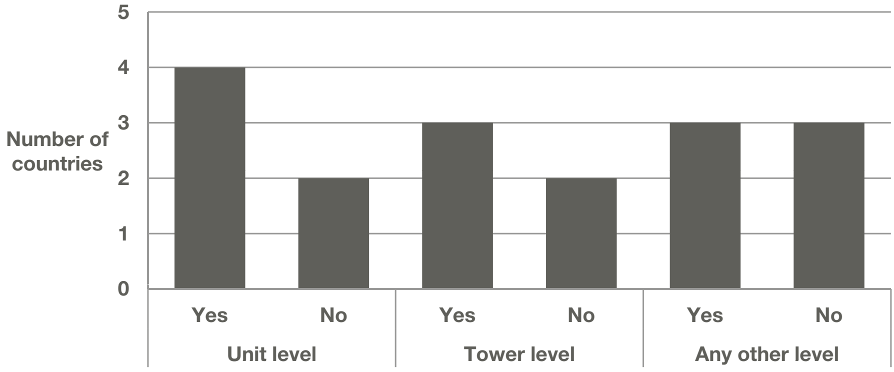

Figure 4: Is it common commercial practice to benchmark at...?

As illustrated by Figure 4, there is no common practice as to the incremental basis for outsourcing. Essentially, this is a negotiation topic that depends on the negotiation power of the customer.

Similarly, there are no clear trends towards automatic adjustments. In mature outsourcing markets, Western Europe and the USA, there is a tendency towards automatic adjustments. However, the unilateral right to require adjustments is tempered by caps applicable to yearly or total adjustments.

8. DURATION OF AN OUTSOURCING ARRANGEMENT

8.1 What is the common duration of an outsourcing arrangement in years

In recent years, most consultancies have advised that customers should opt for 4–5 year outsourcing arrangements. Certainly, there are few of the 10 year plus deals around, which used to be the norm for complex arrangements, but there is no evidence globally that outsourcing agreements in general have shorter terms than 5–7 years. See Figure 5.

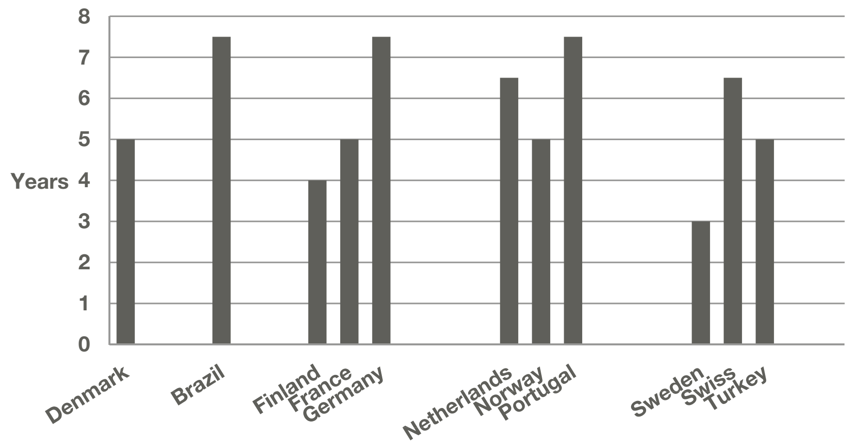

Figure 5: Common duration of an outsourcing arrangement

9. TERMINATION FOR CONVENIENCE BY THE CUSTOMER

9.1 Is it common practice for the customer to have a right to terminate for convenience?

A key element in the flexibility of an outsourcing agreement is whether the customer may terminate a part of an agreement for convenience, typically against the payment of termination fees. As illustrated by Figures 6 and 7, termination for convenience may take place per service tower, site or country, depending on the nature of the agreement. There is no clear global practice as to the parts of an agreement by which termination for convenience can take place, but there is an established practice that termination for convenience will apply in respect of both an agreement in its entirety and of parts of an agreement.

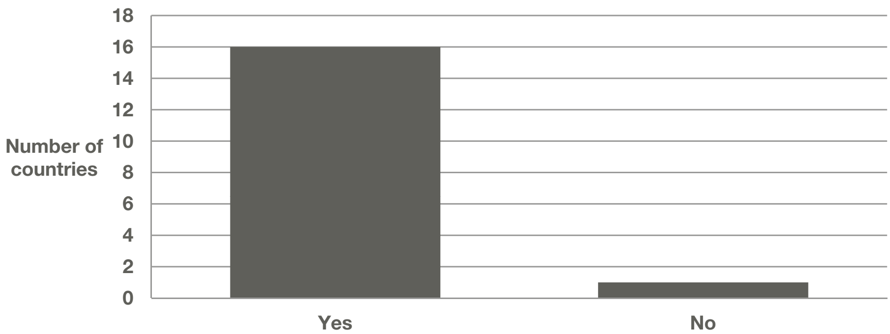

Figure 6: Is it common practice for the customer to have a right to terminate for convenience?

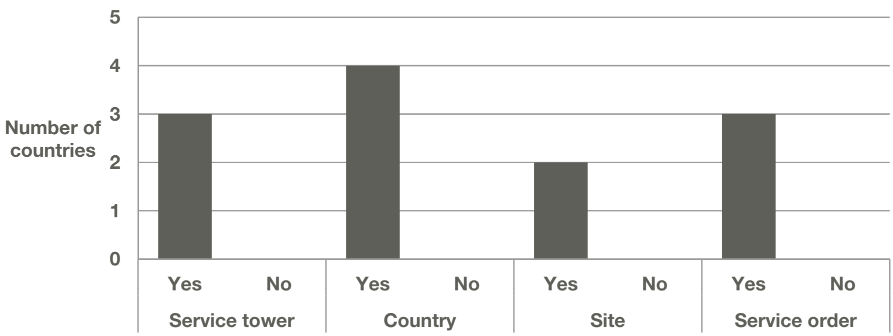

Figure 7: Which parts of an agreement may a customer commonly terminate for convenience?

Republic of Ireland

Mason Hayes & Curran Philip Nolan & Wendy Hederman

1. BUSINESS PRACTICE (INTERNATIONAL DIVISION OF LABOUR, BREAKING-UP VALUE CHAINS)

1.1 Describe generally the maturity of the outsourcing market in your jurisdiction

Within the Irish private sector, the degree to which organisations outsource processes remains relatively limited, as organisations prefer to retain some control over each outsourced activity. The majority opt for a partial outsourcing model as opposed to a full outsourcing model. For example, 36 per cent of companies outsource either payroll or other HR services (IBEC, *HR Update*, Spring 2013), and a high proportion of businesses outsource other non-core services, such as cleaning, canteen and security services.

Traditionally, the public service has not been party to any substantial outsourcing agreements. In more recent years, particularly in light of the Irish economic crisis, the scrutiny of public expenditure has increased, with many calls for efficient use of outsourcing and shared services to reduce expenditure, especially in non-core areas of the public sector. In its Programme for Government (2011), the current coalition government proposed to examine areas in which both outsourcing and shared services could be used. In respect of outsourcing, the government's emphasis is always on the outsourcing of non-core activities, though this is gradually changing (for example, the government announced the outsourcing of 'back-to-work' initiatives for the long-term unemployed to the private sector in October 2014). In reality, shared services have proven to be the more popular outsourcing option for the public service.

Paradoxically, Ireland enjoys a reputation as a top destination for both IT outsourcing and BPO solutions (Locations4business, 2013). Due to Ireland's IT infrastructure, skills, training and facilities, Ireland has established itself as one of the top five locations in the world for the relocation of managed services businesses and BPO.

1.2 How are cloud-based services affecting traditional outsourcing models?

Businesses within the private sector are more likely to engage cloud-based services than those in the public sector, with take-up of cloud services slightly ahead of many European jurisdictions. Fourteen per cent of Ireland's CIOs host most or all core systems in the Cloud. Twenty-two per cent do not host any services in the cloud (Harvey Nash CIO Survey 2013).

Within the private sector, start-up companies are more likely to embrace cloud-based services as part of their initial start-up, and it has become common to buy server capacity from the cloud. Established businesses are less likely to engage cloud-based services, due to existing IT infrastructure and systems which are already in place.

In June 2012, the Department of Public Expenditure and Reform published a paper entitled 'Cloud Computing Strategy' which aimed to set out a strategic approach for the public service to engage with cloud computing. In reality, there has been little engagement by the public sector with cloud-based services and Ireland has not witnessed initiatives such as G-Cloud in the UK.

1.3 Describe the current supplier landscape

There are major suppliers in Ireland in areas such as IT services and data centres providing outsourced services to Ireland-, Europe- and US-based customers. Further, the global market share of suppliers of back-office activities (in Dublin's International Financial Services Centre) for global financial services companies is significant.

Offshoring of services to Asia-based suppliers has been limited. Irish customers are more likely to offshore to Eastern Europe, or to other companies within their group that are based in lower cost countries.

2. PROCUREMENT PROCESS, ROLE OF BUSINESS ADVISERS AND MATURITY OF THE CONSULTANCY INDUSTRY

2.1 Describe generally the procurement process

The procurement process used in a given transaction will depend on whether the outsourcing entity is a private or a public body.

Private procurement

Private sector entities in Ireland are not subject to mandatory procurement rules (with the exception of utilities that fall within the scope of the Utilities Directive 2004/17/EC and corresponding Irish regulations), although a tender process is commonly used.

A customer will often issue a request for tenders (RFT) (or similarly named document) to suppliers selected by it. The RFT outlines the customer's requirements, listing the critical capabilities and skills required as well as the desired service-level targets. It may also set out the key criteria that will be used to select the preferred bidder. Prospective suppliers then submit a tender in response to the RFT. The customer then selects and negotiates a contract with its preferred bidder or bidders. The tender process may also include a due diligence phase, though the extent of this varies considerably from one outsourcing to another.

The Irish courts to date have not accepted that terms may be implied into a private tendering process which may restrict or regulate how the procuring entity must run the tender process. Nonetheless, it is common practice to include a provision in the RFT excluding any potential implied terms.

Public procurement

Contracts awarded by public sector bodies, public and private utilities and public bodies in respect of defence and security must be awarded in accordance with the provisions of the corresponding European directives and Irish regulations, provided that (i) the contract has an estimated value above the relevant thresholds laid down by that legislation and (ii) there is no applicable exception.

The applicable directives and Irish regulations are:

- Public Sector: Directive 2004/18/EC, the European Communities (Award of Public Authorities' Contracts) Regulations 2006 and the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010;
- Utilities: Directive 2004/17/EC, the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 and European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010; and
- Defence and Security: Directive 2009/81/EC and the European Union (Award of Contracts relating to Defence and Security) Regulations 2012.

In February 2014, the Council of Ministers of the European Union adopted three new directives on procurement. These directives consist of Directive 2014/24 (which replaces Directive 2004/18), Directive 2014/25 (which replaces Directive 2004/17) and a new Directive on Concessions, namely Directive 2014/23. Member states have two years in which to transpose these directives into national law. These directives have not yet been transposed into domestic Irish law. It is currently anticipated that they will be transposed in 2015.

The procurement thresholds are updated by the European Commission every two years, and were most recently updated by Commission Regulation 12336/2013. The current thresholds for services contracts are:

- government departments and offices: EUR 134,000;
- local and regional authorities and public bodies outside the utilities sector: EUR 207,000;
- entities in the utilities sector: EUR 414,000; and
- defence and security: EUR 414,000.

These thresholds came into force on 1 January 2014 and are applicable until 31 December 2015.

The principles derived from the Treaty on the Functioning of the European Union must also be complied with by public bodies if the contract is of interest to bidders from outside Ireland or is otherwise relevant to the Internal Market. These include the principles of transparency, equality of treatment, non-discrimination, proportionality and effective judicial protection.

There is a volume of national guidance that public bodies are also expected to comply with in respect of the award of contracts, though this guidance is probably not binding on public bodies (with the exception of local authorities) in the strict legal sense.

Public procurement procedures

The procurement directives provide for four different public procurement procedures:

Open procedure

This is a one-stage process. The contracting authority commences the process by publishing a contract notice in the Official Journal of the European Union (OJEU). It will normally publish an RFT (or similarly named document) with the contract notice. The RFT sets out the contracting authority's requirements in respect of the contract, the rules governing the process, any pass/fail minimum requirements (eg with respect to minimum turnover or experience) that tenderers must satisfy and the award criteria that will be used to identify the successful tenderer. Any interested party may submit a tender. The successful tenderer is chosen based upon an evaluation of its tender against the pass/fail minimum requirements and the award criteria. Tenderers are sometimes required to submit comments on the contract prior to submission of the tender and to then tender based upon the revised contract issued by the contracting authority (without the option of reopening negotiations post-tender). Post-tender negotiations on material points are not permitted in the open procedure. The open procedure is not normally used for an outsourcing.

Restricted procedure

This is a two-stage process, comprising a pre-qualification stage followed by a tender stage.

- Stage 1: the contracting authority commences the process by publishing a contract notice in the OJEU. It will normally publish a project information memorandum and/or a pre-qualification questionnaire (or similarly named document) with the contract notice. These documents set out the contracting authority's requirements in respect of the contract at a high level, the rules governing the first stage of the process, any pass/fail minimum requirements (eg with respect to minimum turnover or experience) that candidates must satisfy and the selection criteria that will be used to rank and select the candidates that will be invited to submit a tender. Interested parties must normally complete and submit the pre-qualification questionnaire in the first stage of the process. The contracting authority will then, based upon the submitted pre-qualification questionnaires and by applying the pass/fail minimum requirements and selection criteria, shortlist a specified number of candidates that will be invited to tender.
- Stage 2: the contracting authority then issues an invitation to tender (ITT) (or similarly named document) to the shortlisted candidates. The ITT sets out the contracting authority's requirements in respect of the contract in more detail, as well as the rules for the second stage of the process and the award criteria that will be used to identify the successful tenderer. Any due diligence takes place prior to submission of the tender. The successful tenderer is chosen based upon an evaluation of its

tender against the award criteria. Tenderers are sometimes required to submit comments on the contract prior to submission of the tender and to then tender based upon the revised contract issued by the contracting authority (without the option of re-opening negotiations post-tender). Post-tender negotiations on material points are not permitted in the restricted procedure with the result that it is not appropriate for more complex outsourcings.

Competitive dialogue

This is a three-stage process established under Directive 2004/18/EC and the corresponding Irish regulations. It is only available for particularly complex contracts where the customer is unable to define the technical solutions required to satisfy its needs, or is unable to specify the legal and/or financial make-up of a project.

- Stage 1: the first stage is similar to the first stage of the restricted procedure.
- Stage 2: in the second stage, the contracting authority issues an invitation to participate in the dialogue (ITPD) (or similarly named document) to the shortlisted candidates. The ITPD sets out the contracting authority's needs and requirements in respect of the contract in more detail, as well as the rules for the second stage of the process and the award criteria that will be used to identify the successful tenderer. The second stage of the process is dedicated to dialogue with tenderers. This takes place through meetings/discussions, as well as the submission of formal outlines and more detailed submissions. Any due diligence normally takes place during this stage. It is possible for the contracting authority to eliminate some tenderers during the second (dialogue) phase by applying the award criteria.
- Stage 3: once the contracting authority is satisfied that it has discussed all key issues with the tenderers, it then declares the second (dialogue) stage over and invites the tenderers to submit a final tender. These final tenders may be clarified, specified and fine-tuned at the request of the contracting authority. The contracting authority then chooses the preferred tenderer by evaluating the final tenders against the award criteria. The contracting authority has limited opportunity to engage in discussions with the preferred bidder at this point. As a result, contract negotiations are normally undertaken during the second (dialogue) stage prior to appointment of a preferred bidder.

Negotiated procedure

The negotiated procedure normally follows a two-stage process, similar to the restricted procedure. The difference between the restricted and negotiated procedures is that the contracting authority may engage in negotiations with tenderers during the second stage, unlike in the restricted procedure. This facilitates discussions on various points, more extensive due diligence and negotiations, often culminating in a best and final offer stage, at which point the preferred tenderer is selected and any final negotiations concluded. Where Directive 2004/18/EC or the corresponding Irish regulations apply, a contracting authority's right to use the negotiated procedure is limited to certain specific circumstances exhaustively set out in the procurement legislation.

There is an obligation for contracting authorities to provide a written notification to unsuccessful candidates/tenderers. This must outline, in broad terms, why they were unsuccessful. The contracting authority cannot conclude the contract until it has applied a standstill period (14 days or, if the notification is not sent by email, 16 days) after providing that written notification.

A procurement challenge must, in most cases, be taken within 30 days of when the aggrieved tenderer knew or ought to have known of the alleged infringement. It is accordingly critical for a tenderer to act quickly if it wants to challenge any aspect of a tender process. If legal proceedings challenging a procurement process are instigated before the contracting authority has concluded the contract, the contracting authority cannot conclude the contract until the legal proceedings are withdrawn or the court has issued its decision. The contracting authority cannot apply to lift this suspension.

2.2 What is the average duration of a private procurement process?

The duration of a private procurement process varies considerably, normally lasting between two and 12 months. Generally, two to four bidders are invited to submit bids, though in some cases a single bidder is selected without any competition (although often this is not revealed to the bidder in an attempt to maintain competitive tension). Where customers attempt to fast track the procurement process, this inevitably impacts on the quality and extent of the due diligence. This, in turn, may result in more risk being transferred to the customer through permitted assumptions and/or post-contract verification.

2.3 Which roles and tasks are generally performed by business advisers?

The extent to which a customer engages business advisers depends on the size and nature of the outsourcing, as well as of the customer itself.

In most cases, a customer will engage external legal advisers to provide advice and assistance in relation to the structuring of the outsourcing and procurement process, as well as the drafting and negotiation of the contract.

In larger outsourcing transactions, customers may also engage business advisers to assist in relation to:

- preparation for, and structuring of, the outsourcing;
- managing the selection process;
- managing the due diligence process;
- assessing tenders;
- transition and delivery management;
- service evolution; and
- assessment and development of the outsourcing agreement.

Specialist advice may also be obtained in relation to certain aspects of an outsourcing, such as IT, change management and supply chain management.

Large private companies/groups often have internal procurement and change management expertise and, consequently, rely less on external advisers than other companies.

3. STATUTORY RULES, INDUSTRY SPECIFIC REQUIREMENTS AND REGULATIONS

3.1 Statutory rules governing sourcing transactions in general

See section 2.1 above.

3.2 Legal or regulatory requirements (formal or informal) concerning outsourcing in any industry sector

In the financial sector, the Central Bank of Ireland (CBI) is responsible for the regulation of financial institutions and markets. It is also responsible for ensuring compliance with prudential and other requirements.

In recent years, EU legislation relating to financial services has set out specific provisions relating to outsourcing. Examples of this include the Payment Services Directive (2007/64/EC), transposed in Ireland by the European Communities (Payment Services) Regulations 2009 (S.I. No. 383/2009); the Electronic Money Directive (2009/110/EC), transposed in Ireland by the European Communities (Electronic Money) Regulations 2011 (S.I. No. 183/2011); and the Markets in Financial Instruments Directive (2004/39/EC) (MiFID), transposed in Ireland by the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60/2007).

Each of the above pieces of legislation, which relate to separate financial services, sets out detailed requirements in respect of the activities that may be outsourced by a regulated entity subject to their provisions and the circumstances in which they may be outsourced.

The banking and the insurance industries in Ireland are also subject to rules relating to outsourcing. The Committee of European Banking Supervisors issued a set of guidelines on outsourcing of credit institutions' business activities in December 2006. The guidelines, which are consistent with MiFID, aimed to promote an appropriate level of convergence in supervisory approaches to outsourcing in the banking industry.

Insurance undertakings should comply with the Committee of European Insurance and Occupational Pensions Supervisors (now EIOPA) Level 2 Implementing Measures on Solvency II: System of Governance, published in 2009. Again, these measures aim to promote an appropriate level of convergence in supervisory approaches to outsourcing in the insurance industry.

The public sector must comply with certain regulations when they outsource (outlined above).

In the defence sector, Directive 2009/81/EC applies to defence and security procurement, particularly to the procurement of arms, munitions and war material and to sensitive non-military contracts in areas such as protection against terrorism.

3.3 Applicable rules regarding control or monitoring of the supplier, reporting to the regulator, rights of access to, and audit of, the supplier's records to be granted to the regulator, segregation of staff, functions or entities

In the context of outsourcing by regulated financial services providers, the CBI may require to be notified in advance of material outsourcings and request further information regarding the nature of the outsourcing contract, or may impose specific conditions governing the arrangement. Generally, the CBI will also expect to see a provision in the relevant outsourcing agreement granting the CBI access to data held by the outsourced services provider (and its premises) to enable the CBI to properly carry out its supervisory functions.

In non-regulated sectors, audit rights and controls are determined on the basis of the contract between the parties. A 'right to audit' clause in the contract allows organisations to carry out specific audits or procedures in order to obtain assurance over the risks associated with outsourced activities. Service Level Agreements (SLAs) are a popular method of assessing the adequacy of the controls in place in the outsourcing provider. Other methods of assurance include internal audits, ISAE 3402 or SAS 70 audits and audits on outsourcing suppliers undertaken by the outsourcer.

Staff of the supplier should be clearly distinguishable from staff of the customer, in order to keep the employment relationship as being with the supplier, particularly where there is no physical segregation of staff.

3.4 Which services (if any) must be performed by a regulated or specially licensed entity, or any specially trained personnel?

Generally speaking, where a regulated financial services provider outsources services, the entity providing these services should be capable of lawfully providing the relevant services. Where such outsourced services require a regulatory licence, the relevant outsourced services provider should hold such a licence in order to provide the regulated service.

Where it is expected that the outsourced service provider will interact with customers of the regulated financial services provider, the personnel of the outsourced service provider may require to be adequately trained to do so. For example, the CBI requires that the employees of regulated financial services providers who interact with certain categories of customers comply with the requirements of the CBI's Minimum Competency Code. Where a regulated financial services provider outsources activities, the provision of which are subject to the Minimum Competency Code, the regulated financial services provider will remain fully responsible for discharging all of the regulated financial services provider's obligations under the Minimum Competency Code and, as a consequence, may look for assurance or confirmation from the relevant outsourced service provider in respect of compliance with the Minimum Competency Code.

Where a regulated financial services provider outsources pre-approval controlled functions or controlled functions (being certain categories of positions within a regulated financial services provider), such outsourcing must comply with the CBI's Guidance on Fitness and Probity Standards.

3.5 Requirements (formal or informal) for regulatory notification or approval of outsourcing transactions in any industry sector

While exact requirements vary slightly depending on the type of regulated financial services provider involved, on a general basis, the CBI would require formal notification where a regulated financial services provider intends to outsource important or material functions.

4. DATA PROTECTION, TRANS-BORDER DATA FLOWS, PROFESSIONAL SECRECIES, CLOUD COMPUTING

4.1 What are the requirements for a third party to process data on behalf of the data controller?

The storage and processing of personal data is regulated by the Data Protection Act 1988, as amended by the Data Protection (Amendment) Act 2003 (the DPA).

The DPA provides that where an organisation, that is a data controller, engages the services of a third party to process personal data on its behalf, the processing of the personal data must only be carried out on the basis of a contract which stipulates that:

- the data processor carries out the processing only on, and subject to, the instructions of the data controller; and
- the data processor complies with obligations equivalent to those imposed on the data controller by section 2(1)(d) of the DPA.

4.2 What are the rules and regulations regarding data protection and data security, confidentiality of customer data, banking secrecy and other professional secrecies?

The DPA requires the data controller to ensure that data is protected and secure at all times. In particular, the data controller must ensure that:

- the data it collects is processed fairly;
- the data is being held for a specific, lawful and clearly stated purpose;
- the data, if obtained for a particular purpose, is not used for any other purpose;
- the data is kept accurate, complete and up to date where necessary;
- the data is adequate and relevant to the purpose for which it was collected;
- the data is kept no longer than is necessary for the purpose for which it was collected; and
- a copy of the data retained is issued to an individual on request.

Section 2C of the DPA provides that appropriate security measures must be taken for the protection of the personal data. The data controller must have regard to the current state of technological development, the cost of implementing the measures, the level of security that is appropriate depending on the nature of the data concerned and the harm that would result if there was unauthorised processing, loss or damage of that data.

Additional rules apply in the case of sensitive personal data. The presumption is that, because information about these matters could be used in a discriminatory way, and is likely to be of a private nature, it needs to be treated with greater care than other personal data. Sensitive personal data relates to a data subject's:

- racial or ethnic origin, political opinions, religious or philosophical beliefs;
- trade union membership;
- health or sexual life;
- offences or alleged offences; and
- involvement in court proceedings.

To process sensitive personal data, at least one of the stated pre-conditions must be met prior to processing. The pre-conditions include complying with certain statutory obligations, being in the context of legal or medical activities and having the explicit consent of the data subject.

There have been recent developments in relation to law enforcement requests for data held on Europe-based servers. The case of *In re Search Warrant*, No. 13 Mag. 2814, M9-150 is, at the time of writing, before the courts in the US. The case concerns whether or not US authorities can access data on Ireland-based Microsoft servers by the service of a warrant only rather than complying with the terms of the Mutual Legal Assistance Treaty. It is anticipated that this matter will most likely be heard by the Court of Appeals for the Second Circuit Court in early 2015.

Professional secrecy

The obligation of confidentiality between a banker and customer in Ireland arises from the operation of common law. Unless the terms of the contract between the parties stipulate otherwise, common law implies a duty of confidentiality on a bank in its relationship with its customer. There are certain exceptions to this confidentiality which are imposed by statute and which have developed through jurisprudence, including where the disclosure is required by law, where there is a duty to the public to disclose, where the interests of the bank requires disclosure and where the disclosure is made by the express or implied consent of the customer.

It is common for a bank's terms of business to include consent from the customer which permits the bank to outsource its data processing functions.

Members of professions including medical practitioners, solicitors and barristers are bound by professional codes of confidentiality.

4.3 Rules governing the transfer of data outside your jurisdiction

Section 11 of the DPA provides that personal data cannot be transferred to a country outside the European Economic Area (EEA) unless that country ensures an adequate level of protection for the privacy of its data subjects in relation to the processing of their personal data. The EEA comprises the 27 EU member states as well as Norway, Iceland and Liechtenstein.

The EU Commission maintains a list of countries that are automatically regarded as providing an adequate standard of data protection. Although the United States is not recognised as offering an adequate level of privacy protection, the Commission has recognised the US 'Safe Harbour' arrangement as providing an adequate level of protection. The EU Commission's decision on the US Safe Harbor regime was at issue in the case of *Schrems v Data Protection Commissioner* [2014] IEHC 310. The Irish High Court referred two questions to the Court of Justice of the European Union regarding whether the Irish Data Protection Commissioner is bound by the EU Commission's decision or if he may conduct his own investigation into the adequacy of US data protection standards.

In cases where the third country does not offer an adequate level of protection, the data may be transferred pursuant to an EU Commission-approved 'model contract'. The model contractual clauses contained in the model contracts may not be varied on substantive issues. There are two forms of contract, one for data controller to data controller transfers and another for data controller to data processor transfers.

If data is being transferred within a multinational corporation which operates both inside and outside of the EEA, Binding Corporate Rules (BCRs) may be used as an alternative mechanism for international transfers within the organisation. BCRs ensure that all transfers made within the corporation benefit from an adequate level of protection, even if some of the group entities are located in third countries which do not ensure an adequate level of protection.

Under section 11(4) of the DPA, certain data transfers may go ahead notwithstanding the fact that the protection afforded cannot be guaranteed by law. These exceptions include where the data subject has consented to the transfer or where the transfer is necessary in order to prevent personal injury or damage to the health of the data subject.

Under section 11(7) of the DPA, the Data Protection Commissioner (DPC) has the power to prohibit transfers of personal data to other jurisdictions in certain circumstances. A prohibition notice issued by the DPC may be absolute or may prohibit the transfer of personal data until the individual concerned takes certain steps to protect the interests of the individuals affected. An individual in receipt of a prohibition notice has the right to appeal it to the Circuit Court.

4.4 Are data transfer agreements contemplated or in use? Does the relevant national regulator need to approve the data transfer agreement? Have any standard forms or precedents been approved by national authorities?

Data transfer agreements are used in Ireland.

As noted in section 4.3 above, the European Commission has provided 'model contracts' to assist data controllers who wish to transfer data to a country that does not provide 'adequate protection' safeguards. These model contracts automatically fulfil the minimum criteria required for transfers to a jurisdiction where an adequate level of protection does not exist.

In addition, the DPC has approved contractual clauses that do not conform exactly to the EU Commission's 'model contracts'. Such contracts must provide adequate data protection safeguards. The DPC has also approved formal arrangements, other than contractual measures, which provide 'adequate safeguards' for data protection purposes. A data controller may rely on this approval as a basis for transferring personal data to third countries.

4.5 Is a data transfer agreement sufficient to legitimise transfer, or must additional requirements (such as the need to obtain consent) be satisfied?

An approved data transfer agreement is sufficient to legitimise the transfer.

A data transfer agreement is not required where the data subject has consented or the transfer is made pursuant to law.

4.6 In cloud computing, which precautions (contractual, factual, others) are usually taken to protect, or to allow control over, the data?

Effective SLAs should be drawn up between the customer and the cloud service provider. SLAs should document the level of service that is to be provided and define the roles of both parties in relation to the service requirements.

In the case of an Irish business outsourcing functions to the cloud, that business is the data controller, and the entity providing the cloud-based services will generally be considered to be a data processor. Section 2C(3) of the DPA provides that that data controller must ensure that processing is carried out in pursuance of a contract between the data controller and the data processor. The contract must provide that the processing is carried out only on the instructions of the data controller and that the data processor complies with obligations equivalent to those imposed on the data controller by section 2(1)(d) of the DPA. The data processor must provide sufficient guarantees in respect of the technical and organisational security measures governing the processing and the data controller is responsible for taking 'reasonable steps' to ensure compliance with the measures.

If the cloud provider is located outside the EEA, additional steps must be taken by the data controller to ensure that the data remains protected (see section 4.3 above).

4.7 How is supplier liability for breach of data protection requirements generally handled?

Section 7 of the DPA provides that a duty of care is owed by data controllers and data processors to data subjects.

It is legally possible to cap the supplier's liability for breach of data protection requirements. However, it is increasingly common for the supplier's liability for breaches of data protection laws to be excluded from (carved-out of) the contractual caps on liability or to be subject to a higher cap than other contractual liabilities.

Breach of the DPA in Ireland will most often result in regulatory sanctions, as opposed to monetary damages.

5. ASSET DEAL, LEGAL CONCEPTS AND MECHANICS

5.1 What legal concepts apply to the transfer of assets in an outsourcing?

Title to moveable property may be transferred by delivery. However, contracts pertaining to transfer the title of such property will not be enforceable unless they meet the requirements of the Statute of Frauds (Ireland) Act 1695.

The Land and Conveyancing Law Reform Act 2009 provides that a legal estate or interest in land may only be created or conveyed by deed. Transfers must also be registered with the Land Registry. Registration in the Land Registry is compulsory in respect of land in Ireland and provides conclusive proof of ownership.

Generally speaking, assignments or transfers of copyright and trademarks are not valid unless in writing and signed by or on behalf of the assignor. Where a person becomes entitled to an interest in a patent, or patent application, by transfer, assignment or operation of law, that person must apply to the Controller of Patents, Designs and Trademarks for registration of his or her interest.

Contracts are assignable by way of novation, a tripartite contract whereby a contract between two parties is rescinded in consideration of a new contract being entered into between one of the parties and a third party.

5.2 Particular considerations for the transfer of assets offshore (such as export or licence requirements)?

Some categories of assets may only be exported under licence from the relevant authority.

The Control of Exports Act, 2008 is the Irish legislation which provides the basis for export controls, the licensing regime and the overall regulatory environment relating to the export of dual use and military goods. In addition, a number of directly effective EU regulations regulate the export of these goods from the EU. A dual-use item includes software and technology, which can be used for both civil and military purposes. A dual-use export licence is required for exports outside the EU customs territory in circumstances where a product falls within one of the various categories of Council Regulation 388/2012. Furthermore, a limited number of dual-use products listed in Council Regulation 428/2009 require an export licence when exporting them within the EU customs territory

A military export licence is required in circumstances where a product falls within the various categories of the Control of Exports (Goods and Technology) Order 2012 or Directive 2009/43/EC.

There are also controls on the export of many other products, such as cultural goods, documents and pictures of national, historical, genealogical or literary interest, of medicinal products, of certain agricultural products and of certain dangerous chemicals.

6. HR, TRANSFER OF UNDERTAKING, MASS DISMISSAL, REPUTATION ASPECTS

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

6.1.1 to a supplier in an initial outsourcing?

6.1.2 to a supplier on a change of supplier?

6.1.3 back to the customer on termination of an outsourcing?

In Ireland, the transfer of undertakings is governed by the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131/2003) (TUPE Regulations) which transpose the provisions of Directive 2001/23/EC into Irish law.

The Regulations, in summary, provide that employees wholly or mainly attached to a business which is being transferred, transfer to the business of the new employer on the same terms and conditions of employment at the date of transfer including with their continuity of service. It is settled law that the TUPE Regulations can apply to outsourcing situations, to where there is a changeover of supplier/contractor, and to a situation where an outsourcing arrangement is being terminated and the function is to be done internally (insourcing).

In order to trigger the TUPE Regulations, an outsourcing, insourcing or changeover of contractor situation must involve the transfer from one employer to another of an economic entity which retains its identity. There must be an associated and related transfer of significant tangible or intangible assets or the transfer of a major part of the workforce in terms of numbers or skill. It follows that in the absence of any transfer of assets, or a major part of the work force in terms of skill or numbers, there is no transfer within the meaning of the TUPE Regulations, and the TUPE Regulations will not be triggered.

In terms of the business transferring, a distinction can be made between labour-intensive businesses and asset-reliant businesses. For example, in a labour-intensive business, such as cleaning contractors, the main deciding factor is whether the new incumbent /transferee accepts into its employment a major part of the workforce, in terms of their numbers or skills. Case law strongly suggests that in the context of a labour-intensive outsourcing, insourcing or change of contractor situation, where there is no transfer of assets and the new incumbent refuses to accept any of the employees into its employment, the TUPE Regulations do not apply. Where the new incumbent does accept a major part of the workforce either in terms of numbers or skills, the TUPE Regulations do apply.

6.2 If employees transfer by operation of law, which terms and effects apply (including pensions, employee benefits, collective agreements)?

With some limited exceptions noted below, when the TUPE Regulations apply, post-transfer, the transferred employees are entitled to continue to benefit from all the terms and conditions of employment which they benefited from at the date of transfer. The terms and conditions agreed in any collective agreement which, at the date of transfer applied to the employees being transferred, shall continue to apply post-transfer.

For the most part this automatic transfer of rights does not apply in relation to employees' rights to old-age benefits, including survivors' benefits, under occupational pension schemes.

Finally, the rights and obligations of employees are not preserved where the transfer is undertaken as part of insolvency or bankruptcy proceedings, as the TUPE Regulations do not apply to this type of transfer. This exception to the application of the TUPE Regulations is limited to compulsory winding-ups and does not apply to either a members' or a creditors' voluntary winding-up.

6.3 Means for the customer (contractual or other) to retain particular employees, or make them redundant. Can dismissals be implemented before or after the outsourcing? How is redundancy pay calculated?

The transfer of an undertaking or business (or parts thereof) shall not in itself constitute grounds for the dismissal of an employee. The TUPE Regulations prohibit the dismissal of an employee by either a transferor or a transferee for transfer-related reasons. Accordingly, any dismissal, the principal reason for which is a transfer, is automatically an unfair dismissal, unless it is for economic, technical or organisational reasons which entail changes in the workforce (the ETO defence).

Dismissals on the grounds of redundancy may be made by either party on the basis of the ETO defence. Case law suggests that dismissals for ETO reasons are much more likely to be considered fair when implemented by the transferee (after the transfer), who knows the future requirements of the business, rather than by the transferor attempting to put the business 'in better shape' in the lead up to the transfer. That said, employers should exercise caution with regard to dismissals, as an employee who considers that he/she has been dismissed in connection with the transfer of an undertaking could bring a claim under the Unfair Dismissals Acts 1977 to 2007 or, alternatively, under the TUPE Regulations.

Qualifying employees, over the age of 16 and with at least two years' service, are entitled to a statutory redundancy payment calculated in accordance with the Redundancy Payments Acts 1967 to 2007. The statutory redundancy payment is calculated as follows:

(i) two weeks' pay for each year of continuous and reckonable service; and
(ii) one bonus week's pay.

One week's pay, for the purposes of the statutory redundancy calculation, is capped at EUR 600 per week.

6.4 To what extent can a supplier harmonise terms and conditions of transferring employees with those of its existing workforce?

Any harmonisation of terms and conditions undertaken by the transferee must result in more favourable conditions for the employees. Any harmonisation of contract terms that would result in less favourable conditions could be challenged at a later stage as the TUPE Regulations provide that any provision of an agreement which purports to limit the application of the TUPE Regulations is void. However, where the harmonisation of contractual terms are implemented with consent (for example, employers often try to buy out an employee's benefit), there is unlikely to be any issue.

6.5 Can the parties structure the employee arrangements of an outsourcing as a secondment?

The TUPE Regulations only apply where there is a transfer from one employer to another of significant tangible or intangible assets or the transfer of a major part of the workforce in terms of numbers or skill.

In the case of asset-intensive services, if the transferor retains the assets, goodwill, customer lists and other assets of the business, seconding only its employees to the transferee, the TUPE Regulations will not be triggered. Similarly, in a labour-intensive business, where the employees are seconded to the transferee, regardless of whether they constitute a major part of the workforce in terms of numbers or skills, given that there is no change of employer (as the employees remain employees of the transferor), the TUPE Regulations will not be triggered.

6.6 Notice, information and/or consultation obligations of customer and/or supplier in relation to employees or employees' representatives (including timing, duration, usual process and sequence of events)

Where the TUPE Regulations are triggered, the transferor is obliged to inform the representatives of its employees affected by the transfer of:

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

The transferee must also notify its existing employees' representatives on similar terms but only insofar as its existing employees will be affected by the transfer.

These notifications must be made to the employees' representatives in good time before the transfer occurs but not later than 30 days before the transfer.

If the transferor or transferee envisages measures in relation to the transferring employees, they must engage in consultation with employee representatives, where reasonably practical, not later than 30 days before the transfer is carried out, on such measures with a view to reaching agreement.

Employees' representatives for the purposes of the TUPE Regulations include a trade union, staff association or excepted body with which it has been the practice of the employees' employer to conduct collective bargaining negotiations. However, where none exist in the organisation, the employers should arrange for the employees to elect representatives for this purpose.

6.7 Consequences (civil and/or criminal) of non-compliance with any of above requirements (including whether any such consequences can be avoided or mitigated by contractual means)

The penalties for non-compliance with the TUPE Regulations include:

(i) a declaration that the complaint is well founded;

(ii) an order requiring an employer to comply with the TUPE Regulations and to take a specified course of action in order to comply; and

(iii) compensation.

The compensation that can be awarded ranges from up to four weeks' remuneration for breach of the information and consultation requirement to up to two years' remuneration for other breaches of the TUPE Regulations.

There is also the possibility of criminal sanctions in the event that a person makes a false statement upon examination on oath (fine not exceeding EUR 3,000 and/or imprisonment of up to 12 months) or fails to attend a hearing and/or fails to give evidence when directed to do so by the Employment Appeals Tribunal (fine not exceeding EUR 3,000).

7. DUE DILIGENCE, TRANSITION, SERVICE COMMENCEMENT, TRUE-UP

7.1 Describe the due diligence processes and methods commonly used by suppliers and customers

Detailed due diligence by the customer on the prospective suppliers, their expertise, their reliability and their financial proposals is common, and a critical part of the procurement process.

Likewise, due diligence by the potential supplier on the service being outsourced is essential if the supplier is to understand the risks of the business it is undertaking and to properly price its proposal. The supplier's due diligence would include a careful consideration of all (or, where appropriate, only some of) the following:

- the scope of services;
- the service levels expected;
- the assets and human resources (currently being used and likely to be required once outsourced);
- access to intellectual property;
- premises;
- IT dependencies; and
- third party contracts that are part of the outsourced business.

Practical constraints on supplier due diligence include confidentiality concerns, and the time and cost involved in multiple bidders carrying out full due diligence. In practice, data rooms may be used in higher value outsourcings, with access limited to shortlisted (pre-qualified) bidders. Site visits may also be permitted, and Q&A sessions with key managers of the customer.

If a supplier has not been permitted (by the customer or by circumstances) to carry out sufficient due diligence, the supplier will want to retain the right to adjust its charges if information provided by the customer proves to be inaccurate or incomplete. The customer should make sure any such true-up provision is tightly drafted, and limited to factors that have a direct impact on the cost of providing the outsourced service, with a clear mechanism or formula for adjusting the charges.

Post-contract variations of this kind are not common in public sector outsourcings, partly due to constraints in public procurement processes, with the result that the supplier may have to bear a greater risk for the accuracy of the service scope.

7.2 How do suppliers usually try to protect their business case?

Where suppliers are required to quote a fixed price, a very tight description of the scope of services is of critical importance for the supplier. If the scope is not sufficiently clear, the supplier will often delineate it by assumptions, which are likely to form part of the final negotiation (in private sector outsourcings) and/or the evaluation process (particularly in certain public sector processes). Under Irish law, there is no general legal obligation of good faith or cooperation on the customer, and the supplier should (i) spell out the customer responsibilities and dependencies in the contract, and (ii) make the supplier's obligations and liabilities conditional on the customer (or, where relevant, third parties) performing its own responsibilities.

7.3 How are services usually measured upon service commencement?

The usual practice in Ireland is for outsourcing contracts to contain detailed service level agreements. There may be a transitional or implementation period, when greater latitude is given to the supplier in achieving service levels. Once the services are fully up and running, service levels are usually measured by key performance indicators (KPIs), on a weekly or monthly basis, with failure to achieve the KPIs having such consequences as requiring the supplier to take specific remedial actions, to increase the resources on the project, to provide further training to staff and/or to provide credits (discounts in the fees) to the customer.

The service levels and KPIs are usually set by reference to good industry practice and/or to the customer's requirements as set out in the RFT. Suppliers should be wary of very ambitious service levels, particularly where it is a new service or one that has not previously been outsourced.

8. CHARGING, ADJUSTMENT OF FEES, AUDITING, BENCHMARKING

8.1 Describe the charging methods commonly used in an outsourcing

Cost or cost-plus pricing was once popular in Ireland but is less so now, and it is more common to find outsourcing being on a fixed price. In fixed price contracts of more than a year's duration, there may be mechanisms for increasing or decreasing the price due to significant changes in input costs (eg for inflation, for national wage agreements or as a result of changes in legislation) and/or if the customer's or supplier's assumptions around the scope of services and factors affecting price calculations do not hold true.

Pay-per-use pricing is common in IT and cloud-based services, as well as in utility contracts. Logistics and warehousing contracts are also often on a price-per-unit basis. In such contracts, suppliers may require minimum volume commitments from the customer and/or a minimum payment to cover supplier's set-up costs and overheads.

Risk-or-reward based pricing can also be found in services contracts, with bonuses for the quality of the results, though these can be particularly complex to define and implement, and suppliers should have completed detailed diligence on the business being outsourced before taking on such risks.

8.2 Describe customary change management procedures

An inherent disadvantage with outsourcing is that the customer loses the flexibility to make changes in the business. A customer should ensure that the supplier will make any changes in the services that the customer reasonably requires, and will provide all additional services that are incidental to and related to the initial services. The supplier will invariably require a change management procedure that allows for an increase in charges if the change in services, or additional services, results in increased costs to the supplier. Change management clauses or schedules will usually outline a series of notifications (from customer to supplier, then from supplier to customer), with details of the changes proposed, the likely impact on services and service levels, the project timelines (if applicable), the resources required and the fees or charges, followed by discussions between management of the parties to finalise these details.

The customer will have the final discretion as to whether to proceed with the change/new service on the basis of the information provided by the supplier. The change management procedure will usually include reference to escalation or reference to an independent expert to verify/adjudicate on any additional costs the supplier has proposed. For maximum flexibility, the customer should ensure it can contractually insist that the supplier make the change or provide the additional service even pending agreement on any fee increase.

8.3 Are there other adjustment mechanisms?

N/A.

8.4 Describe the contract rules for disputed charges and related consequences

Irish law (based on an EU directive) generally requires public authorities to pay invoices for goods and services within 30 days or, in very exceptional circumstances, within 60 days. Private sector customers should pay their invoices within 60 days, unless they expressly agree otherwise in the contract and a later payment time is not grossly unfair to the supplier. Suppliers are automatically entitled, without the necessity of a reminder, to interest for late payment of invoices plus compensation costs. The statutory interest rate for late payment is determined by reference to the European Central Bank main refinancing rate plus 8 per cent.

Contract clauses will usually require a customer to dispute or raise any queries on an invoice within a specific time-frame (eg within 30 days of invoice), and may also require payment of the undisputed portion of the invoice pending resolution of the dispute. Escalation to senior management of the parties is common for disputed invoices, and may be followed by reference to an industry expert or to mediation.

Where the outsourced services are business-critical for the customer, the customer should ensure that the contract does not permit the supplier to suspend provision of services, or to terminate the contract, for as long as there is a *bona fide* dispute over an invoice and an ongoing process to resolve the dispute. It would not be common to lodge disputed sums with any court or authority, though contract clauses may occasionally provide for disputed amounts to be placed in a deposit account pending resolution.

An equitable right of set-off arises where there is money owing (say, from the customer to the supplier) and money owed (from the supplier to the customer, perhaps for service credits or damage caused) in circumstances that it would be unjust to enforce one debt without taking the other debt (cross claim) into account. Equitable rights of set-off will only arise where the two debts are closely connected and arise from the one contract or trading relationship. Both claims must have accrued (ie they may not be for future or contingent claims), and can be for either a liquidated (ascertained) sum or an unliquidated sum.

There are also legal rights of set-off that arise in the course of litigation, where the court may balance monies owing between the parties to the litigation.

Rights of set-off can be varied or excluded by contract provisions, and can also be extended to allow for set-off in additional circumstances, such as set-off of amounts owed to or by other group companies, or amounts owing from other contracts or trading relationships. The supplier will usually want to resist extended rights of set-off, as the supplier's priority is to obtain payment in full of its invoices as promptly as possible.

8.5 What are the contractual rules usually applied to auditing?

See the answer to question 3.3 above in respect of auditing. As regards contractual rules, there may be a limit on the frequency of audits and provisions on who bears the cost of the audit, depending on whether the audit reveals overcharging or inaccurate reporting by the supplier. In regulated sectors (such as financial services), the customer should ensure that it can carry out sufficient audits for the customer to satisfy any investigations, queries or audits by the regulatory authority of the customer.

It has also become more common to allow the customer to carry out regular audits of the technical and security measures employed by the supplier (when acting as a data processor for the customer) to ensure compliance with the requirements of the Data Protection Acts regarding keeping personal data secure.

8.6 Describe common benchmarking methodologies

Benchmarking clauses are occasionally included in longer term supply agreements at the customer's request. A classic benchmarking clause will permit the customer to terminate the contract if the supplier does not match the lower price that results from the benchmarking process. However, true comparators in terms of service definition, standards, service levels and risk allocation are often difficult to identify. A benchmarking clause will be of limited effect where the outsourcing is for bespoke goods or services, but can be useful as part of a mid-term price review or renegotiation.

Benchmarking clauses are not common in short term outsourcing agreements.

9. TAX ASPECTS, TAX EFFICIENCY IN GROUP STRUCTURES, TRANSFER PRICING

9.1 What are the main tax issues that arise in an outsourcing in relation to:

9.1.1 transfers of assets?

9.1.2 value added tax (VAT) or other sales tax?

9.1.3 service charges or other taxes at source?

9.1.4 withholding taxes?

9.1.5 stamp duty?

9.1.6 corporate tax?

9.1.7 other tax issues?

The transfer of assets by an Irish supplier to an outsourcing partner may trigger certain tax implications including:

- capital gains tax (CGT) is chargeable on gains arising on the disposal of assets. Any transfer of assets from an Irish resident for tax purposes to an outsourcing partner can be subject to CGT on any gain arising from the disposal of assets. Any form of property, including an interest in property is an asset for CGT purposes. An Irish-resident company is liable to CGT but only on gains that arise on the disposal of development land. In the context of the disposal of other assets by a company, any chargeable gains realised on the disposal will be subject to corporation tax rather than CGT. Certain bodies are exempt from CGT. CGT and corporation tax on chargeable gains are charged at a rate of 33 per cent;
- outsourced services are generally subject to VAT, the standard rate currently being 23 per cent. VAT may be fully recoverable, depending on the nature of the business being carried out. Council Directive 2006/112/EC currently provides for the VAT system in operation throughout the European Union and is the basis for the national VAT legislation in the 27 Member States, including Ireland. Certain categories of services are exempt from VAT, these categories and services are outlined in Article 135 of the Directive;
- withholding tax (known as PSWT) at a current rate of 20 per cent is deductible at source from payments for 'professional services' made to individuals and companies by government departments, local

authorities, health boards and state bodies. Professional services falling within the scope of this tax include services of a pharmaceutical, medical or veterinary nature, architectural, engineering, quantity surveying, accountancy, auditing, economic, marketing, advertising, legal services and other consultancies. A claim may subsequently be made by the service provider to have the amount of tax deducted offset against the income tax or corporation tax chargeable on those profits;

- dividend withholding tax is generally payable by a company on distributions or dividends paid from its after tax profits at the standard rate of income tax (currently 20 per cent);
- stamp duty of 1 per cent applies on residential property transfer deeds on a consideration of up to EUR 1 million and a rate of 2 per cent is payable on any consideration in excess of this. Stamp duty of 2 per cent applies to instruments relating to non-residential property; and
- corporation tax of 12.5 per cent is payable on the trading income of any company which is resident in Ireland. A higher rate of 25 per cent is payable on any non-trading income, eg investment or rental income. A non-resident company which carries on trade in Ireland through a branch or agency is also liable to corporation tax.

9.2 Precautions that are usually taken to arrange for tax efficiency (between customer and supplier, or within the customer group and/or the supplier group, including aspects of transfer pricing)

Intra-group arrangements and transfer pricing

Limited transfer pricing rules were introduced in Ireland for accounting periods commencing on or after 1 January 2011 to regulate pricing arrangements between related parties in respect of the supply and acquisition of goods, services, money or intangible assets. Irish transfer pricing provisions apply in relation to arrangements the terms of which were not agreed in advance of 1 July 2010 and are based on OECD Transfer Pricing Guidelines. In addition to grandfathering of existing arrangements, there are a number of exemptions from the application of Ireland's transfer pricing rules. The rules are subject to de minimis limits and do not apply in computing the profits, gains or losses of small or medium-sized enterprises (within the meaning of Commission Recommendation 2003/361/EC of 6 May 2003). In addition, the transfer pricing provisions apply only to trading transactions and therefore many holding companies do not typically fall within the new regime.

Tax efficiency between customer and supplier – third party arrangements

Although the Irish tax code does not contain specific market value rules determining pricing arrangements between unrelated parties, a tax deduction is only afforded to the extent that expenses are incurred wholly and exclusively for the purposes of the payer's trade.

10. TERM AND TERMINATION, NOTICE PERIODS, MANDATORY TERMINATION, PROLONGATION RIGHTS, TERMINATION MANAGEMENT

10.1 What are the rules and regulations regarding the term of an outsourcing agreement and/or length of notice period?

There are no mandatory provisions regarding the term of an outsourcing agreement apart from a public sector framework agreement, which generally cannot exceed four years' duration.

The length of notice period specified in the contract may be for whatever period is agreed between the parties, though a period of less than 30 days is not advisable where the TUPE Regulations apply, as the relevant employee consultation period must be observed.

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.

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

10.2 Which events justify termination of an outsourcing agreement without giving rise to a claim in damages against the terminating party as a matter of mandatory law?

As a matter of contract law, a party to a contract may terminate it (without giving rise to a claim in damages) where there is fundamental breach or a repudiatory breach of contract, or a total failure to perform. Insolvency or liquidation of a party is not in itself a good ground for termination unless expressly provided for in the contract.

10.3 What contractual termination rights are usually included in the outsourcing agreement?

Outsourcing contracts will usually list the circumstances that entitle each party to terminate, eg bad performance or other (material or repeated) breaches, or change of control without prior consent. Where the contract is terminated in accordance with the termination provisions, no claim in damages should arise unless the parties have agreed that compensation will be payable.

10.4 Are there termination for convenience rights?

Termination for convenience rights are less commonly included in outsourcing contracts, particularly where the outsourced service requires considerable investment by the supplier.

10.5 Are there implied rights for the customer and/or supplier to continue to use licensed IP rights or gain access to relevant know-how post-termination?

Irish law does not recognise any implied rights to continue to use licensed IP or gain access to know-how post-termination. Such rights are generally governed by express terms in the outsourcing agreement.

It is possible that the refusal of an undertaking to license its IP could constitute an abuse of a dominant position, in breach of competition law. However, a party that wishes to access or use IP post-termination would be well advised to negotiate this into the contract at the outset of the outsourcing.

10.6 Describe particular aspects of termination management, assistance by the supplier

It is advisable to include detailed bespoke provisions in the contract to oblige the supplier to assist with the management of the end of the outsourcing, including such matters as:

- transfer back of data and software;
- return of relevant manuals and other hard copy information;
- arrangements for the transfer back of assets;
- coordination with the start-up of services by a replacement supplier; and
- management of employees, where relevant (TUPE Regulations).

These obligations should apply both in a specified period up to termination and for a reasonable period afterwards. Suppliers may seek payment for providing this assistance. In significant outsourcings, an exit plan would be scheduled in the agreement, and updated during the lifetime of the outsourcing.

10.7 Are disputes common in respect of exit services and transition from one vendor to another and if so please describe the nature of such disputes and how they are resolved?

Disputes do arise over the application of the TUPE Regulations, often because the parties disagree on whether the termination of the outsourcing is a transfer within the meaning of the TUPE Regulations. Disputes can also arise regarding payment to the supplier for assistance on exit and transition where the contractual provisions are not sufficiently clear, where the transition takes longer than the customer had envisaged or because it requires assistance with more issues than are provided for in the exit plan. It would, however, be rare for disputes between customer and supplier to end in legal proceedings, as it is in all parties' interests to reach agreement on an equitable payment for the transition assistance, and for the customer to proceed with the appointment of its new supplier.

11. REMEDIES, RISK MANAGEMENT AND PROACTIVE MEASURES

11.1 Remedies and/or relief available to the customer under law in case of bad or non-performance by the supplier (including fitness for purpose and quality of service warranties, and whether or not, and if yes to what extent, they can be excluded by contract)

In the case of bad or non-performance by the supplier, a customer's legal remedies may include monetary damages, specific performance, injunctive relief and/or termination of the agreement.

The Sale of Goods Act 1893, as amended by the Sale of Goods and Supply of Services Act 1980, implies certain warranties and conditions into contracts for the sale of goods, eg merchantability and fitness for purpose, and for the supply of services, eg the service will be supplied with due skill, care and diligence.

Breach of a condition gives the injured party the right to treat the contract as repudiated. Where the goods are not of merchantable quality or where the seller did not have good title to the goods, the customer may either reject the goods, or demand a refund and/or damages under the general law of contract.

The Sale of Goods Act 1893 provides that where the customer (outsourcer) does not deal as a consumer, the warranties that the goods will correspond with the sample or description provided and that the goods will be of merchantable quality can be excluded where fair and reasonable. In contrast, the conditions and warranties relating to the supply of services can be expressly excluded where the customer is not a consumer without having to show it is fair and reasonable.

11.2 Customer protections typically included in the contract to supplement statutory remedies/relief (including mechanisms such as quality assurance, no interruption or suspension, audit rights, reporting and governance, service credits and penalties, hold-back, step-in rights etc)

Protections regularly included in outsourcing contracts are quality assurance provisions, regular reporting, service credits and penalties. For ongoing services and IT outsourcing, guarantees of availability (with penalties for exceeding per cent downtime) would be included, and it is good practice to include early-warning mechanisms to identify and help remedy performance issues before they adversely affect service provision.

SLAs are the most popular method of either assessing or providing assurance of the adequacy of the controls in place in the outsourcing provider.

For business-critical services, a customer may seek to give itself 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.

Audit rights are covered in section 3.3 above.

11.3 Warranties and indemnities typically included in the contract, protection of customer and/or supplier regarding liabilities and obligations arising from outsourcing (including those relating to employee arrangements)

Warranties

Outsourcing contracts regularly contain a range of general warranties, such as the requisite skill of employees, performance standards, ownership of IP rights and compliance with all applicable laws. Further contract-specific warranties will usually be included to cover aspects of the services, systems performance, compliance with regulatory requirements or with specific legislation, such as environmental, employment, tax and data protection legislation, the holding of all necessary licences and consents, and to guard against specific legal and business risks identified.

Indemnities

Indemnities are now commonplace in outsourcing contracts, but the extent of such indemnities can involve lengthy negotiation. Indemnities from the supplier traditionally related to the supplier meeting the cost of third party claims against the customer that resulted from the supplier's acts or omissions, third party claims related to alleged IPR infringement, and indemnities for employee claims and liabilities during the outsourcing period. In recent times, much broader indemnities have been sought from the supplier, including for any loss, damage or injury caused to the customer by the (negligent) actions or inactions of the supplier, by the supplier's breach of any applicable law and by breach of any contract obligation. Indemnities from the customer, if any, typically relate to claims of breach of a third party's intellectual property rights by reason of the actions of the customer (or any IP supplied by the customer to the supplier for the purposes of the outsourced services), employee claims arising prior to the date of transfer of employees to the supplier (on commencement of the outsourcing) and possibly also third party claims for death or personal injury caused by the customer's negligence. Indemnities are a contentious area and are often subject to intense negotiation.

11.4 Limitation and/or exclusion of liability (in particular for indirect and consequential loss, loss of business, profit or revenue, and how any available cap on liability is usually fixed)

Limitations of liability are common and are usually set by reference to a multiple of the value of the contract to the supplier. Limitations of liability will not be effective where the supplier has acted fraudulently, and the courts are unlikely to allow a party to rely on a limitation (or exclusion) of liability where that party is in fundamental breach of its contractual obligations unless the limitation clause is very specifically drafted. In practice, contract clauses usually also provide that there will be no cap (limitation) on a party's liability for death or personal injury (though this is not required by Irish law).

Exclusions of liability for certain types of loss, particularly for loss of profit and lost revenue, are often sought and usually granted.

Particular care should be taken with exclusion of indirect or consequential loss. The Irish courts can take a different interpretation of what is and what is not indirect or consequential loss than the interpretation which the parties intended at the time of entering into the contract.

Similarly, care should be taken with the interaction between the indemnities and the limitation and/or exclusion of liability clauses.

11.5 Statutory set-off rights (and whether or not they can be contractually excluded or limited)

There is no general statutory set-off right under Irish legislation. A limited number of statutory provisions create a right for financial institutions in respect of customer's debts. For example, section 20 of the Credit Union Act 1997 provides that a credit union may set off any sum credited to a member in or towards the payment of a debt due to the credit union from that member.

Rights of set-off do exist at common law, which recognise:

- legal set-off: this only arises in the defence of a court action and provided the two claims to be set-off are liquidated, or ascertainable with certainty, and are both due and payable at the commencement of the action;
- equitable set-off: this can occur where the two claims arise from the same or closely related transactions, where both sums are due and payable, and may arise even where the claim is for an unliquidated sum provided it is a reasonable assessment of the loss made in good faith;
- a bank's right of set-off of accounts: where a customer has more than one account with his bank, at least one of which is in debit and one of which is in credit, the bank may, subject to certain restrictions net off the amounts in the accounts or combine the accounts; and
- contractual rights of set-off.

Parties to a contract are free to enhance the common law rights of set-off or to exclude them. It can be useful for the customer to include contractual rights of set-off so that any sums it owes to the supplier may be reduced by the amount of any sums owing, or that may become owing, by the supplier such as payment of damages or compensation by the supplier even when not yet ascertained, or a sum arising from an unrelated transaction. However, the supplier's preference will be to exclude the customer's common law right of set-off.

12. INSURANCE

12.1 Types of insurance readily available in your jurisdiction (and to what extent), such as employee liability, property damage, third party liability (including professional indemnity risks and fraud), business protection, fidelity and guaranty insurance

Employers' liability insurance is available to cover damages resulting from accidents to employees arising out of, or in the course of, their employment.

Public liability insurance is available to indemnify the policyholder in respect of all sums to which the policyholder shall become legally liable arising out of accidental bodily injury, nuisance or loss of or damage to material property.

Property damage liability insurance is common in many industry sectors, as is professional indemnity insurance, which is usually a prerequisite for any suppliers of professional services.

Product(s) liability insurance provides cover for damages, expenses and legal costs caused by defects in products manufactured, sold, supplied, processed or repaired by the insured.

13. SUBCONTRACTING AND ASSIGNMENT

13.1 Which rules and regulations apply to subcontracting and assignment of obligations under the contract?

In the absence of a contractual prohibition, the supplier is legally entitled to subcontract, except where a contract clearly requires personal performance.

Assignment of the benefit of a contract can be done without the consent of the other party to the contract; however, liabilities generally cannot be assigned without the prior consent of the other party.

13.2 What contractual arrangements are usually made regarding subcontracting and assignment?

It is advisable to establish in the terms of the outsourcing contract any controls that the customer wishes to put on subcontracting by the supplier, and the customer may want to be able to check out the competence and financial standing of the proposed subcontractor. It is advisable for the customer to insist that the original contracting party remains liable for the subcontractor.

Outsourcing contracts will usually prohibit assignment, as the customer has specifically selected the supplier based on its competence and expertise. Nevertheless, a contract may permit that it be assigned, in whole or in part, by the supplier to its affiliates, related or group companies, or as part of the transfer of all of the business and assets of the supplier on prior notice to (or with prior consent of) the customer.

14. JURISDICTION, LITIGATION, ARBITRATION, MEDIATION, FAST TRACK DISPUTE RESOLUTION

14.1 Statutory rules and practice regarding contract management, governance and escalation (including fast track for disputes with operational impact), mediation

There are no mandatory provisions on contract management or governance, though there are legal rules to determine the governing law of the contract and the jurisdiction for the hearing of legal disputes if the parties have failed to state the governing law in a clause of the contract.

It is common for parties to seek to resolve disputes through informal resolution mechanisms, such as escalation to senior management and mediation, before taking their disputes to court, even if there are no contract clauses obliging the parties to try informal or alternative resolution.

There is a fast track procedure in Ireland for cases with high value. Since 2004, the Commercial Court enables speedy resolution of commercial disputes. Commercial proceedings commence as normal High Court proceedings. An application to have an action transferred to the commercial list may be made at any time prior to the close of pleadings. There is no automatic right of entry onto the commercial list of the High Court, and the entry of each case onto the commercial list is at the discretion of a judge. In general, the claim must have a value of at least EUR 1 million, although there are exceptions to this.

The Commercial Court uses a detailed case management system that is designed to streamline the preparation for trial, remove unnecessary costs and stalling tactics, and ensure full pre-trial disclosure. The judge can adjourn proceedings for up to 28 days to allow resolution of the dispute through some form of alternative dispute resolution, such as mediation, conciliation or arbitration. A case in the Commercial Court could be heard in full within six months; therefore, it is essential that all parties are well prepared prior to an application for transfer to the commercial list.

Mediation – a mediator is an independent third party who assists the parties to the dispute to reach a settlement. Mediation is most commonly used in employment disputes in Ireland. The parties may agree a term in the contract whereby mediation will be used as a first form of resolution in the event of a dispute. In the absence of an express term, the parties may still agree to engage a mediator once the dispute arises. Even during litigation, Order 56A of the Rules of the Superior Courts (RSC), facilitates referral by the Court of proceedings, or issues in proceedings, to a process of mediation or conciliation. Order 99 of the RSC provides that the refusal or failure without good reason of a party to participate in mediation or conciliation may be taken into account by the court when awarding costs.

14.2 What are the usual provisions regarding applicable law and arbitration clauses?

Arbitration in Ireland is governed by the Arbitration Act 2010 (the Arbitration Act).

The Arbitration Act adopts the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) ensuring that Irish legislation contains what is considered best practice in international arbitration law.

The Arbitration Act applies to both international commercial arbitrations as well as arbitrations which are not international commercial arbitrations.

Arbitration clauses can be written into the terms and conditions of the contract, thus obliging the parties to the contract to go to arbitration in the event of a dispute arising. The rules governing the appointment of an arbitrator are usually set out in the arbitration clause of the contract. The arbitrator’s award is final and is binding on the parties to the contract. Under the provisions of the Arbitration Act, the courts have extremely limited powers of intervention.

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