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GLOBAL GUIDE 2020
OUTSOURCING

Outsourcing: Ireland overview

Mark Adair and Wendy Hederman, Mason Hayes & Curran LLP

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REGULATION AND REQUIREMENTS

National regulations

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

There is no specific legislation in Ireland regulating outsourcing transactions other than regulations affecting specific industries such as the financial services sector.

Despite this, both national and EU law regulate certain general elements of outsourcing transactions in areas such as data protection, transfer of employees, and intellectual property (IP) rights.

In terms of the financial services sector, regulated financial services providers must consider the relevant national legislation, regulatory requirements, standards and guidance that apply to them when commencing or conducting any outsourcing arrangement to ensure they are in compliance with their statutory requirements (*see Question 2, Financial services*).

Sectoral regulations

2. What additional regulations may be relevant for the following types of outsourcing?

In many respects, the regulation of outsourcing in Ireland focuses more on the sector in which the outsourcing is taking place, as opposed to the type of outsourcing.

Customers operating in regulated sectors must consider the regulations that apply to the proposed outsourcing and what licences and approvals are needed in light of the structure and scope of the outsourced services.

Financial services

The Central Bank of Ireland (CBI) is the competent authority for the purposes of financial services in Ireland, and is responsible for supervisory and prudential oversight of the following regulated financial services providers:

- Credit institutions (banks).
- Investment firms.
- Insurance and reinsurance undertakings.
- Payment institutions.
- Electronic money institutions.
- Insurance, investment and other financial services intermediaries.
- Investment funds and service providers to investment funds.
- Other financial institutions.

Outsourcing by regulated financial services providers can be subject to specific rules and is an area of ever-increasing scrutiny by the CBI and European regulators. The specific rules will depend on the type of licence held by the relevant regulated financial services provider and below are some examples of the requirements that apply to some areas of regulation.

The European Banking Authority (EBA) has published regulatory requirements for outsourcings by:

- Credit institutions.
- Investment firms authorised under Directive 2014/65/EU on markets in financial instruments (MiFID II) that are subject to Directive 2013/36/EU on capital requirements (Capital Requirements Directive IV).
- Payment institutions.
- Electronic money institutions.

The Final Report on EBA Guidelines on Outsourcing Arrangements (EBA Guidelines) entered into force on 30 September 2019, repealing the Committee of European Banking Supervisors (CEBS) guidelines on outsourcing issued in 2006.

The EBA Guidelines define outsourcing as "an arrangement of any form between an institution or an electronic money institution and a service provider by which that service provider performs a process, a service or an activity that would otherwise be undertaken by the institution, the payment institution or the electronic money institution itself".

The management body of every institution subject to the EBA Guidelines remains responsible for all the activities of that institution and must ensure that sufficient resources are available to appropriately support and ensure the performance of those responsibilities, including overseeing all risks and managing the outsourcing arrangements. Outsourcing must not lead to a situation in which an institution becomes an "empty shell" that lacks the substance to remain authorised.

With regard to outsourcing to service providers located in third countries, institutions subject to the EBA Guidelines are expected to take particular care that compliance with EU legislation and regulatory requirements is ensured.

The EBA Guidelines provide criteria to aid the identification of which arrangements with third parties are deemed outsourcing and, more particularly, what is meant by "critical or important" functions. If "critical or important" functions are outsourced, stricter requirements will apply to these outsourcing arrangements than to other outsourcing arrangements.

The EBA Guidelines set out the:

- Specific steps that an institution must take when outsourcing.
- Specific provisions that must be built into the relevant contractual arrangements.

Business process

There is no specific legislation regulating business process outsourcing. Regulation may arise in the context of certain industries, for example, parties in particular industries may be

required to prepare statutory financial statements for tax compliance.

Professional services

Not applicable.

Legal process

Not applicable.

Knowledge process

Not applicable.

IT and cloud services

There is no specific legislation regulating outsourcing involving IT and cloud services. Regulation may arise in the context of certain industries, for example, compliance with data protection legislation or engaging a cloud service provider when outsourcing a material function in the financial services sector.

Telecommunications

There is no telecommunications specific legislation regulating outsourcing. However, depending on the services being outsourced, parties may need to comply with general telecommunications regulations, including the Communications Regulation Act 2002 (as amended) and the new Directive Establishing the European Electronic Communications Code (*(EU) 2018/1972*) (EECC) which is due to be adopted into Irish telecommunications regulation in 2020.

Public sector

There is no specific legislation regulating outsourcing in the public sector, but regulation may arise in specific contexts such as compliance with data protection legislation or the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. In addition, if a public sector entity proposes to enter into an outsourcing arrangement, it must have statutory authority to outsource the activity in question and must comply with the applicable public procurement rules.

Manufacturing

Not applicable.

3. What further legal or regulatory requirements (formal or informal) are there concerning outsourcing in any industry sector?

Financial services

In addition to the specific obligations for various sectors of the financial services industry outlined in *Question 2*, in November 2018, the CBI published the discussion paper *Outsourcing – Findings and Issues for Discussion*, which sets out the CBI's expectations around outsourcing across all areas of financial services regulation and highlights some good and some poor practices in relation to outsourcing.

The CBI's *Consumer Protection Outlook 2020*, released in March 2020, highlights the regulatory expectation for regulated financial services providers to have adequate oversight of all their outsourcing activities. *Consumer Protection Outlook 2020* provides that regulated financial services providers must ensure that:

- They have effective oversight of their outsourcing arrangements, by clearly assigning responsibility for the task to relevant individuals, functions and/or committees.
- The governance and management of outsourcing arrangements meets all legal and regulatory requirements.
- They have the appropriate skills and knowledge to effectively oversee and understand arrangements, and their associated risks, from inception to conclusion are in place.

Regulated financial services providers are expected to conduct an outsourcing risk assessment at both the initial consideration of any outsourcing proposal and on an on-going basis to ensure that, at all times, there is a comprehensive view of all outsourced services. Regulated financial services providers should have firm risk management frameworks in place to mitigate any operational risk and must maintain a risk register to appropriately assess and monitor outsourcing risks.

Fund administration and depositary services

The CBI has specified that for fund administrators, core management functions must not be outsourced. Core management functions include setting the risk strategy and risk policy of the relevant administrator. In addition, management functions (such as control and oversight of the operation of the fund administrator's processes and the final responsibility towards clients and the CBI) must not be outsourced.

The outsourcing must not impair the orderliness of the conduct of the fund administrator's business or the services being provided. The outsourcing must also not impair the ability of other internal governance bodies (such as the board of directors or audit committee) from fulfilling their oversight tasks.

The CBI has set out what constitutes "good practice" for fund administrators conducting outsource activities, which includes:

- Preparing an outsourcing policy.
- Carrying out take back/resilience testing on a regular basis.
- Forming an outsourcing committee which will be responsible for:
  - the approval of outsourcing arrangements;
  - on-going oversight of outsourced arrangements;
  - ratifying any changes to the outsourcing policy; and
  - monitoring any remediation plans that may transpire from due diligence inspections of service providers.

For depositaries, under the European Union (Alternative Investment Fund Managers) Regulations 2013 (as amended) (which transposed Directive 2011/61/EU on alternative investment fund managers (AIFM Directive) into Irish law) and the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (as amended) which transposed Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (UCITS IV Directive) into Irish law, delegation by depositaries is permitted in respect of their safe-keeping functions. A distinction is made between the "delegation" of functions and the "outsourcing" of functions by depositaries. Depositaries cannot delegate their cash flow monitoring and oversight duties.

Insurance

The specific requirements for insurers and reinsurers in relation to outsourcings are provided in:

- The European Union (Insurance and Reinsurance) Regulations 2015, which transposed Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II Directive) into national law.
- Commission Delegated Regulation (EU) 2015/35 supplementing Solvency II.

These laws also set out the measures that insurance and reinsurance undertakings must take in advance of any outsourcing.

In addition, the European Insurance and Occupational Pensions Authority (EIOPA) has the authority to issue guidelines to competent authorities to ensure consistent and effective supervisory processes. On 6 February 2020, the EIOPA published the Guidelines on Outsourcing to Cloud Service Providers, which will be applicable

from 1 January 2021. These new guidelines are modelled on the EBA Guidelines, but are narrower in scope, as they focus mainly on outsourcings of critical or important operational functions to cloud service providers.

MiFID II investment firms

Article 16 of MiFID II also sets out the requirements for outsourcings carried out by investment firms (with additional requirements provided in Commission Delegated Regulation 2017/565). Investment firms must:

- Take reasonable steps to avoid undue operational risks when outsourcing critical operational functions.
- Ensure there is a written outsourcing agreement in place with the relevant outsourced service provider.

Other sectors

The public sector must comply with certain regulations in respect of outsourcing (*see Question 2*).

In the defence sector, Directive 2009/81/EC on defence and sensitive security procurement (Defence Procurement Directive) applies to defence and security procurement, particularly to the procurement of arms, munitions and war material and to sensitive non-military contracts.

4. What requirements (formal or informal) are there for regulatory notification or approval of outsourcing transactions in any industry sector?

Financial services

Generally, if a regulated financial services provider intends to outsource a function or service that is material, critical or important, it must notify the CBI in advance. Any notification to the CBI must be sufficiently detailed and allow sufficient time for the CBI to consider the outsourcing in detail in advance of the outsourcing becoming effective. A general guide is that the CBI should be afforded a period of six weeks. This timeframe gives the CBI the opportunity to raise any concerns it might have in relation to the outsourcing.

Insurance

An insurance undertaking wishing to outsource critical or important functions must notify the CBI at least six weeks before the effective date of the outsourcing.

Merger control

Under Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation) and the Irish Competition Act 2002 (as amended) (Competition Act), a "concentration" is notifiable where the undertakings involved in the concentration have a turnover exceeding the certain prescribed thresholds.

An outsourcing arrangement that involves a transfer of assets or personnel constituting a business with a market presence to the service provider, or that which would enable the service provider to develop a market presence within a relatively short period of time, will generally amount to a "concentration" within the meaning of the Merger Regulation and Competition Act.

Where the undertakings involved in such an outsourcing arrangement meet the relevant turnover thresholds (*see below*), a notification must be made, and a clearance determination obtained, before putting the arrangement into effect. A failure to do so can result in fines and constitutes a criminal offence in Ireland.

In Ireland, notifications must be made when the following cumulative criteria are met:

- The aggregate turnover in the Republic of Ireland of the undertakings involved is not less than EUR60 million.
- The turnover in the Republic of Ireland of each of two or more of the undertakings involved is not less than EUR10 million.

The maximum duration of the statutory review period is 30 working days in Phase I, which may be extended to 45 working days where proposals are made by notifying parties to overcome competition concerns. In Phase II, the Competition and Consumer Protection Commission has 120 working days from the appropriate date to clear the transaction, clear it subject to conditions or block the transaction. The period can be extended to 135 working days where proposals are made by the notifying parties to overcome competition concerns.

These statutory review periods may be further extended by the issuance of a formal requirement for information, which in Phase I, stops and restarts the clock and, in Phase II, stops and suspends the clock.

In the EU, the main threshold is met when both the:

- Combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR5 billion.
- Aggregate EU wide turnover of each of at least two of the undertakings concerned exceeds EUR250 million.

The alternative threshold is met if:

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR2.5 billion.
- In each of at least three member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million.
- In each of at least the three member states included for the purpose of the above criterion, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR25 million.
- The aggregate EU wide turnover of each of at least two of the undertakings concerned exceeds EUR100 million.

The maximum duration of the European Commission's review period is 25 working days in Phase I, which may be extended to 35 working days, if the notifying parties submit remedies or if the Commission receives a referral request from a member state, and 90 working days in Phase II, which may be extended to 125 working days, (the 90-working-day period is extended by 15 working days where the notifying parties offer commitments and by a further 20 working days if an extension is requested by the parties or the Commission, with the agreement of the parties).

Joint ventures and merger control

Under the Merger Regulation, a transaction involving several undertakings newly acquiring joint control of an undertaking, or assets constituting the whole or part of an undertaking (that is, a business with a market presence to which a turnover is attributable), constitutes a concentration. Further, a transaction involving a change from sole to joint control over an existing undertaking, in circumstances where the undertaking will be a "full-function" joint venture post-transaction, is a concentration (*Case C-248/16, Austria Asphalt GmbH & Co OG v Bundeskartellanwalt, Judgment of 7 September 2017, ECLI:EU:C:2017:643*).

Therefore, an outsourcing arrangement involving the transfer of assets or personnel constituting a business with a market presence to two or more service providers, or that would enable the service providers to develop a market presence within a relatively short period of time, can amount to a "concentration" within the meaning of the Merger Regulation and Competition Act. This should be assessed on a case-by-case basis.

LEGAL STRUCTURES

5. What legal structures are commonly used in an outsourcing?

Parties proposing to enter into an outsourcing arrangement can select from a number of different structures, whether the outsourcing is with a third-party supplier or is an intra-group outsourcing.

Direct outsourcing

Description of structure. Direct outsourcing is the most common structure for an outsourcing arrangement. The supplier provides the services directly to the customer and the parties will enter into a bilateral contract.

Advantages and disadvantages. The main advantage is that this is the most familiar and straightforward legal structure. Parties will be used to the back and forth of a bilateral contractual negotiation.

One of the main disadvantages is that, in a competitive situation that includes multiple bidders, the supplier may sign-up to terms that are biased towards the customer. A one-sided contract may not represent the ideal commercial "partnership" between the parties and may not meet the goals of mutual trust and sharing responsibility.

Prime contractor

Description of structure. The customer enters a contract with the prime contractor who takes overall responsibility for managing several different interconnected services and suppliers (who are effectively subcontractors). The prime contractor is the "single point of contact" for the customer.

Advantages and disadvantages. This structure can make governance more straightforward for the customer and reduce the time the customer must spend managing the relationship. If something goes wrong with any aspect of a service or a subcontractor, the prime contractor has the legal responsibility for remedying it. However, it means the customer loses a degree of control over the outsourcing, as it does not have a direct contractual relationship with the subcontractors.

Multi-sourcing

Description of structure. The customer enters into contracts with several different suppliers in respect of interconnected functions that it wishes to outsource. The customer can sign either an individual contract with each supplier or a multi-supplier contract. The customer can use the service and integration management (SIAM) model to help manage multiple suppliers.

Advantages and disadvantages. The customer has more control over the outsourcing, as it has a direct contractual relationship with each supplier and can require each supplier to interface their solution and work collaboratively with the other suppliers. Management of the suppliers is trickier for the customer, as there is no single point of contact, which can lead to an unclear delineation between suppliers. There can also be a lack of co-operation and co-ordination between suppliers.

Joint venture

Description of structure. If multiple suppliers are bidding for an outsourcing, they can organise their bid as a joint venture, either contractually or by setting up a joint venture vehicle.

Advantages and disadvantages. The customer only has to deal with a single legal entity but receives the experience and expertise of different suppliers who are part of the joint venture. A disadvantage is that the customer has no guarantee that the suppliers are in it for the long term and the joint venture is only as strong as the legal document that created it.

Build operate transfer

Description of structure. In the context of an outsourcing, the customer engages the supplier to set-up, optimise and run a business process with the intent of the supplier transferring the operation to the customer. Traditionally, this structure was seen in the construction and engineering industries in Ireland (partially in significant Public Private Partnership (PPP) infrastructure projects) but it is becoming more common in the services industry.

Advantages and disadvantages. This structure is best suited for large-scale projects where the customer requires a high degree of control. The customer can benefit from the expertise of the supplier and the supplier assumes the risk of planning and operation. However, it requires strong governance and significant customer resources to provide oversight.

PROCUREMENT PROCESSES

6. What procurement processes are used to select a supplier of outsourced services?

The procurement process that a customer uses to select a supplier of outsourced services depends on a number of factors such as whether the customer is a private or public body and the type, value and complexity of the proposed services.

Private sector entities in Ireland are not subject to mandatory procurement rules (with the exception of utilities that fall within the scope of Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Utilities Directive) and the corresponding regulations). However, they must comply with competition law. Private sector entities are free to refer to the public procurement rules and principles to ensure that their own procurement process is transparent, non-discriminatory and undertaken in good faith.

Request for information (RFI)

An RFI is a "fact finding" document. Customers will often decide to issue an RFI to gain an understanding of the range of options in the marketplace. The RFI will typically be followed by the customer issuing a request for tenders or a request for quotation.

Request for tenders (RFT)

A customer often issues a RFT (or similarly named document) that invites potential suppliers to submit an offer. The RFT typically outlines the customer's requirements, such as listing the critical capabilities and skills the customer requires, and setting out the desired service-level targets. The RFT may also set out the key criteria to be used to select the preferred bidder.

Request for quotation (RFQ)

An RFQ is similar to a RFT but typically also contains a specific set of requirements that the customer requires the supplier to assess and respond to. The RFQ sets out the requirements in a table with a request for the supplier's response to indicate beside each individual requirement whether it can meet the requirement in whole, in part or not at all.

Shortlisting and negotiation

The customer will shortlist its preferred bidder(s) based on the responses to the RFT or RFQ from prospective suppliers. Once this is done, the customer will proceed to negotiate a contract with its preferred bidder or enter parallel negotiations with multiple bidders.

Due diligence

The tender process may include a due diligence phase during which the supplier can investigate the customer's business to tailor its offering. The due diligence must include a careful consideration of some or all of the following:

- The scope of services.

- The expected service levels.
- The assets and human resources currently being used and likely to be required once outsourced.
- Access to IP and premises.
- IT dependencies.
- Key third party contracts that are part of the outsourced business.

In practice, higher value outsourcings tend to provide access to this information through a data room for short-listed bidders. In some instances, the customer may permit site visits and question and answer sessions with the customer's key employees.

Public sector

In Ireland, public sector bodies and utilities that want to outsource a service must comply with EU and Irish public procurement rules.

Contracts awarded by public sector bodies, public and private utilities and public bodies in respect of defence and security must be subject to a public tender process that awards in accordance with the provisions of the corresponding European directives and Irish regulations, provided that the estimated value of the contract exceeds the relevant thresholds and it does not fall within an exception.

The four public procurement procedures available are:

- Open procedure.
- Restricted procedure.
- Competitive dialogue.
- Negotiated procedure.

TRANSFERRING OR LEASING ASSETS

Formalities for transfer

7. What formalities are required to transfer assets on an outsourcing transaction?

Immovable property

The following formalities apply to transfers of immovable property:

- Registration in the Land Registry is compulsory in respect of land in Ireland and provides conclusive proof of ownership.
- For registered land, the Land and Conveyancing Law Reform Act 2009 provides that a legal estate or interest in land can only be created or conveyed by deed. Transfers must also be registered with the Land Registry.
- For unregistered land, the transfer requires a conveyance deed. This must be registered in the Registry of Deeds. An application must also be made for first registration to the Land Registry.

IP rights and licences

The following formalities apply to transfers of IP:

- Assignments or transfers of IP rights such as copyright and trade marks are not generally valid unless in writing and signed by or on behalf of the assignor.
- If 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/her interest.

Movable property

Title to movable property can transfer by delivery. There are no specific formalities associated with this process. The outsourcing contract will usually list in a Schedule the moveable property that the parties have agreed will transfer.

Key contracts

Parties can transfer key contracts by assignment or novation.

Whether assignment is an option typically depends on the terms of the key contract. Most contracts contain a clause stating that a party needs the consent of the other party to assign it. If a contract is silent on assignment, a party can assign the benefit of the contract without the other party's consent, but not the burden.

Novation of a key contract requires the outgoing party, incoming party and the other party to the key contract to enter into a tripartite deed of novation under which the original key contract between the outgoing party and the other party to the key contract is rescinded in consideration of a new contract being created between the incoming party and the other party to the key contract.

Offshoring

There are no specific regulations or controls on offshoring. Additional issues can arise if the assets are subject to export controls (*see Question 8, Export licences*) or one of the parties to the outsourcing is located either:

- Outside the European Economic Area (EEA). In this case, the parties need to consider how to make the transfer of personal data legitimate under the data protection laws (*see Question 10, Data protection and data security*).
- In a country on the UN or EU list of sanctioned countries.

Data and information

See *Question 10*.

Formalities for leasing or licensing

8. What formalities are required to lease or license assets on an outsourcing?

Immovable property

The following formalities apply:

- A lease over immovable property must be recorded in writing.
- A lease over registered land with a duration of more than 21 years must be registered with the Land Registry.
- For unregistered land, the lease must be registered in the Registry of Deeds through the Property Registration Authority. An application for first registration of the land may be required.
- There are no strict formalities for licences of immovable property and such licences do not create any rights under landlord and tenant legislation. Instead, they are generally considered to be "licences at will".

IP rights and licences

The following formalities apply:

- As a matter of good practice, IP licences should be in writing.
- An IP licence that concerns registered IP be must be recorded on the appropriate register to avoid enforcement issues.

Movable property

Parties licensing or leasing moveable property are free to negotiate and agree the rights under the licence or lease and there are no strict formalities.

Key contracts

Key contracts are not generally leased or licensed.

The customer could appoint the supplier as the customer's agent if the customer wanted to maintain its contractual relationship under the key contract while allowing the supplier to manage the relationship in that key contract.

Export licences

Some categories of assets can only be exported under licence from the relevant authority. Under Irish law, the Control of Exports Act 2008 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 Regulation (EU) 388/2012 amending Regulation (EU) 428/2009 on the control of exports, transfer, brokering and transit of dual-use Items (Dual-Use Regulation). Further, a limited number of dual-use products listed in the Dual-Use Regulation 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 certain categories of the Control of Exports (Goods and Technology) Order 2012 or Directive 2009/43/EC on simplifying terms and conditions of transfers of defence-related products within the Community.

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.
- Medicinal products.
- Certain agricultural products.
- Certain dangerous chemicals.

Data and information

See *Question 10*.

TRANSFERRING EMPLOYEES ON AN OUTSOURCING

9. Are employees transferred by operation of law?

Initial outsourcing

Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive) was implemented in Ireland by the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (Regulations).

The Regulations essentially mirror the Transfer of Undertakings Directive and provide protection for employees' rights in the event of a transfer of the whole or part of an undertaking or business from one employer to another, and the business retains its identity post-transfer.

While it is settled law that the Regulations can apply to outsourcings (and indeed to insourcings, and on a changeover in contractors), the Regulations do not automatically apply to every such situation in Ireland. The applicability of the Regulations will depend on the specific circumstances of each case. Such scenarios are not expressly provided for in the Regulations.

To trigger the Regulations, an outsourcing (insourcing or changeover in contractors) must involve the transfer of an economic entity which retains its identity. In addition, there must be an associated and related transfer of significant tangible or intangible assets or the transfer of the major part of the workforce in terms of numbers or skill.

In this regard, case law essentially divides service contracts into:

- Labour-intensive service contracts (that is, there are no significant physical assets, but there are stable economic activities in their own right, such as security services or cleaning services).
- Asset-reliant service contracts (which involve significant assets).

In a labour-intensive service, the key factor will normally be whether the new incumbent accepts into its employment a major part of the workforce, in terms of their numbers or skills. In an asset-reliant service, the key factor will normally be whether there has been a transfer of significant assets.

Case law strongly suggests that in the context of an outsourcing, where there is no transfer of assets or employees, the Regulations do not apply.

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

Change of supplier

As set out above, the Regulations can apply to a situation where a customer changes supplier, depending on the circumstances of the transfer and whether there is any transfer of assets or employees between the suppliers (*see above, Initial outsourcing*). In the absence of any transfer of assets or employees, the Regulations do not apply.

If the Regulations apply, the Regulations usually operate so that the incoming supplier is the transferee and the outgoing supplier is the transferor.

Termination (or expiry)

The Regulations can apply where a company terminates an outsourcing arrangement, and rather than engaging a new contractor, decides that those services will be dealt with internally. This will depend on the circumstances as a whole, including an examination of whether there are any assets or employees transferring between the parties.

In the absence of any transfer of assets or employees, the Regulations do not apply (*see above, Initial outsourcing*).

If the Regulations do apply, the company is the transferee and the outgoing contractor is the transferor.

Commercial agreement

It is not permissible to use a commercial agreement or contract of employment to exclude or limit the application of the Regulations or part of the Regulations. Any such limiting provision will be void to the extent that it attempts to exclude or limit the rights granted or obligations imposed by the Regulations. However, the parties can seek to negotiate the allocation of risk and liabilities associated with the Regulations through warranties and indemnities in the commercial agreement.

For more information on transferring employees on an outsourcing, including structuring employee arrangements (including any notice, information and consultation obligations) and calculating redundancy pay, see *Transferring employees on an outsourcing in Ireland: overview*.

DATA PROTECTION AND SECRECY

10. What legal or regulatory requirements and issues may arise on an outsourcing concerning data protection?

General Data Protection Regulation (*(EU) 2016/679*) (GDPR) was adopted in May 2016 and applied directly in all EU member states without the need for transposition from 25 May 2018. The reform was intended to respond to new technological challenges and to put in place a harmonised framework for the protection of personal data. The GDPR applies to the processing of personal data wholly or partly by automated means, or other than by automated means, if the data forms part, or is intended to form part, of a filing system (*Article 2(1)*). The GDPR defines personal data as "any information relating to a data subject" (Article 4(1)). For more details on the GDPR, see *Practice Note, Overview of EU General Data Protection Regulation*.

Data protection and data security

General. Due to the ubiquity of digital information, most outsourcing arrangements in Ireland require the parties to address data protection requirements. For example:

- If the outsourcing arrangement involves the processing of personal data by supplier or customer on behalf of the other, the provisions of the GDPR and the Data Protection Acts 1988 to 2018 regarding appointing a data processor will apply.
- If employees are transferring, then data protection issues can arise.
- If the outsourcing arrangement involves a cross-border transfer of personal data outside of the EEA, the parties will need to consider how to legitimately transfer the personal data in a way that meets the requirements of the GDPR.

Parties typically address the contractual requirements of the data protection laws in the outsourcing contract itself, often in a dedicated "Data Protection Schedule", which sets out the obligations on the supplier and customer and allocates risk through indemnity and liability provisions.

Use of processors and sub-processors. The GDPR defines a processor as "any person, body or agency who processes personal data on behalf of the controller". For the purposes of an outsourcing arrangement, the supplier is usually the processor and the customer is the controller. The customer, as the controller, is ultimately responsible for ensuring that the personal data is processed in accordance with the GDPR.

The controller and processor must enter into a written agreement that meets the requirements of Article 28 of the GDPR. This can be either a:

- Specific data protection clause in the main outsourcing contract.
- Data processing agreement that is attached to the main agreement.

This clause or separate data processing agreement must set out the:

- Subject matter and duration of the processing.
- Nature and purpose of the processing.
- Type of data processed and the categories of the data subjects.
- Obligations and rights of the controller.
- Obligations of the processor.

The processor can appoint a sub-processor if it has the consent of the controller. The processor must enter a contract with the sub-processor with terms equivalent to the data processing agreement between the controller and processor.

Liability for breaches of personal data processing requirements (for both the customer and the supplier). Article 4(12) of the GDPR defines a personal data breach as a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data.

Article 33(1) of the GDPR states that the controller must report the breach to the Irish Data Protection Commission (DPC) without undue delay, and in any event within 72 hours, unless the breach is unlikely to result in a risk to the rights and freedoms of affected individuals. In addition, if the risk to affected data subjects is high, they must be informed without undue delay.

Outsourcing contracts generally require the supplier, as the processor, to notify the customer of any data breaches without undue delay and in any event within a specified number of hours to enable the customer to fulfil its obligations as a controller.

The GDPR obliges controllers and processors to maintain records of both compliance with and breaches of the GDPR and to furnish these to the DPC on request.

The GDPR establishes rules on compensation for infringement, which extend to both material and non-material damage, and provide for the imposition of significant administrative fines by the national supervisory authority (*see below, Sanctions for non-compliance*).

Transfer of personal data to third countries. If a party to an outsourcing contract wishes to transfer personal data outside the EEA, it must ensure that the transfer is made on one of the following bases:

- With the consent of the data subject.
- The European Commission has determined that the destination country has an adequate level of data protection.
- Under the EU-US Privacy Shield that enables certain US companies to receive personal data from the EU.
- Under intra-group binding corporate rules.
- Under standard contractual clauses for the transfer of personal data between EU and non-EU countries as approved by the European Commission.

The controller must have authorised the processor to transfer the personal data in question and the processor must have a legal basis for processing.

Article 44 of the GDPR provides that any transfers outside the EU must meet all other relevant requirements of the GDPR. Section 37 of the Irish Data Protection Act 2018 provides that the Irish government can make additional restrictions for transfer of data to third countries for important reasons of public policy.

Security requirements. Generally, the parties must be mindful of information and physical security in terms of:

- Access controls.
- Security of IT equipment.
- Internal training and periodic checks.

Article 32 of the GDPR provides a general obligation of security of processing personal data that a controller or processor must have in place but does not detail specific security measures. Parties to an outsourcing contract must have in place appropriate technical and organisational measures to ensure the protection of the personal data. In assessing whether this requirement has been met, the DPC will take into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons.

The EU (Measures for a High Common Level of Security of Network and Information Systems Regulations) 2018 (SI 360/2018) and

Commission Implementing Regulation 2018/151/EU specify certain security steps for parties in the electronic communications services sector including:

- A general security obligation to identify and take appropriate technical and organisational measures to manage the risks posed to the security of network and information systems.
- A requirement to take steps to comply with the general security obligation.
- A requirement to take measures to prevent security incidents.
- A requirement to put in place sufficient documentation to comply with the security requirements.

Mechanisms to ensure compliance. The DPC is the national authority responsible for upholding the fundamental right of individuals in the EU to have their personal data protected. The DPC is the Irish supervisory authority for the GDPR, and also has functions and powers related to other important regulatory frameworks, including the Irish ePrivacy Regulations (2011) and Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities (Data Protection Enforcement Directive).

International standards. There are none that are compulsory.

Sanctions for non-compliance. The data subject can lodge a complaint with a supervisory authority if he/she considers his/her data has been processed unlawfully. The supervisory authority is obliged to inform the complainant on the progress and outcome of the complaint, including on the possibility of a judicial remedy.

A data subject has the right to an effective judicial remedy against a responsible controller or processor where the data subject considers that his or her rights under the GDPR have been infringed as a result of the processing of his or her personal data in non-compliance with the GDPR.

A data subject that has suffered material or non-material damage due to an infringement of the GDPR has the right to receive compensation from the controller or processor for the damage suffered. Both controllers and processors can be liable for compensation under the GDPR. Controllers are liable for the damage caused by processing which infringes the GDPR. Processors are liable for the damage caused by processing in breach of their GDPR obligations or where processing is carried out outside or contrary to the lawful instructions of the controller.

The supervisory authorities can impose significant administrative fines for breaches of the GDPR. They must ensure that fines imposed are "effective, proportionate and dissuasive". The level of fine depends on the specific data protection obligation breached. Fines can be up to 4% of an undertaking's annual global turnover of the preceding financial year or EUR20 million, whichever is greater.

Banking secrecy

General requirements. 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 have developed through case law, including where:

- The disclosure is required by law.
- There is a duty to the public to disclose.
- The interests of the bank requires disclosure.
- The disclosure is made by the express or implied consent of the customer.

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

Security requirements. See above, *General requirements.*

Mechanisms to ensure compliance. See above, *General requirements.*

International standards. There are none that are compulsory.

Sanctions for non-compliance. The customer can bring a claim against the bank for breach of contract or breach of duty.

Confidentiality of customer data

General requirements. It is best practice for parties to ensure that the confidentiality provision in an outsourcing contract addresses customer data. Customer template outsourcing contracts can draft the confidentiality provision in favour of the customer. The supplier must ensure that the provision is drafted on a mutual basis.

In the context of customer data that contains personal data, Article 28(3)(b) of the GDPR states that the processor must ensure that its staff and subcontractors have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality in respect of such personal data.

Security requirements. See above, *General requirements.*

Mechanisms to ensure compliance. Confidentiality is typically addressed through a confidentiality clause in the outsourcing contract. Employees of the supplier (or other authorised persons) must be under a duty of confidentiality clause, usually found within their employment contract. The supplier will usually "flow-down" the confidentiality provision of the main outsourcing contract to its subcontractors.

International standards. There are none that are compulsory.

Sanctions for non-compliance. For breach of confidentiality claims, the non-breaching party can have claims for breach of contract or breach of duty. For breach of the GDPR, see above, *Data protection and data security.*

SUPPLY CHAIN COMPLIANCE

11. Are there any circumstances where an outsourcing customer would need (or want) to include compliance-related provisions in the contract documentation?

Customers can be subject to legal obligations in areas such as anti-bribery and corruption, anti-slavery and human trafficking, and ensuring network security. Customers may be required to flow-down such obligations to the supplier.

Financial services

In the context of outsourcing by a regulated financial provider, the CBI can require to be notified in advance of the material outsourcing and request further information regarding the nature of the outsourcing contract, or impose specific conditions governing the arrangement.

Pharmaceutical and food and beverage

If a pharmaceutical company appoints a supplier of outsourced services, it will impose compliance obligations on the supplier, such as the requirement to comply with the "Good Manufacturing Practice". Similarly, in a food production outsourcing arrangement, the customer will impose obligations on the supplier to comply with food hygiene regulations in the outsourcing contract.

Essential/digital services

If the customer is an operator of essential services (OES) or a relevant digital service provider (RDSP) within the meaning of the Network and Information Systems Directive (*(EU) 2016/1148*)

(NISD), transposed into Irish law by the European Union (Measures for a High Common Level of Security of Network and Information Systems) Regulations 2018 (*SI 360/2018*), the customer must ensure compliance by the supplier with NISD.

Human trafficking

It is common for customers in particular industries (for example, retail) to state in the outsourcing contract that, when acting in connection with the outsourcing contract, the supplier must comply with the:

- Criminal Law (Human Trafficking) (Amendment) Act 2013.
- Criminal Law (Human Trafficking) Act 2008.
- Criminal Law (Sexual Offences) Act 2017.

Anti-bribery/anti-corruption

It is common for the customer to state in the outsourcing contract that when acting in connection with the outsourcing contract, the supplier must comply with all applicable anti-corruption, anti-bribery and anti-solicitation laws, including the:

- Ethics in Public Office Act 1995.
- Proceeds of Crime (Amendment) Act 2005.
- Criminal Justice (Corruption Offences) Act 2018.

Anti-money laundering

Customers operating in certain industries (for example, financial services and banking) must, where necessary, ensure compliance by the supplier with the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 to 2018.

12. How would the customer seek to ensure compliance with these requirements further down the supply chain (for example, if the outsourcing supplier engages a subcontractor)?

It is advisable to establish in the terms of the outsourcing contract any controls that the customer wishes to put on the supplier's supply chain. The customer may want to investigate the competence and financial standing of a proposed subcontractor in advance of appointment. It is also advisable for the customer to insist that the supplier, as the original contracting party, remains liable for all its subcontractors.

General measures

Audit rights and controls over subcontractors are determined on the basis of the outsourcing contract negotiated between the parties. A "right to audit" clause in the outsourcing contract allows the customer, or its third-party auditor, to carry out audits or inspect records of the supplier and its subcontractors to obtain assurance over the supplier's compliance and any risks associated with the outsourced activities.

Service level agreements are a popular method of assessing the adequacy of the controls in place.

Other methods of assurance include internal audits, ISAE 3402 or SAS 70 audits and audits on subcontractors undertaken by the supplier and reported to the customer.

Financial services

The CBI requires a provision in the relevant outsourcing contract granting the CBI access to data held by the outsourced services provider (and its subcontractors) to enable the CBI to properly carry out its supervisory functions.

Where it is expected that as part of the outsourcing the supplier will interact with customers of a regulated financial provider, the supplier's staff and subcontractors will need to be adequately trained to do so.

SERVICES: SPECIFICATION, SERVICE LEVELS AND ESCALATION

13. How is the service specification typically drawn up and by whom?

The party responsible for drafting the service specification differs depending on the circumstances of the particular outsourcing transaction. This task can be carried out by:

- The customer.
- The supplier.
- A collaborative process between the customer and supplier.
- An appointed specialist third party adviser for particularly complex outsourcings.

If the customer takes responsibility for drafting the service specification, it will often include the draft specification as part of the RFP, as this can lead to a more effective bidding process and more realistic pricing.

The RFP can only set out a skeleton description of the customer's requirements if the customer is outsourcing a service for the first time. In these cases, the parties will aim to draft a detailed services description during the contract negotiations phase.

If the supplier takes responsibility for drafting the service specification, it may prefer to do this task after completing its due diligence exercise.

If a supplier is not permitted, either by the customer or by circumstances, to carry out sufficient due diligence, the supplier can:

- Specifically list the customer responsibilities and dependencies in the outsourcing contract and make the supplier's obligations and liabilities conditional on the customer (or where relevant, third parties) performing their own responsibilities.
- Request that the outsourcing contract contain a right for it to adjust its charges if the information the customer provides proves to be inaccurate or incomplete. If the customer agrees to this principle, it must make sure any "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 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.

If the customer requires the supplier to provide a fixed price quote, a specific and defined 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) or the evaluation process (particularly in certain public sector processes).

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

Outsourcing contracts across all sectors usually contain service level agreements (SLAs) for performance management. The SLA usually sets out the:

- Service levels.
- Key performance indicators.

- Service credits (also known as service level rebates) for service level failure.

More complex and strategic outsourcings tend to require more detailed service level regimes.

Service level requirements can be sector specific. For example, the CBI requires customers operating in the financial services industry to include clear quantitative and qualitative service levels in all material outsourcings (*see Question 2, Financial services*).

Well-drafted service levels in an outsourcing contract will define objective measures of financial and non-financial performance that the supplier must meet (such as service uptime percentage (that is, the percentage of time the service is available and operational) or the time it takes to respond to fault reports). Service levels are usually set by reference to specific industry requirements or the customer's requirements as set out in the RFT.

The customer can agree to a transitional or implementation period where it gives greater latitude to the supplier in achieving service levels and cannot enforce service credits for service level failure.

Once the services are up and running, service levels are usually measured on a weekly or monthly basis. Failure to achieve service levels can require the supplier to:

- Take specific remedial actions.
- Increase the resources on the project.
- Provide further training to staff.
- Provide service credits to the customer.

Service credits can be a fixed amount or a percentage of the charges and can depend on importance of the service level and the period or severity of the service level failure.

Suppliers should be wary of very ambitious customer-set service levels, particularly where it is a new service, or one that has not previously been outsourced.

Customers can link service levels with a general obligation on the supplier to continuously improve the services and provide on-going price efficiencies.

Service level regimes can be monitored through the governance processes in the contract. The supplier may have to report on service level performance and any service level failures at periodic review meetings and the customer may have a right to audit the supplier's service level compliance against the service credits it has received.

15. Are there any service escalation mechanisms that are usually included in the contract documentation? How often are these exercised and how effective are they in restoring the services to the required levels?

The governance provisions in the contract will typically provide for regular meetings and reviews between the customer and supplier to help the parties address service-related issues. Day-to-day working groups can try to resolve service issues initially with an escalation route to more senior groups that meet less frequently if required. This process usually addresses most of the issues.

The contract can include a continuous improvement obligation that places an ongoing responsibility on the supplier to make incremental improvements to the services and processes.

The outsourcing contract can permit the customer to monitor the supplier's performance. In the event of the supplier not meeting the required level of performance, the supplier must develop and implement over a set period (for example six months) a service improvement plan to remedy the failures and the customer can increase its monitoring during this time.

For business-critical services, a customer can seek 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. In the financial services sector, the CBI will require a contract for a material outsourcing to contain a right for the CBI to step in.

If these mechanisms do not prove to be effective, various other remedies can be available to the parties (*see Question 29*) or, alternatively, the parties can utilise the dispute resolution procedure (*see Question 34*).

FLEXIBILITY IN VOLUMES PURCHASED

16. What level of flexibility is allowed to adjust the volumes customers purchase?

The customer's level of flexibility to adjust volumes varies depending on the services being outsourced, the charging mechanism, and the terms of the contract.

The contract can provide that the supplier requires a minimum volume commitment from the customer. If the customer does not meet this commitment, the supplier may have a right to one of the following:

- Increase the charges.
- Be paid for the shortfall.
- Terminate the contract in whole or in part.

Where an anticipated volume of services has been set out in the RFQ or the contract, the terms of the contract will usually require the parties to follow the change management procedure to address any change in services or volume.

Customers with a degree of commercial leverage can insist that they have a contractual right to compel the supplier to adjust volumes, pending agreement on any increase in the charges.

The change management procedure will usually provide for any dispute over additional charges the supplier proposes to be referred to the dispute resolution procedure in the contract or an independent expert for adjudication.

CHARGING METHODS AND KEY TERMS

17. What charging methods are commonly used on an outsourcing?

Cost or cost plus (including resource-based charging)

Cost or cost plus pricing was popular in Ireland but is less so now, and it is more common to find outsourcing transactions provided on a fixed price.

Fixed price

In fixed price contracts of more than one year duration, there may be mechanisms for increase or decrease in price due to significant changes in input costs (for example, for inflation, for national wage agreements, or as a result of changes in legislation), or if the customer's or supplier's assumptions around the scope of services and factors affecting price calculations do not hold true.

Time and materials

Time and materials is fairly common due to its convenient structure and relative flexibility. However, it may not be the most appealing pricing mechanism for the customer due to its open-ended structure and potential lack of control of costs.

Pay-per-use

Pay-per-use pricing, also known as "utility 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 these contracts, suppliers can require minimum volume commitments from the customer or a minimum payment to cover the supplier's set-up costs and overheads.

Risk or reward

Risk or reward-based pricing, which provides the supplier with bonuses for the quality of the results, can be complex to scope and put into practice. Suppliers taking on such risks should have completed detailed diligence on the business being outsourced.

18. What other key terms are used in relation to costs, including auditing and benchmarking mechanisms?

Benchmarking

Benchmarking clauses are used in longer-term outsourcing contracts at the customer's request but are not common in shorter-term contracts.

A classic benchmarking clause permits the customer to terminate the contract if the supplier does not match the lower price that results from the benchmarking process. Despite this, it can be difficult to identify suitable peers in terms of the definition of services, service standards, service levels and risk allocation. 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.

Change control

The customer will want to ensure that the contract obligates the supplier to make changes to the services that the customer reasonably requires and provide all additional services that are incidental and related to the initial services.

The supplier will invariably require a change control 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, and then from supplier to customer) with details of the changes proposed, the likely impact on services and service levels, project timelines (if applicable), resources required and the fees or charges, followed by discussions between management of the parties to finalise these details.

The customer should ensure that the change control clause gives it the final discretion as to whether to proceed with the change/new service on the basis of the information the supplier provides.

Late payment

It is an Irish government requirement (non-statutory) that all central government entities, the Health Services Executive (HSE), local authorities and all other public sector bodies (excluding semi-state bodies) pay valid invoices from their suppliers promptly and in any event within 15 days. This does not alter contractual relationships and does not affect the late payment rules where interest becomes payable after 30 days.

In an outsourcing between two private sector entities, the customer should pay its invoices within 60 days, unless the parties expressly agree otherwise in the contract and a later payment time is not grossly unfair to the supplier.

All 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's main refinancing rate plus 8%.

Outsourcing contract clauses will usually require a customer to dispute or raise any queries on an invoice within a specific timeframe (for example, 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 a common first step to deal with disputed invoices and may be followed by reference to an industry expert or mediation.

Where the outsourced services are business-critical for the customer, the customer must ensure that the contract does not permit the supplier to suspend provision of services, or terminate the contract, for as long as there is a genuine 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, however, contract clauses can occasionally provide for disputed amounts to be placed in a deposit account pending resolution.

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 owing to or by other group companies, or amounts owing from other contracts or trading relationships. The supplier will usually try 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.

CUSTOMER REMEDIES AND PROTECTIONS

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

If the supplier fails to perform or breaches its obligations, a customer's legal remedies include:

- Monetary damages.
- An order for specific performance.
- Injunctive relief.
- A right to terminate the contract.

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

It is good practice for a customer to include early warning mechanisms to pro-actively identify and correct performance issues and other provisions to incentivise the supplier's performance.

Typical customer protections in outsourcing contracts include:

- Service levels and service credits or rebates, which tend to be the most popular method of either assessing or providing assurance of the adequacy of the controls in place in the outsourcing provider.
- Governance through frequent meetings between the parties' representatives and regular formal and informal reviews.
- An obligation on the supplier to prepare and implement a service improvement plan in the event of default or non-compliance.
- A right for the customer (or its third-party auditor) to conduct financial and operational audits. In material outsourcings in the financial services industry, audit rights must extend to the CBI (*see Question 2, Financial services*).
- For business-critical services, the remedy of step-in rights. These enable the customer, or a third party acting on its behalf, to step into the supplier's role. In material outsourcings in the financial services industry, these step-in rights must extend to the CBI (*see Question 15*).
- Business continuity planning and disaster recovery.

- Parent company guarantees.
- Incentive mechanisms, such as paying the supplier a bonus payment for exceeding service levels or achieving a percentage increase in the customer's revenue.
- To drive performance, measurement and evaluation of the supplier's performance against a balanced scorecard.
- Benchmarking of the supplier's performance and pricing against its peers.
- The sanction of suspension or termination.

WARRANTIES AND INDEMNITIES

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

Warranties

Outsourcing contracts often contain several general warranties, covering matters such as:

- Training, experience and skill of the supplier personnel.
- Performance standards.
- Authority to enter into the contract.
- Compliance with all applicable laws.
- Ownership of IP rights.

Other contract-specific warranties may be included to guard against specific legal and business risks, such warranties relating to:

- 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.

Indemnities

Indemnities are now commonplace in outsourcing contracts, but the extent of the indemnities depends on the type of the services.

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 IP infringement, and indemnities for employee claims and liabilities during the outsourcing term. In recent times, much broader indemnities have been sought from the supplier, including indemnities for:

- Any loss, damage or injury caused to the customer by the (negligent) actions or inactions of the supplier.
- The supplier's breach of any applicable laws.
- The supplier's breach of confidentiality or data protection obligations.
- The supplier's breach of any contractual obligations.

Most customers request that these indemnities fall outside of the supplier's cap on liability. If the supplier agrees to this, it presents a significant commercial risk for the supplier.

The supplier will typically seek indemnities from the customer relating to:

- Claims for any breaches of a third party's IP 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 before the date of transfer of employees to the supplier (on commencement of the outsourcing).
- Any third-party claims for death or personal injury caused by the customer's negligence.

Indemnities are a contentious area in outsourcing contracts and are often subject to intense negotiation.

22. What requirements are imposed by national or local law on fitness for purpose and quality of service, or similar implied warranties?

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 both:

- The sale of goods (for example, merchantability and fitness for purpose).
- The supply of services (for example, that the services will be supplied with due skill, care and diligence).

The Sale of Goods Act 1893 provides that where the customer 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.

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.

23. What other provisions may be included in the contractual documentation to protect the customer or supplier regarding any liabilities and obligations arising in connection with outsourcing?

Each party will aim to include provisions limiting and excluding its liability.

Indemnities are typically used as a way to allocate risk both between the parties and in respect of third-party claims.

The customer can also require the supplier to maintain and provide evidence of appropriate insurance or provide parent company guarantees.

24. What types of insurance are available in your jurisdiction concerning outsourcing, and to what extent are they available?

The following types of insurance are available:

- **Employers' liability insurance.** This covers liability for accidents suffered by employees in the course of their employment. This type of insurance is widely available from a number of providers and although not compulsory, is very common.
- **Public liability insurance.** This covers liability from accidental bodily injury, nuisance or loss of, or damage to, material property. While not compulsory, it is commonly held by any company which interacts with members of the public.
- **Property damage insurance.** This is available to cover material damage to property and is widely available, although, there may be some restrictions according to business or premises type.

- **Product liability insurance.** This provides cover for damages, expenses and legal costs caused by defects in products manufactured, sold, supplied, processed or repaired by the insured.
- **Motor insurance.** This is compulsory if a business owns motor vehicles.
- **Business interruption insurance.** This generally covers a business for material losses caused by specific events. Traditional policies generally cover things such as fire and flood, but it is also possible to obtain non-damage cover. This is less widely available.
- **Cyber risk/cyber liability insurance.** This is a relatively new type of insurance and is often purchased as an add-on to business interruption or other types of insurance.
- **Professional indemnity insurance.** This is compulsory for members of many professional bodies.

The insurances that the parties should hold for an outsourcing arrangement will depend on the specific sector, scope and value of the outsourcing. The parties should seek advice from their insurance broker as to what is relevant and necessary.

TERM AND NOTICE PERIOD

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

Private sector parties are generally free to agree the duration of the outsourcing and any extensions. No maximum or minimum period applies.

If a public sector body uses a framework agreement to outsource specific services to a panel of suppliers and the relevant outsourcing is subject to public procurement rules, the term of the framework agreement put in place for the outsourcing cannot exceed four years, unless exceptional circumstances justify a longer duration (*see Question 2, Public sector*). For example, a longer term for the framework agreement can be justified for contractors to dispose of equipment with an amortisation period longer than four years, where that equipment must be available over the entire duration of the framework agreement. Call-off contracts based on framework agreements can be longer than four years where there are duly justified circumstances. Utilities governed by public procurement rules are subject to similar requirements for their procurement frameworks, save that the maximum period of the framework agreement cannot exceed eight years, unless there are duly justified and exceptional circumstances. Given the nature of frameworks and associated restrictions, it may be more appropriate (and usual) for public sector bodies and regulated utilities to outsource specific requirements by other contracting means.

In the financial services sector, the law does not impose maximum or minimum terms for an outsourcing. In addition, a financial services provider must generally be in a position to terminate the relevant contract where necessary and therefore, a fixed term without the ability to terminate would not be permissible. Material outsourcing contracts in the financial services sector must also include a provision permitting the customer to terminate the contract if required by the CBI (*see Question 3, Financial services*).

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

Private sector parties are generally free to agree the length of the notice period and any later variation to this period. No maximum or minimum period applies. In situations involving the the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003, a period of less than 30 days is not advisable, as the relevant employee consultation period must be observed.

If the outsourcing contract is "evergreen" (of indefinite duration) and does not provide a set notice period, the parties can terminate the contract by mutual agreement, or either party can terminate by providing prior reasonable notice.

In the financial services sector, the law does not prescribe the relevant notice periods. Generally, however, these periods must be long enough to allow the relevant financial services provider to find a suitable replacement or allow it to transition the services back in-house.

TERMINATION AND TERMINATION CONSEQUENCES

Events justifying termination

27. What events justify termination of an outsourcing without giving rise to a claim in damages against the terminating party?

Termination without cause

A right for the customer to terminate the contract for convenience is becoming less commonly agreed by suppliers in outsourcing contracts, particularly where the outsourced service requires considerable upfront investment by the supplier. If the parties include a termination for convenience right in the contract, it is common to include a calculation of an early termination charge that the supplier is entitled to receive as a result of such termination.

In the financial services sector, the CBI can require the customer to include a provision permitting the customer to terminate the contract if required by the CBI.

Termination for cause

Outsourcing contracts typically list the circumstances that entitle each party to terminate, (for example, poor performance or other (material or repeated) breaches by the other party, or change of control without prior consent). Termination in accordance with the terms of the contract generally mean that the contractual consequences apply and no claim in damages will arise, unless the parties have agreed in the contract that compensation will be payable.

Termination for insolvency and similar events

Insolvency of a party is not an automatic trigger under Irish law for termination, unless the contract expressly provides that it is.

Insolvency and similar events are usually listed in outsourcing contracts as specific events (for example, where a liquidator, examiner, administrator or receiver is appointed) which will trigger termination. No claim in damages will arise, unless the parties have agreed in the contract that compensation will be payable.

Other

As a matter of contract law, a party to a contract can terminate the contract (without giving rise to a claim in damages) if there is a repudiatory breach of contract (that is, a breach of a condition), or a total failure to perform. A contract can also be terminated if it has become incapable of being performed without default of the parties due to an unanticipated event, known as the doctrine of frustration. A mistake can render a contract void from the start in relatively limited circumstances.

28. In what circumstances can the parties exclude or agree additional termination rights?

Under Irish law, the parties are generally free to include or exclude their respective rights of termination in the outsourcing contract.

The parties typically include specific termination rights for bad performance or other (material or repeated) breaches of either the contract or specific clauses, including:

- Failure to meet service levels.
- Non-payment by the customer.
- Change of control without prior consent.
- If one of the parties is the subject of or suffers an insolvency-related event.

The customer will typically insist on detailed disengagement and exit provisions to facilitate the outsourcing services moving back in-house to the customer or to a replacement supplier.

It is becoming standard practice for the customer to include an express clause providing that any termination trigger rights it has under the contract does not limit any other termination rights it may have under the common law or equity.

29. What remedies are available to the contracting parties?

Under Irish law, the primary legal remedy a party can claim in the event of bad or non-performance by the other party that amounts to a breach of contract is damages.

Other equitable remedies are available at the discretion of the court (if the judge considers damages alone to be inadequate), including:

- Rectification.
- Specific performance.
- Injunctions.
- Account of profits.
- Subrogation.
- Rescission and declarations.

The contract or SLA can provide that certain delays, breaches or service failures entitle the customer to claim liquidated damages or service credits.

An outsourcing contract can provide the customer or its appointee with temporary step-in rights before the customer exercises its suspension or termination rights.

If the outsourcing contract uses a framework model, it may be open to terminate one of the call-off contracts/statements of work (SOW) while the main framework contract and other call-off contracts/SOWs remain in force.

IP rights and know-how post-termination

30. What, if any, implied rights are there for the supplier to continue to use licensed IP rights post-termination? To what extent can the parties exclude or include these by agreement?

The terms of the outsourcing contract will usually address licensing of IP rights both during the term of the contract and post-termination. There is no general implied right to continue to use licensed IP rights post-termination, except to the limited extent necessary to benefit from an express right that survives termination.

It is possible that a party's refusal to license its IP could constitute an abuse of a dominant position, in breach of competition law.

For reasons of clarity, a party intending to access or use IP rights post-termination should address this right of use or access as an express provision of the contract at the outset of the outsourcing.

31. To what extent can the customer gain access to the supplier's know-how post-termination and what use can it make of it?

Generally, express contractual provisions agreed between the parties in the outsourcing contract will govern the customer's right to use the supplier's know-how. Know-how tends to be treated as a form of trade secret or confidential information that is addressed in the confidentiality provisions of the contract rather than as a form of IP.

If the supplier's know-how is retained by employees of the customer, it can be used post-termination if this matter is addressed as an express provision of the contract at the outset of the outsourcing.

LIABILITY, EXCLUSIONS AND CAPS

32. What liability can be excluded?

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, outsourcing contracts usually also provide that there will be no limitation on a party's liability for death or personal injury, although this is not an express requirement of Irish law.

Otherwise, the parties are generally free to agree in the contract the liability that they exclude. This often includes:

- Exclusions of liability for certain types of loss, particularly for loss of profit and lost revenue.
- Exclusion of indirect or consequential loss. Parties must take care when drafting these exclusions, as the Irish courts may take a different interpretation to other jurisdictions of what is or what is not indirect or consequential loss. The court's interpretation may be different to what the parties intended at the time of entering into the contract.

33. Are the parties free to agree a cap on liability and, if desirable, a cap on indemnities? If so, how is this usually fixed?

Financial caps on liability are common. The customer will usually try to set the cap by reference to a fixed amount that reflects the potential damage the customer may incur if the supplier acts negligently or breaches the contract. The supplier typically prefers the cap to reflect the value of the contract to the supplier or a multiple of the contract value. Limits may be aligned with the available insurance cover.

Broadly, the parties are free to agree the value of the cap, except where limitations of liability will not be effective under certain circumstances (*see Question 32*).

Ireland has seen an increase in the use of separate discrete caps on liability for matters such as breach of data protection obligations,

where the liability of the party in breach is much higher than its potential liability for other matters.

In relation to indemnities, these are permitted to be capped, but the customer will often request them to be either uncapped or capped at a high figure. They do not tend to be linked to the contract value.

Parties should take care with the interaction between the indemnities and the limitation and exclusion of liability clauses in the contract.

Liability caps are a contentious area in outsourcing contracts and are often subject to intense negotiation.

DISPUTE RESOLUTION

34. What are the main methods of dispute resolution used?

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. Irish solicitors must advise their clients to consider mediation before issuing legal proceedings. However, mediation remains a voluntary option.

There is a fast-track procedure in Ireland for cases with high value. 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 can be made at any time before the close of pleadings. There is no automatic right of entry to the commercial list of the High Court and the entry of each case to the commercial list is at the discretion of a judge of the Commercial Court. In general, the claim must have a value of at least EUR1 million, although there are exceptions to this. 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 before an application for transfer to the commercial list.

The parties can agree to include an arbitration provision in the dispute resolution clause of the contract, which requires the parties to go to arbitration as a step in the dispute resolution process. Arbitration in Ireland is governed by the Arbitration Act 2010 which adopts the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law). However, the parties are free to agree that the arbitration will be governed by different rules (for example, the London Court of International Arbitration Rules). The rules governing the appointment of an arbitrator are usually set out in the dispute resolution clause of the contract. An arbitrator's award is final and binding on the parties to the contract and the courts have extremely limited powers of intervention.

TAX

35. What are the main tax issues that arise on an outsourcing?

Transfers of assets to supplier

Where the outsourcing arrangement involves a transfer of assets, this can trigger certain tax implications including:

- **Capital gains tax (CGT).** Generally, where an Irish resident disposes of capital assets, a charge to Irish CGT may arise on the taxable gain (if any) realised on the sale. This is calculated as the difference between the consideration paid (or market value in certain circumstances, for example, where the parties are connected) and the original cost of the asset (including any incidental costs of acquisition and disposal and qualifying enhancement expenditure) currently at a rate of 33%. The gain is calculated by reference to the Euro equivalent value. Relief from CGT can apply in some instances, such as on a transfer inter-group. Also, depending on the nature of the assets, the seller may need to produce a CG50 tax clearance certificate to avoid Irish withholding tax being withheld by the buyer.
- The disposal of assets consisting of stock is not subject to CGT. Instead, profits on the sale may be subject to Irish income tax, or corporation tax on income, where the seller is a company.
- **Capital allowances.** Transfers of plant and equipment and certain IP which qualify for tax depreciation allowances, known as "capital allowances" can give rise to a balancing charge or allowance, depending on the difference between the disposal proceeds (or in some cases, their market value) and the tax written-down value of these assets on the transfer date. This can give rise to an additional tax allowance or tax charge for the party making the transfer.
- **Stamp duty.** See below, *Stamp duty.*
- **Transfer pricing.** Ireland generally applies the Organisation for Economic Co-operation and Development (OECD) transfer pricing rules to cross-border transactions involving associated parties.

VAT or sales tax

Outsourced services are generally subject to VAT. For business to business (B2B) services, the place of supply is normally the place where the recipient is based. The standard rate of VAT in Ireland is currently 23%. There is a reduced rate of 13.5% and a 0% rate which applies in limited circumstances, (for example, a rate of 13.5% applies to building services and cleaning and maintenance services, and a rate of 0% applies to exports and essential groceries). In addition, some services can be outside the scope of VAT (such as, many financial services).

VAT is generally fully recoverable where the business/service provider is providing VAT-able goods or services. For exempt businesses, VAT is generally an irrecoverable cost. Directive 2006/112/EC on the common system of value added tax currently provides for the VAT system which operates throughout the EU, which is the basis of legislation in Ireland. Categories of services which are exempt from VAT are set out in Article 135 of Directive 2006/112/EC.

Stamp duty

A document evidencing a transfer of title to assets or an agreement to transfer assets may be subject to Irish stamp duty, depending on the nature of the asset, at rates of up to 7.5%. In the case of residential property, the rate of stamp duty will be between 1% and 2% and, in the case of shares, generally, the rate is 1%. For assets such as stock-in-trade or plant and equipment where the title to the assets can pass by delivery, the outsourcing agreement can provide that title to the goods will pass by physical delivery only, to avoid Irish stamp duty on these assets. Also, there are several exemptions from stamp duty available in certain circumstances, for example, with respect to transfers of IP.

Corporation tax

Irish corporation tax, at a rate of 12.5%, is payable on the trading income of a company which is resident in Ireland for tax purposes or an Irish branch or agency of a non-resident company. A higher rate of 25% is payable on any non-trading income (for example, investment or rental income). Generally, fees paid to a supplier will be regarded as revenue expenses deductible for corporation tax purposes, where incurred wholly and exclusively for the purposes of the trade.

Relevant contracts tax (RCT)

Payments made by principal contractors to subcontractors in respect of contracts in certain industries such as construction, forestry and meat-processing, are subject to the RCT system. RCT applies to contracts carried out in Ireland, irrespective of where the

parties are based. Under this online system, there are specific notification, reporting and deduction obligations in relation to withholding tax (at rates of 35%, 20% or 0%) in respect of relevant payments imposed on the principal contractor as defined in the legislation. Credits and offsets for any Irish withholding RCT withheld can be claimed against Irish income tax or corporation tax liabilities on relevant profits.

Transfers of employees to supplier

Where employees are transferred as part of any outsourcing arrangement, generally the payroll obligations with respect to those employees will transfer to the new employer. The Irish Revenue Commissioners now operates a real time pay-as-you earn (PAYE) reporting system.

Practical Law Contributor profiles

Mark Adair, Partner

Mason Hayes & Curran LLP

T +353 1 614 2345
E madair@mhc.ie
W www.mhc.ie

Professional and academic qualifications. Ireland, Solicitor; MA Law, University of Cambridge, 2005; Legal professional training, Bristol Law School, 2006

Areas of practice. Technology; outsourcing; fintech; privacy & data security.

Recent transactions

- Advising PTSB bank on the complex multi-million euro outsourcing of its entire IT security function.
- Advising Ulster Bank on the outsourcing of its consumer mortgage protection solution to a third party.
- Advising national broadcaster RTÉ on the procurement and implementation of a new core IT system for its HR and finance functions.
- Advising MUFG Bank on an outsourcing contract for a cloud-based dedicated infrastructure-as-a-service hosting and storage solution.
- Acting for PTSB bank on the data protection/GDPR aspects of a EUR2.1 billion non-performing loan portfolio sale.
- **Languages.** English

Professional associations/memberships. Society for Computers and Law; International Technology Law Association; Fintech & Payments Association of Ireland; International Bar Association.

Publications

- *Impact of Brexit on data transfers by UK and European businesses, Financier Worldwide magazine.*
- *The Blockchain legal landscape, BusinessPlus magazine.*
- *Ireland's Fintech Sector: Investment and Innovation, PaymentCompliance magazine*
- *Blockchain Technology: Emerging from the Shadows, PLC Magazine.*
- *Six "Golden Rules" When Reviewing Cloud Contracts: The Licensing Journal, Wolters Kluwer.*

Wendy Hederman, Partner

Mason Hayes & Curran LLP

T +353 1 614 5857
E whederman@mhc.ie
W www.mhc.ie

Professional and academic qualifications. Ireland, Solicitor, 1993; Masters in European Law, Université Libre de Bruxelles, Belgium; Certified Diploma in Accounting and Finance, ACCA

Areas of practice. Commercial contracts and outsourcing; consumer law and e-commerce; technology law; food and beverage sector; privacy.

Recent transactions

- Advising AIB plc (Irish bank) on the sale of its ATM business, involving service contracts and certain outsourcings.
- Advising another Irish pillar bank on the outsourcing of banking activities, including cash handling and processing.
- Advised a multinational pharmaceutical company (a top-10 company globally) in outsourcing a wide range of core and non-core business activities for its Irish manufacturing facility.
- Advising an insurance services company on the outsourcing of its case handling and underwriting activity to a cloud-based platform.
- Advising Coca-Cola HBC on commercial contracts, supply arrangements and on GDPR compliance and related privacy matters.

Languages. English, French, Irish

Professional associations/memberships. Law Society of Ireland; Irish Society for European Law; Trinity Business Alumni.

Publications

- *Co-author, Product Liability and Safety in Ireland, Thomson Reuters, 2019.*
- *Co-author, Irish Chapter of Sourcing World, First and Second editions, European Lawyer Reference.*
- *Irish chapter of Appointing Commercial Agents in Europe.*