REGULATION AND REQUIREMENTS

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

Swiss law does not specifically regulate outsourcing transactions. However, there are statutes governing outsourcing in particular industries (see Question 2) and particular aspects of outsourcing (see Question 3).

2. What additional regulations may be relevant on:
   - A financial services outsourcing?
   - A business process outsourcing?
   - An IT outsourcing?
   - A telecommunications outsourcing?
   - A public sector outsourcing?
   - Other outsourcings?

Financial services

The outsourcing of business areas (infrastructure or business processes) by Swiss financial institutions is subject to:

- Article 47 of the Swiss Federal Banking Act of 8 November 1934, as amended (Banking Act) on banking secrecy protects customer-related data from disclosure to third parties and applies to all banking institutions in Switzerland. Any disclosure of non-encrypted data to a supplier is only allowed with the express consent of each banking customer. Consent can be given under the bank's general terms of business if they are made an integral part of the contract between the bank and its customers. The Banking Act does not prohibit the transfer of encrypted data (where the supplier cannot identify individual customers).

- Circular 2008/7 relating to outsourcing (Outsourcing Circular) issued on 20 November 2008 by the Swiss Financial Market Supervisory Authority, FINMA (the supervisory authority for banks, insurers, reinsurers, stock exchanges, securities dealers, collective investment schemes and audit firms). This applies to banks and securities dealers organised under Swiss law, including Swiss branches of foreign banks and securities dealers which are subject to FINMA supervision. Before outsourcing a significant business area, these institutions must comply with the detailed measures set out in the Outsourcing Circular, including:
  - mandatory information of bank customers affected by the outsourcing;
  - careful selection, instruction and control of the supplier;
  - conclusion of a written contract with the supplier setting out, among others, security requirements and the supplier’s obligation to comply with business, banking and professional secrecy rules.

The customer (bank) continues to bear responsibility for the outsourced business areas, so it must ensure their proper supervision. For outsourcings to foreign suppliers, the customer must obtain evidence that it can assume and legally enforce control over the supplier abroad, for example by one of the following means:

- Legal opinion in the foreign jurisdiction to which the data is to be transferred.
- Confirmation by the relevant foreign supervisory authority.

Swiss banks and securities dealers must also consider that outsourcings to independent service providers are generally considered to increase operational risks and therefore lead to additional capital requirements for them.

Business process

No additional regulation applies specifically in relation to outsourcing business processes.

IT

No additional regulation applies specifically in relation to IT outsourcings.

Telecommunications

The Federal Telecommunications Act of 30 April 1997, as amended, sets out secrecy obligations that apply to telecommunications service providers in Switzerland, and which extend to outsourcing suppliers to the extent that they provide telecommunications services.
Public sector
There is a mandatory competitive tender process if the price paid for the services provided by the external supplier exceeds a certain threshold defined by either federal or cantonal law (depending on the authority arranging the outsourcing):

- Generally, for procurements of services by authorities of the Swiss confederation exceeding CHF150,000 (as at 1 February 2011, US$1 was about CHF0.9), at least three potential suppliers must be invited to tender. For procurements exceeding CHF230,000, a public call for tenders must be made (Federal Act on Public Procurement dated 16 December 1994 and implementing ordinance, as amended). This threshold is reviewed periodically by the Federal Department of Economic Affairs.
- Generally, procurements of services by state and communal authorities exceeding CHF150,000 must follow an invitation procedure, and a public call for tender must be made for procurements exceeding CHF250,000 (Inter-Cantonal Agreement on Public Procurement of 15 March 2001, as amended). Federal law also imposes certain obligations, for example, a duty of public tender and equal treatment of submitted bids.

The (federal and cantonal) public procurement legislation becomes more complex in an international context. Switzerland is a signatory to the WTO Government Procurement Agreement (GPA; in force since January 1994) and has entered into a bilateral agreement with the EU on certain aspects of government procurement (in force since June 2002). Discrimination with suppliers with domicile outside of Switzerland is not allowed if both the:
- Supplier is domiciled in a member state of the GPA.
- Country grants reciprocal rights.

The same applies to countries that have concluded a respective bilateral agreement with Switzerland. Since Switzerland is not a member of the EU, it is not required to transpose the EC public procurement Directives into national law.

Special data protection provisions apply to outsourcing by federal authorities (Article 16 et seq. DPO) and by state authorities (under the relevant cantonal statutes).

Other
Sector or subject-specific legislation may be relevant to particular outsourcing transactions, such as human resources outsourcing.

3. Please specify any further legal or regulatory requirements (formal or informal) concerning outsourcing in any industry sector.

The following statutes apply to certain aspects of outsourcing transactions:
- Federal Civil Code of 10 December 1907, as amended (CC) which deals with, among other things, property law.
- Federal Code of Obligations of 30 March 1911, as amended (CO) which deals with, among other things, general contract, employment and company law.
- Federal Act on Cartels and other Restraints of Competition of 6 October 1995, as amended (Cartel Act) and Federal Ordinance on the Control of Concentrations of Undertakings of 17 June 1997, as amended (MCO).

Notification and/or approval requirements must be considered in connection with outsourcings by Swiss financial institutions:
- The outsourcing of a significant business area by a bank or securities dealer does not require FINMA approval provided the requirements of the FINMA Outsourcing Circular (see Question 2) and the DPA are complied with (if one or several requirements are not fulfilled, the bank or securities dealer must apply with FINMA for an exemption before the outsourcing). Courtesy notifications to FINMA should be considered for material outsourcing transactions.
- The outsourcing of core functions or other principal functions of insurance or reinsurance companies with domicile in Switzerland (or Swiss branches of foreign insurance or reinsurance companies) constitutes a business plan change which must be notified to FINMA. Notification should be made by the signing date of the outsourcing agreement and is deemed to be approved by FINMA unless it opens an investigation within four weeks after notification has been made.

Non-compliance with these requirements may result in administrative measures and sanctions.

Notification and/or approval requirements under the Cartel Act and the MCO (see Question 3) must be considered if both:
- An outsourcing transaction results in the acquisition by the supplier of the direct or indirect control of parts of the customer’s business, that is, the supplier is able to exercise a decisive influence over the activities of the customer by the acquisition of rights over shares or by other means (for example, through the acquisition of ownership rights, or rights to use, in the assets of the customer).
- Certain turnover thresholds are met.
LEGAL STRUCTURES

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

Direct outsourcing
The simplest structure is a direct outsourcing by way of an outsourcing agreement between the customer and the supplier. This can comprise one or more separate contracts, dealing with core issues (for example, price and duration) with detailed schedules setting out:

- The staff and assets transferred.
- The services provided (see Question 19).
- Service levels (see Question 20).
- The consequences of failing to meet service levels (see Question 20).

If the proposed supplier is not the main trading entity within its group, or does not have sufficient assets to meet its potential contractual liabilities, a parent company guarantee may be required (see Question 20).

The structure is more complex if the customer procures services on behalf of itself and its group companies. If so, the customer generally does one of the following:

- Enter into the outsourcing agreement on its own behalf and as an agent on behalf of its group companies.
- Include a third-party rights clause to ensure that its group companies have directly enforceable rights under the agreement.
- Include an assignment clause that allows the assignment of the agreement as a whole, or part, or any relevant rights under the agreement within the customer’s group of companies.

A supplier must consider including specific contract provisions controlling multiple actions by the customer and its group companies, setting out their co-operation duties, and ensuring that its liability limitations and exclusions apply to all of them.

If the supplier intends to use subcontractors, the customer is likely to require notification of the subcontractor, and possibly a right of veto over particular subcontractors. The supplier is likely to be required to remain liable for the acts and omissions of its subcontractors. The customer can also seek a contractual right to pay key subcontractors directly or to seek the assignment of key subcontractors to the customer, if the supplier suffers a certain level of financial distress.

Indirect outsourcing
This is similar to a direct outsourcing, except that the customer appoints a Swiss supplier that subcontracts to a supplier abroad. It shares similar advantages and disadvantages, but it is easier for the customer to enforce its rights against the Swiss supplier. However, the resulting level of management and risk sharing may reduce the potential cost savings.

Joint venture or partnership
This involves the customer and the supplier setting up a joint venture company, partnership or contractual joint venture, perhaps operating in an offshore jurisdiction. The customer’s potential advantages under this structure include:

- Retaining of a greater degree of control than in other models.
- Benefitting from the supplier’s knowledge and credibility.
- Sharing profits generated by third-party business conducted by the joint venture.
- Facilitating the transfer to a new supplier, or back in-house, on termination.

However, the joint venture structure is complicated and expensive to set up and maintain.

Captive entity
In this structure, the processes are outsourced to a wholly-owned subsidiary with advice taken from local suppliers on a consultancy basis. This gives the customer direct operational control and may have tax benefits in appropriate jurisdictions. However, there are significant upfront set-up costs and risk cannot pass to a third-party supplier.

Build operate transfer
In this structure, a third-party supplier (perhaps abroad) is contracted to build and operate a facility pending the transfer of the operation to the customer. This is a relatively low-risk model but can be expensive. The customer may ask the supplier to operate the facility in the long term.

Supplier models
Alternatively, a number of suppliers can form a joint venture to supply services on a major project, through a contractual joint venture or a special purpose vehicle. However, complex issues arise in ensuring that risk, liability, reward and tax exposure are shared in the proportions intended by the parties.

PROCUREMENT PROCESSES

6. Please briefly describe the procurement processes that are usually used to select a supplier of outsourced services (including request for proposal, invitation to tender, due diligence and negotiation).

In the private sector, there is no mandatory competitive tender process. It is generally advisable for customers to apply best practice methods and to follow five generic steps:

- Clearly define the strategy.
- Carefully select the partner.
- Clearly define new processes.
- Review service level agreement (SLA) compliance.
- Review outsourcing operations.
To select an appropriate supplier, the customer defines its requirements and produces a long list of possible partners. This is then reduced to a shortlist of potential partners. The number of evaluated partners depends on the nature and size of the outsourcing. Most customers prepare and file a formal request for proposal with several suppliers.

In the contract negotiations with the selected supplier, special consideration is given to (among other matters) the precise specification of services, and the rights of the customer to control and change the service process during the operation of the outsourced business. This is particularly important in cases where actual costs exceed the planned costs.

In the public sector, there is a mandatory competitive tender process if the value of the outsourcing agreement exceeds certain thresholds (see Question 2, Public sector).

**TRANSFERRING OR LEASING ASSETS**

7. What formalities are required to transfer the following assets on an outsourcing:
   - Immovable property?
   - IP rights and licences?
   - Movable property?
   - Key contracts?

While the supplier must generally use relevant customer assets, this can be achieved by granting a right to use the assets (on a shared or exclusive basis) rather than an outright transfer. Retaining title to an asset, licence or contract can give the customer greater protection on the eventual termination of the outsourcing contract.

If a business function is offshored from Switzerland, export restrictions can apply in the case of dual-use goods, that is, goods that can be used for civil and military purposes, which are transferred outside of Switzerland. In addition, offshoring to certain countries can be prohibited due to embargoes or sanctions ordered by the United Nations.

**Immovable property**
Transfer of title to real property must be made by public deed and, in many cases (depending on the nature of the title involved) requires registration. Where the asset is a lease, the landlord’s consent is required.

**IP rights and licences**
A transfer of IP rights must generally be in writing and may require registration of the transfer, depending on the IP rights involved.

The transfer of IP licences should be effected by written assignment. In addition, it may require the consent of the licensor where the licence is expressed as personal or there is an express restriction on assignment. Particular attention is needed where the licence is held in the name of another group company. Allowing third parties to use IP rights may also require consent, even if a transfer is not involved. These issues must be identified and addressed at an early stage.

**Movable property**
A written assignment is usually sufficient to transfer movable property for evidential purposes. Where assets are leased, the transfer may require the landlord’s consent.

**Key contracts**
The transfer of key contracts should be agreed in writing. As with IP licences, any contract to be transferred must be identified at an early stage and its terms reviewed to identify whether the transfer requires the counterparty’s consent (as is usually the case) or not (where approval of the transfer is already given in the contract).

Absent or pending consent of the counterparty to the transfer, if the terms of the contract do not prohibit this, the customer may retain ownership of the contract and allow the supplier to perform the contract in relation to the counterparty as agent of the customer (usually on a back-to-back basis, that is, in a trustee mode with the customer acting as formal contracting party and the supplier bearing the risks and benefits of the contract). The customer must then consider whether the risks of the contract should be further transferred to the supplier, either by:

- Novation (between the supplier and the counterparty).
- Express indemnity (which leaves some residual risk with the customer).

8. What formalities are required to lease or license the following assets on an outsourcing:
   - Immovable property?
   - IP rights and licences?
   - Movable property?
   - Key contracts?

**Immovable property**
A written lease should be entered into as a matter of good practice to record the agreed terms. Where the asset is a lease of real property, the landlord’s consent is required (see Question 7, Immovable property).

**IP rights and licences**
A written licence agreement should be entered into as a matter of good practice to record the agreed terms.

**Movable property**
A written lease should be entered into as a matter of good practice to record the agreed terms.
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Key contracts
The concept of a contract being leased or licensed is not generally recognised. Contractual rights can be assigned, rights and liabilities can be novated, or rights can be exercised and obligations fulfilled by a third party as the contracting party’s agent or subcontractor (subject in each case to the counterparty’s consent, as required). Each of these has a different legal analysis and risk profile, so it is good practice to have a written contract clearly setting out the basis on which this is being done.

TRANSFERRING EMPLOYEES

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

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

Initial outsourcing
In the private sector, where an employer transfers a business (or part of it) to a third party:

- The employment agreements and all rights and obligations derived from them automatically transfer from transferor to the transferee at the date of transfer of the business, unless the employee refuses this transfer.
- The employer and the third party are jointly and severally liable for certain employees’ claims (in particular for claims which have become due before the transfer of the business).
- The employer must inform or consult the workers’ representatives (Article 333, CO).

Article 333 of the CO applies to the transfer of a business, or part of a business, if the business retains essential parts of its identity (that is, its business purpose, organisation and individual character) when infrastructure, operating resources and/or customers are transferred to the transferee. It is essential that the transferee continues or resumes the same or similar business activity. According to court practice and doctrine, “business” is any permanent self-contained organisational unit which is economically autonomous, and “part of a business” is an organisational unit which lacks economic autonomy.

In outsourcings that do not fall under Article 333 of the CO, the transfer of employment agreements requires the consent of each employee.

Change of supplier
See above, Initial outsourcing.

Termination
See above, Initial outsourcing.

10. If employees transfer by operation of law please describe the terms on which they do so, including any effect on pensions, employee benefits or other matters (including collective agreements) that the transfer may have.

General terms
To the extent that employment agreements are automatically transferred to the supplier under Article 333 of the CO, they are transferred on essentially all their existing terms and conditions. After the transfer, the transferee can modify the employment terms (see Question 12).

Pensions
Employers must set up or join a pension scheme for employees who meet certain minimum requirements. The pension scheme is independent from the employer’s business. When employees are transferred under Article 333 of the CO, the employees’ vested benefits under the transferor’s pension scheme are transferred to the transferee’s pension scheme. After the transfer, the employees’ pension benefits are calculated according to the new scheme’s regulations.

If the workforce that forms part of the transferor’s pension scheme reduces substantially, the respective pension scheme must be partially liquidated. The employees then have individual or collective claims to a portion of the non-committed funds (free reserves) in addition to their ordinary claims to the vested benefit.

Employee benefits
The transferred employees keep all contractual benefits related to their employment agreements (for example, share option plans, benefits granted for years of service and accrued holiday entitlements).

Other matters
The transferee must comply with any collective agreements that apply to the transferred employees immediately before the transfer for one year after the transfer (unless the collective agreement expires earlier or is terminated by notice).

Both the transferor and, on completion of the transfer, the transferee may in principle make transferring or transferred employees redundant, subject to compliance with the applicable notice period. The employer’s freedom of termination, which is a signature feature of Swiss employment law, is in principle not affected by a transfer of business (see Question 17 for a particular restriction). In the event the notice period of terminated employees has not expired on completion of the transfer of business, these employees will transfer, and will be employed by the transferee for the remainder of the relevant notice period.

11. How is redundancy pay calculated?

In general, Swiss law does not require the employer to pay severance or specific redundancy pay in case of dismissal. Therefore, in the absence of severance payment agreed in
an individual employment agreement, collective bargaining agreement or social plan, the employer must simply continue to pay regular salary and benefits during the relevant notice period.

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

The transferor must not terminate the employment agreement in connection with the transfer of a business (or part of it), and simultaneously arrange for the offering of new employment agreements with the transferee on the transferee’s terms and conditions. This would avoid the employees’ protection rights under Article 333 of the CO.

However, after the transfer, the transferee can modify the employment agreements (and harmonise them with those of its existing workforce) with immediate effect if either:

- The change relates to formal (non-material) aspects only.
- The transferred employees consent to the change.

The transferee can also terminate the employment agreements (by giving contractual notice) and offer new agreements on changed terms of employment (constructive dismissal). The new terms can enter into force only once the notice periods have expired.

Collective agreements can exclude or restrict the employer’s termination rights in a transfer of all or part of a business. Special rules apply to occupational pension schemes (see Question 10, Pensions).

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

Generally, dismissals can be implemented before or after an outsourcing if the party giving notice complies with the contractual notice period and applicable employment regulations and collective agreements. However, employees are protected against untimely termination of employment (for example, in case of illness, accident or pregnancy) as well as against wrongful (abusive) termination, such as:

- An unlawful avoidance of the employees’ protection rights under Article 333 of the CO (see Question 12).
- Non-compliance with the consultation obligations required for a mass dismissal (see Question 17).

Untimely termination of employment is null and void. Wrongful termination is valid, but the employer must indemnify the employee up to six times the employee’s monthly salary.

14. To what extent can particular services only be performed by a local national trained in your jurisdiction?

Certain professional activities are subject to a licence or authorisation requirement. Citizens of the EU member or EEA states may exercise these professions provided they have valid professional certificates in their respective countries of citizenship. Certain restrictions apply for the new EU member countries. Citizens of non-EU/EEA member states must obtain a work permit before performing work in Switzerland, which is granted (on a quota basis) to employees with certain qualifications and particular skills.

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

If Article 333 of the CO applies, employment agreements transfer to the transferee as a matter of law. A contractual clause which provides that certain employment agreements (which belong to the business) do not pass on to the transferee (and that the employee remains an employee of the customer) is invalid.

If Article 333 of the CO does not apply, the parties can arrange an outsourcing as a secondment. Employment agreements must meet certain material and formal requirements. In addition, depending on the circumstances of the case and, in particular, on the number of the seconded employees, the secondment can qualify as professional leasing of personnel. If so, the employer must obtain authorisation for the secondment from the competent authorities.

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

There is no statutory rule on information the transferor and the transferee must exchange during an outsourcing. However, for a smooth transition of the outsourced parts, the outsourcing agreement must at least set out:

- Which employment agreements transfer to the transferee.
- The duty of each party to pass to the other party any employees’ termination notices.
- The duty of the transferor to pass the personnel files to the transferee at the date of the transfer.

However, in view of applicable data protection provisions (see Question 18), the exchange of information is limited to information:

- On whether the employees meet their job requirements.
- That is necessary for the performance of employment agreements.
17. Please describe any notice, information and consultation obligations which arise for the transferor and the transferee in relation to employees or employees’ representatives.

In the case of a business transfer under Article 333 of the CO (see Question 12), the transferor and/or the transferee must:

- Inform the employees’ representative body (or, if no such body exists, the employees) before the transfer of the business (or part of it) of both the:
  - reasons for the transfer;
  - legal, economic and social consequences of the transfer on employees.

This information can be given after all relevant decisions have been taken, contracts signed and a public announcement of the outsourcing made (but before the outsourcing is implemented).

- Consult the employees’ representative body before the decision is made (or, if no such body exists, the employees) if, in connection with the outsourcing, measures affecting the employees are planned, such as dismissals or salary cuts. This consultation obligation requires the transferor and/or transferee to hear the employees, but it is not clear whether there is an obligation to discuss with them or explain why counterproposals are not being considered.

The relevant legislation does not set out specific rules on the duration of the information and consultation procedure. In practice, a consultation period of at least ten business days should be sufficient. The law does not state the consequences for not complying with these information and consultation obligations. Under legal doctrine, the business transfer and measures affecting employees (including termination of employment contracts) remain valid.

The employer has additional information and consultation obligations if there are mass dismissals in connection with an outsourcing. These apply if the following number of employment agreements are terminated by the employer for economic reasons:

- More than ten agreements if the transferor employs between 20 and 100 employees on a regular basis.
- More than 10% of all employment agreements if the transferor employs between 100 and 300 persons on a regular basis.
- More than 30 agreements if more than 300 persons are employed on a regular basis.

If the employer does not comply with consultation obligations, it could be liable for penalty payments for unfair dismissals and damages.

18. Please outline any applicable legal or regulatory requirements and issues which may arise on an outsourcing. How are they typically dealt with in the contract documentation?

### DATA PROTECTION

#### Data protection and data security

Any data subject is protected from its personal data being processed in a way that is not in compliance with the law or made for purposes other than the ones communicated to the data subject, unless the data subject approves this data processing (or unless another statutory justification applies).

However, personal data may be given to outsourcing suppliers based on a contract or the statutory law if the customer ensures that the supplier will only process data in a way that the customer is itself entitled to, and that the supplier will comply with the applicable data security standards, and if no statutory or contractual secrecy obligations prohibit this data processing.

The data subject’s approval (or another statutory justification) is required if the customer transfers to the supplier either of the following:

- Sensitive personal data such as:
  - religious, philosophical, political or trade union-related opinions or activities;
  - health;
  - sexuality;
  - racial origin;
  - social security files; or
  - criminal or administrative proceedings or penalties.

- Personality profiles, that is, a collection of data that allows the assessment of a natural person’s essential personality characteristics.

The Swiss Federal Data Protection and Information Commissioner (FDPIC) must be notified of a data file (defined as a collection of personal data whose structure facilitates a search for data on a particular individual):

- If any sensitive personal data or personality profiles are regularly processed in the file.
- If any personal data is regularly transferred to a third party (supplier) and used by such third party (also) for its own purposes.
- Unless one of the statutory exemptions applies (for example, designation of internal data protection officer or certification with data protection quality mark).

#### Cross-border flow of personal data

If, in the context of an export of personal data out of Switzerland, the data subjects’ privacy could be jeopardised because the other country’s legal framework does not provide adequate data protection standards and if no statutory or contractual secrecy obligations prohibit this data processing, the data subject’s approval (or another statutory justification) is required.
The transferor can only export the data if it complies with certain requirements of the DPA to ensure adequate data protection. In the context of an outsourcing, the parties must either:

- Obtain the consent of each data subject individually.
- Put measures in place to ensure that the data is adequately protected in the relevant jurisdiction, such as:
  - sufficient contractual guarantees;
  - binding corporate rules (BCR), provided both:
    - the outsourcing takes place within a legal entity or among legal entities under common control; and
    - all involved parties are subject to the BCR.

Generally, the parties must inform the FDPIC of any contractual guarantees or BCR before the transfer. However, the FDPIC has issued a standard model contract and approved certain model data protection clauses (all such documents are accessible on its website). If the parties use these models, they need only notify the FDPIC that they are using them.

The FDPIC has published a list of jurisdictions on its website which do not provide adequate data protection.

**Banking secrecy**

Article 47 of the Banking Act regulates banking secrecy, which protects bank customer-related data from disclosure to third parties. If in an outsourcing transaction the customer is subject to banking secrecy, the written outsourcing contract with the supplier must set out, among others, security requirements and the supplier's obligation to comply with business, banking and professional secrecy rules. Any disclosure of non-encrypted data to a supplier is only allowed with the express prior consent of each banking customer (see Question 2).

**Confidentiality of customer data**

The FCC sets out certain provisions relating to business secrecy and professional secrecy which may also cover customer data. The written outsourcing contract between the supplier and the customer must bind the supplier to comply with such business secrecy and confidentiality provisions. Any disclosure of data protected under these provisions to a supplier is only allowed with the express prior consent of each affected party. The same applies to information protected by contractual confidentiality obligations.

**SERVICE SPECIFICATION AND LEVELS**

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

The parties usually draft the services specification together, although the supplier often takes the lead, based on its previous experience in similar projects. The specification should be as detailed as practicable, and as far as possible finalised before the contract is signed.

The customer’s requirements can be attached to the contract as a separate schedule, for example, where the parties agree to develop a detailed specification as part of the services after signature of the contract. In these circumstances, there is usually an obligation on the supplier to ensure the services specification is developed to reflect the customer’s requirements and the customer’s requirements, are stated to take precedence over the service description.

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

The parties usually identify and agree a set of objective criteria by which performance can be measured (key performance indicators (KPIs)). These service levels (for example, that deliveries of products in a logistics contract are made within specific time periods, or that telephone calls to a call centre will be answered within a defined period) are combined with:

- A process for recording and reporting on success or failure to achieve the targets.
- A formula under which financial compensation is credited or paid to the customer if targets are not met (for example, variance from the required level of performance by a specified percentage). These are referred to as service credits or penalties (liquidated damages).

Service levels and service credits can form part of the services specification or a separate schedule to the main agreement (in a service level agreement).

Generally, service credits are set-off (credited) against the fees otherwise payable to the supplier. They are usually relatively modest. The aim is to:

- Partially compensate the customer for poor service without the need to pursue a claim for damages or terminate the agreement.
- Motivate the supplier to meet performance targets.

Service credits should (if applicable) be expressed to be the sole and exclusive remedy of the customer for the particular failure concerned, but this should be without prejudice to the customer’s wider rights in relation to more serious breaches of the agreement or persistent performance failures, both of which should also be dealt with (see Questions 32 and 33).

Establishing a baseline against which the service credits are measured can form part of the due diligence preceding or following contract signature.
CHARGING METHODS AND KEY TERMS

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

Different approaches to charging are adopted depending on, among others:

- The type of service provided.
- Whether the supplier is appointed on an exclusive basis.
- Risk allocation between the parties.

Typical outsourcing contracts adopt one, or a combination, of cost plus, fixed price and pay as you go.

Cost plus
Under this method, the actual cost of providing services is charged together with an agreed profit margin. There are usually additional provisions to ensure costs are assessed on an agreed and transparent basis, which can be reviewed by the customer (open book), and that indirect costs (such as overheads, or the cost of investment in new assets that are amortised over a specified period) are included on an agreed basis. The customer usually insists on including measures to control costs, such as:

- External third-party review to establish typical market prices (benchmarking).
- Pre-agreed inflation adjuster to regulate price increases or decreases (indexation).
- Measures to share cost savings between the parties and provide an incentive to the supplier to achieve these.
- Mechanisms to assess and agree the cost impact of changes in the scope or level of services (charge variation mechanisms).
- A mechanism for agreeing annual budgets, which must then be adhered to, subject to permitted variances.

Fixed price
A fixed price is often used where there will be a regular and predictable volume and scope of services (for example, payroll) and the customer wants certainty for budgeting purposes.

Pay as you go
Pay as you go means paying at a pre-agreed unit price for specific items of service (such as volumes of data processed or deliveries made) and perhaps adding, from the supplier’s perspective, minimum fees. This structure is often used where the level and volume of services is less predictable.

Particular consideration must be given to how (if at all) the supplier can recover its implementation costs (for example, as a specific item of charge, linked to the achievement of measurable milestones/targets, or in an agreed manner over the life of the agreement).

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

The main terms used in relation to costs are charge variation mechanisms, indexation, benchmarking and KPIs (see Questions 20 and 21).

CUSTOMER REMEDIES AND PROTECTIONS

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

The customer has a number of remedies, including:

- Price reduction.
- Restitution for damages.
- Specific performance (available at the discretion of the court).
- Termination.

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

Protection typically included in contracts deal with situations where the supplier fails to perform its obligations, such as:

- A detailed measurement of service performance (often by reference to KPIs) and reporting of actual and foreseeable problems, usually combined with audit rights.
- Service credits or similar (see Question 20).
- Indemnity from the supplier for loss suffered by the customer in specified circumstances.
- Other forms of financial penalty, such as loss of exclusivity or a reduction in the minimum price payable to the supplier.
- Step-in rights.
- Specific provision for termination in defined circumstances (for example, material breach and insolvency) (see Question 31).
- A requirement for the supplier to have insurance (for example, for damage to persons or property) and note the customer’s interest on the insurance policy (if accepted by the insurance company).
- A parent company guarantee.
- An appropriate governance or escalation structure under which each party appoints specified relationship managers to manage problem areas and to escalate them to higher levels if solutions cannot be easily found.
WARRANTIES, INDEMNITIES AND INSURANCE

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

Swiss law categorises a number of different types of undertaking or obligation, such as conditions, representations, warranties and indemnities, each of which has different consequences (for example, as to whether the aggrieved party will be entitled to terminate for breach or non-fulfilment). These terms must be used with care to achieve the desired consequence. Indemnities, in particular, are likely to be the subject of detailed negotiation between the parties.

Typical supplier obligations are to:
- Warrant that it is entitled to enter into the agreement and perform its obligations.
- Perform the services with reasonable skill and care, in a timely and professional manner and in accordance with applicable laws and recognised industry standards.
- Indemnify the customer against harm suffered due to the supplier’s actions. This may be limited to harm suffered due to default (for example, wilful misconduct, negligence or breach of contract) or may extend to situations where the supplier’s liability is not based solely on fault (for example, if performance of the services infringes third-party IP rights).
- Indemnify the customer against future liability in relation to employees transferred to the supplier as part of the outsourcing.
- Warrant that material information provided in the pre-tender and tender stages was, and remains, accurate, complete and not misleading (for example, that the statements made about its services or its financial resources are true).
- Give other assurances specifically related to the project or type of services (for example, that the supplier has particular accreditations or operates in accordance with a particular quality assurance system or audit standards, such as SAS 70 Type II). Many of these can be covered by specific contract terms (for example, in the SLA) rather than in the warranties section.

Typical customer obligations are to:
- Confirm it is entitled to enter into the agreement and perform its obligations.
- Confirm the information provided during the pre-tender and tender stages is accurate, complete and not misleading.
- Give assurances concerning title, condition and maintenance of assets transferred to the supplier, including the absence of outstanding liabilities under transferred contracts (although there may be negotiation as to how far the customer will transfer these “as is”).
- Indemnify the supplier against historic liability in relation to employees transferred to the supplier as part of the outsourcing.

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

Swiss law implies that goods must be fit for purpose and of satisfactory quality and that services must be performed with reasonable skill and care.

To the extent possible (see Question 35), these terms are often specifically excluded in the agreement and replaced by specific wording, with the intention that the agreement should set out all relevant warranties (see Question 25).

27. What provisions may be included in the contractual documentation to protect the customer or supplier regarding any liabilities and obligations arising in connection with outsourcing, including those relating to employee arrangements?

The outsourcing contract typically contains indemnity obligations of the supplier to safeguard the customer against certain liabilities and obligations, such as third-party proprietary rights infringement, and indemnity against future liability of the customer in relation to employees that have been transferred to the supplier as part of the outsourcing.

Common mechanisms in the outsourcing contract to protect the supplier are liability caps, including the right of the supplier to terminate the outsourcing contract if a defined aggregate liability amount is reached, and force majeure provisions which may result in the suspension (and, under certain circumstances, cancellation) of one or several of the supplier’s contractual obligations where certain events beyond the parties’ reasonable control occur.

28. What types of insurance are readily available in your jurisdiction, and to what extent?

Personal liability and property insurance, which is readily available in Switzerland, cover liability arising from death or personal injury and damage to property. Damage to real property caused by fire, water and other elemental damage is covered by (mandatory) state building insurance.

Other readily available insurance includes:
- Professional liability insurance.
- Corporate liability insurance.
- Directors’ and officers’ liability insurance.
- Legal protection insurance.
TERM AND NOTICE PERIOD

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

Generally, Swiss law does not impose any maximum or minimum term on an outsourcing. The arrangement’s duration is negotiated between the parties. Outsourcing arrangements typically last for a fixed term of three to ten years (although there may be provision for automatic renewal on a rolling annual or bi-annual basis if a party does not give notice of termination, and assuming inclusion of a mechanism for reviewing charges).

Under Swiss competition law, in certain circumstances, long-term supply agreements that include exclusive or minimum purchase or supply obligations can be problematic. Vertical agreements containing exclusive purchasing obligations (mutual or one-sided) or certain minimum purchasing obligations require competition law review, in particular if that obligation is for a term of five or more years.

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

Swiss law does not regulate the notice period required to terminate an outsourcing agreement. This is left to the parties to specify in the agreement. The length of notice can vary according to the grounds for termination. In a material breach or insolvency event, a short notice period is likely to be the only practical solution, although usually subject to a cure period for breaches of contract. However, as a matter of Swiss law, any long-term agreement can be terminated with immediate effect for important reasons which make it unreasonable for the aggrieved party to uphold the agreement.

Generally, the nature of an outsourcing arrangement means that an extended notice period is often desirable for the customer to make alternative arrangements. Mechanisms should be included in the agreement that oblige the supplier to continue to perform services during the notice period and to co-operate in the transfer to a replacement supplier (or to bring the services back in-house) by way of termination assistance, phase-out and migration.

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

The parties are free to agree on specific termination rights, which may exclude or extend rights implied by general law. Examples include:

- Breach of the agreement. Typically, the breach must be material and there is usually a cure period in which the aggrieved party gives written notice of the breach and allows the counterparty a reasonable period to remedy it (often 30 days or more).
- Minor but persistent breaches (with the type of breach and number of breaches needed to trigger the termination right defined in the agreement).
- Insolvency (with the definition of insolvency set out in the agreement).
- Change of control (ultimate ownership) of the supplier.
- Termination for convenience by the customer on notice. This allows the customer to switch suppliers without having to give a reason (for example, if it is generally dissatisfied but unable to demonstrate any clear breach). This is usually an expensive option because the supplier often requires compensation for early termination.

TERMINATION AND TERMINATION CONSEQUENCES

31. What events justify termination of an outsourcing without giving rise to a claim in damages against the terminating party (for example, fundamental breach, repudiatory breach, insolvency events and so on)?

The following events are generally considered to be sufficiently serious to justify immediate termination:

- A particularly severe breach that makes it unreasonable for the aggrieved party to uphold the agreement.

- The insolvency of the other party so that it is unable to perform.
- The filing for bankruptcy or composition proceedings, or the appointment of an administrator, over the other party.

However, it is normal to include specific provisions for termination events in the agreement (see Question 32).

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

Where the customer licenses IP rights to the supplier in connection with the outsourcing, continued use of those rights by the supplier post-termination is generally regulated by the terms of any specific licence (either in the main agreement or a separate document). The customer is usually reluctant to agree a continuation unless it receives some benefit.

Where there is no specific agreement and a licence is implied for performing the services, it is generally implied that the licence ends post-termination. The parties can (and should) make specific provision to regulate how far either will remain entitled to use the IP rights of the other post-termination.
34. To what extent can the customer gain access to the supplier’s know-how post-termination and what use can it make of it?

To the extent that the supplier’s know-how is covered by specific IP rights, see Question 33.

Where the know-how is part of the supplier’s confidential information, there is usually an express undertaking from the customer to maintain the information in confidence and use it only in connection with the agreement. However, to the extent that the know-how is the skill and experience of employees engaged in performing the services, and the employees transfer to a new supplier (or back to the customer) under Article 333 of the CO, the customer is entitled to benefit from these skills, except for specific confidential information.

Where the supplier develops know-how (or IP rights) during the term of the agreement for use in the performance of the services, or otherwise embeds its IP into the assets and systems of the customer, the customer usually requires a written licence to continue using this know-how after termination.

LIABILITY, EXCLUSIONS AND CAPS

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

The parties are generally free to exclude most forms of liability, subject to the following exclusions and limitations:

- An exclusion or limitation of liability for gross negligence or wilful misconduct (such as fraud) is not enforceable and should be carved out from any general exclusion or limitation of liability.
- It is not possible to exclude or limit liability for death or personal injury resulting from a negligent breach of contract.

Subject to this, a supplier (and usually also the customer) aims to exclude liability for indirect and consequential loss or damage. The supplier also seeks to exclude liability for loss of business, profit or revenue, where these constitute a direct loss or damage. In contrast, the customer usually tries to ensure that it can recover all of its direct loss or damage (including direct loss of profit, business and revenue) under the agreement and can specify particular categories of loss which are recoverable to clarify that these constitute direct loss or damage. This is subject to negotiation in practice.

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

The parties can agree on a financial limit on liability, subject to the limitations set out in Question 35. This can be a fixed amount, or a percentage or multiple of the contract value.

It is important to define contract value when using this approach and to identify any areas where the liability must not be subject to a cap (for example, the supplier’s indemnity in relation to IP rights is often unlimited).

The supplier must ensure the drafting of the cap does not restrict its right to recover for non-payment of charges that are properly due to it from the customer.

TAX

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

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

Transfers of assets to the supplier

The transfer of assets can trigger:

- Corporate income taxes.
- Real estate transfer tax.
- VAT.

In addition, withholding tax consequences can result for the customer if transfers are made below fair market value to a supplier that is a related party. However, in practice these tax consequences are not a significant concern, as usually only a few assets of value, such as IT equipment, are transferred.

From a Swiss VAT perspective, every transfer of assets to the supplier constitutes a supply of goods or services and is, in principle, subject to VAT. If transferred assets are part of a transferred business unit, VAT may be notified (Meldeverfahren) and need not be paid. However, even if VAT is chargeable on the transfer, it is usually not a significant issue, as the purchase price for transferred assets will often be minor and, in addition, the supplier can usually reclaim charged VAT in full.

Transfers of employees to the supplier

The supplier is responsible, as the new employer, for the payment of any source income tax (Quellensteuer) and social security contributions due on services rendered by the transferred employees after the date of transfer.

Any secondment (as applicable) of employees by the customer to the Swiss supplier is subject to VAT.
VAT or sales tax
In most cases, outsourced services supplied by the supplier to the customer trigger a VAT charge. If the customer's turnovers are subject to VAT, this will usually be of little concern as the customer is entitled to reclaim charged VAT in full.

However, if the customer's turnovers are not fully subject to VAT (for example, if the customer is an insurance, bank or healthcare company), the outsourcing may give rise to substantial additional VAT costs, as the customer can only partially reclaim VAT charged by the supplier.

For the purposes of VAT, any set-off of purchase price for assets transferred to the supplier against fees for services supplied by the supplier leads to VAT liability on the gross consideration of each supply (and not only on the net consideration paid). The price of each supply should therefore be specified in the relevant agreements.

Service taxes
Providing services in Switzerland does not trigger service taxes. However, services are subject to VAT where the principles above apply (see above, VAT or sales tax).

Stamp duty
The following taxes can apply:
- Securities issuance stamp tax on the issue (primary market) of certain Swiss securities (such as shares, participation rights and bonds).
- Securities transfer stamp tax on the transfer of these securities (Swiss and foreign securities) (secondary market).
- An insurance premium tax on certain insurance premiums.

However, by solely outsourcing services to a third-party supplier, usually none of these taxes will be triggered.

Corporation tax
As a rule, service fees charged by the supplier qualify as deductible expenses for corporate income tax purposes.

However, where the supplier is a related party, the service fees charged must meet arm's-length criteria. To the extent these charges exceed fair market value, they qualify as hidden dividend distribution subject to 35% withholding tax and not deductible for corporate income tax purposes.

Other
In international outsourcings, tax planning considerations must be made to avoid double taxation, avoid or reduce source income taxes and, in the context of an intra-group outsourcing, identify tax optimising measures.

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- Advised Xerox Ltd in the provision of multi-year outsourcing services for transactional and production printing for SIX listed Swiss private bank Bank Sarasin & Cie AG as well as for GE Money Bank, a subsidiary of US based General Electric Corporation.
See the deal through

With so much at stake in an outsourcing transaction, only the best possible legal expertise will get the job done. As Switzerland’s largest business law firm, we have advised on many of this country’s most important transactions. If you want your deal guided to a successful conclusion, consult the market leader.

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