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Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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General Chapter:

Country Question and Answer Chapters:

Structuring a Multi-Jurisdictional Outsourcing Deal

Bird & Bird LLP

Mark Leach

Introduction

In today's globalised economy it is not surprising that many organisations are looking to outsource services and functions across more than one country at a time. Indeed, for many multi-national businesses the ability to undertake an outsourcing project on an international scale is often a key factor in enabling them to leverage their purchasing power and unlock the potential cost savings and service improvements that outsourcing promises. However, while any outsourcing deal is a complex undertaking, a multi-jurisdictional project brings particular challenges. This article discusses some of those challenges from a legal point of view and looks in particular at how best to structure the contractual arrangements that will need to underpin a deal of this kind.

What is a Multi-jurisdictional Outsourcing?

First of all, however, it may be helpful to clarify what exactly we mean by a multi-jurisdictional outsourcing project. In broad terms, such a project will usually take one of two forms:

- an arrangement whereby services currently being provided in a number of different territories are transferred to a Service Provider as part of the same deal. This will often involve the provision of services by different entities within the Service Provider's group in particular local territories – e.g. services in the UK are transferred to the Service Provider's UK subsidiary and services in Germany are transferred to the Service Provider's German subsidiary; or
- a deal whereby services from a number of different territories are transferred to a Service Provider entity located in a single alternative territory. Under this kind of arrangement, a Customer organisation might, for example, transfer its finance and accounting functions across, say, the Western European region to a shared service centre based in a Central or Eastern European country. The services are then provided remotely from this centre to multiple countries.

The common feature in these arrangements is the Customer's wish to transfer responsibility for its service requirements to a third party service provider in a number of different territories or regions at the same time.

It is helpful to distinguish these kinds of arrangement from the situation where a Customer outsources services from one country to another – a process typically referred to as 'offshoring' and most commonly associated with the outsourcing of certain IT, call centre and business process functions to 'low cost' jurisdictions such as India or China. While these types of deal will sometimes involve the transfer of services across a number of countries at the same time and so bear similarities to the second type of deal mentioned above, they more often simply involve the transfer of a service delivery activity from a single country to another. This article focuses on the challenges involved in structuring the first two types of multi-jurisdictional deal referred to above and does not discuss in detail this kind of single country offshoring.

Key Challenges in Multi-Jurisdictional Outsourcing

One of the biggest challenges in building the right contractual structure for a multi-jurisdictional outsourcing project is the need to achieve the right balance between central co-ordination and local variations. For practical reasons, deals will usually be led, negotiated and then managed from a central 'core' jurisdiction. This is essential if a Customer is to be able to negotiate a commercial deal that delivers its business case benefits and is not diluted by a myriad of local variations. Similarly, in order to manage the transition and 'steady state' delivery of the services on an ongoing basis, a Customer must retain a degree of central oversight and co-ordination.

On the other hand, in most multi-jurisdictional deals the exact service requirements of each in-scope territory are likely to vary from country to country. As a result, certain territories may require a different service description and, in some cases, a different service level regime. Equally, the specifics of the service transition and exit arrangements and the business continuity and disaster recovery arrangements are also likely to vary depending on the way in which services are configured locally and the nature of the Customer's local estate. Similarly, when it comes to managing an outsourcing project it will not be possible to do everything from the centre – some degree of local management and day-to-day contact between the representatives of the Customer and Service Provider who are on the ground will also be necessary. Critically, there will also be local law considerations to take into account, which may impact on the way in which assets, third party contracts and employees can be transferred and the services provided in particular jurisdictions.

Optimum Contract Structures

An optimum contract structure for a multi-jurisdictional outsourcing should ideally reflect the need to achieve this balance. One of the best ways to do this is to adopt a structure which features a master or global services agreement which contains the main over-arching terms of the deal but also serves as a framework under which subsidiary agreements can be called off. These subsidiary

agreements (which we will refer to in the rest of this article as Territory Agreements) will tend to relate to a particular jurisdiction or a group of closely related jurisdictions and provide a means of dealing with any local variations.

This approach allows the parties to deal in particular with the impact of local legal regimes. While it is advisable to choose the same governing law across both the master services agreements and the Territory Agreements in order to ensure consistency of interpretation and a standardised approach to enforcement, there will be some local laws which will still apply notwithstanding such a choice. These are generally known as mandatory laws and cannot usually be opted out of. It is important to recognise the existence of these local laws as they can impact significantly the implementation of the global deal in a local jurisdiction. On occasion, the presence of such laws may mean that a particular element of the deal simply cannot be given effect, but more often they will require the parties to structure things slightly differently or recast a particular provision in order that the parties' intentions can be given full effect. The Territory Agreement can provide the ideal vehicle for the parties to do this.

The other key factor in choosing an optimum contract structure is tax. A detailed discussion of the tax issues that may apply in a global outsourcing transaction is beyond the scope of this article, but issues that commonly arise relate to the creation of a permanent establishment, VAT and withholding taxes. It is essential that the parties take local tax advice at an early stage in the process so as to ensure that they are aware of the potential impact of any relevant tax rules and to enable a tax-efficient structure to be implemented. Again, the use of a Master or Global Services Agreement with Territory Agreements tends to provide maximum flexibility to the parties in this regard.

Master or Global Services Agreement (MSA)

The MSA will usually be the vehicle through which the main commercial terms are agreed and documented. It will set out the objectives of the project and the pricing model and main commercial terms, together with the key customer and service provider contractual protections and the provisions allocating liability and risk between the parties. It will also often include a global service description that will serve as a baseline scope for the services to be provided by the Service Provider across all territories and a set of global service levels.

While some Territory Agreements will often be entered into at the same time as the MSA is signed, there will usually be a need for the cut over of service responsibility to the Service Provider to be phased over time to avoid the risks inherent in a single go-live date across multiple territories. As a result, the MSA will typically include a procedure for further Territory Agreements to be called off over time to reflect such a phased cut-over approach and also to provide the flexibility for other territories that are not within the original scope of the project to be added if the Customer's requirements change in the future. The procedure will usually include a template form for the Territory Agreement to follow.

Territory Agreements

The Territory Agreements will typically cover two aspects: (1) the transfer of local assets, third party contracts and employees to the Service Provider at the outset of the project; and (2) the ongoing provision of local services. Sometimes these aspects are dealt with in separate agreements, sometimes in the same agreement.

Transfer of assets, third party contracts and employees

As well as the transfer of responsibility for the provision of services, many outsourcings will also involve the transfer to the Service Provider of certain assets (such as equipment), real estate or third party contracts together with certain employees who are currently predominantly engaged in the provision of the relevant services.

As far as assets are concerned, the Territory Agreement should document which assets are in the scope to transfer at the local level and also deal with any local law formalities that may apply in order to achieve an effective transfer. For example, in some jurisdictions a particular form is required for the transfer of tangible assets and the documentation effecting the transfer needs to be notarised. In other jurisdictions, certain rules can be triggered if the transfer constitutes the transfer of the whole or part of a business. Similarly, the legal means by which a contract can be transferred from one person to another also varies by jurisdiction and this needs to be reflected in the Territory Agreement.

The law relating to the transfer of ownership or interests in real estate is also typically complex and jurisdiction-specific, and, accordingly, the transfer of any local property will need to be carefully addressed on a territory by territory basis.

The most significant issues usually arise in relation to the transfer of employees. The differences in the application of local law in this area can have a material impact on the way in which a deal must be structured. A key distinction to be aware of is whether a transfer of employees must be effected in the relevant jurisdiction by means of a (freely given) acceptance by an employee of an offer of employment or whether, as is the case under the Acquired Rights Directive in the European Union, the relevant employees are deemed to transfer automatically by operation of law if the business or undertaking that they are working for is effectively transferring to the Service Provider as part of the outsourcing. The answer to this question will clearly affect how the provisions dealing with the transfer of employees are drafted in relation to a particular territory. It is also worth pointing out, however, that even within the European Union there are significant variations in the details of how the Acquired Rights Directive has been implemented in different European countries. As a result, it is not possible to assume that an entirely uniform approach can be taken even within the EU area and, as a result, the identification of which employees are in scope to transfer and the associated consultation and other obligations will need to be reviewed on a territory by territory basis.

Provision of services

The Territory Agreement will also govern the ongoing provision of services at a local level following any initial transfer of assets, contracts or employees. In this regard, the Territory Agreement will generally incorporate all the terms of the MSA so that the local provision of services is governed by the over-arching terms and conditions that have been agreed centrally but, as with the transfer of assets, will also include any variations that may be required from the perspective of local mandatory law. Areas where local laws tend to impact on the provision of services typically include the following:

- **Regulatory consents to outsource**: Customers in particular industry sectors, such as financial services for example, are likely to be subject to local regulatory requirements in terms of outsourced activities and these will need to be reflected in the relevant Territory Agreement.

- **Licences/consents to provide service**: linked to the above, the Service Provider may require particular consents and licences in order to provide services in certain territories, but not in others.
- **Enforceability of terms and conditions**: it is sometimes the case that particular terms that may have been agreed as part of the 'global' deal in the MSA will not be enforceable in a particular territory. Examples in certain jurisdictions may include certain limitations or exclusions of liability or common warranties that might apply to the provision of services, such as those relating to fitness for purpose or satisfactory quality. In some circumstances, terms may need to be amended or a particular formality followed in order to give effect to the parties' intentions at a local level and in other cases an alternative approach may need to be suggested altogether. The key in each case, however, should be to make only such changes as are necessary to ensure the enforceability of the parties' original intentions or something as close to those original intentions as possible, rather than seeking to re-open commercially agreed points in order to achieve a further advantage.
- **Intellectual property**: the law relating to the ownership, transfer and use of intellectual property tends to vary by jurisdiction and this will be an important area in many technology outsourcings. Potential areas to be aware of include restrictions on the ability to transfer certain IP rights, the implying of certain licences to use by commercial code or local statute and formalities required to achieve an effective transfer of IP ownership (for example, in some jurisdictions this must be done in writing and a specific form of wording is required).
- **Data protection**: where a Service Provider is processing personal data as part of the provision of services, local data protection law will need to be taken into account. In the European Union this is another area where the implementation of European Directives has differed from country to country leading to a number of traps for the unwary. In some territories, for example, data protection legislation extends to information about corporate persons and not just individuals and rules governing who is considered to be the data controller in respect of personal data can also vary. Generally speaking, data protection law will require certain provisions to be included in a services contract where a third party outsourcer is processing personal data and the nature of these requirements will need to be checked on a country-by-country basis. A further complication is introduced where personal data is being transferred to another territory, as is common in many multi-jurisdictional outsourcings. In this scenario, the parties will need to ensure that they comply with the data transfer requirements of the country from which the personal data is being exported – and, again, these can vary from territory to territory. For instance, some territories will simply require particular contracts to be put in place between data exporter and importer, whereas in other territories the local regulator may require a more formal notification and approval process to be followed, something which can have significant practical consequences for the deal timetable.

In addition to the legal requirements that will apply at a local level, thought also needs to be given to more practical and operational questions.

Service descriptions: it is likely that the Customer's local operations will require certain variations in the nature of the services it requires and hand off points and dependencies may also be different. These kind of technical issues need to be identified at an early stage and, critically, tested to see where a local request reflects a genuine requirement, rather than a 'nice to have'. A certain amount of caution is needed in this area if the Customer is not to lose much of the cost and business benefits that a greater degree of standardisation in service provision will provide. However, where local variations are genuinely required, these can be reflected in the relevant Territory Agreements.

Governance: as will have become clear from many of the points made above, it is essential that the Customer organisation implements a governance structure that enables clear and efficient communication between the co-ordinating territory and the other territories which will be benefiting from the deal. This is important both during the RFP and deal negotiation stages and during the implementation and 'steady state' running of the outsourcing. While a full discussion of how best to optimise a governance structure lies beyond the scope of this article, some of the key principles that should be reflected in the context of a multi-jurisdictional deal are as follows:

- a requirement that local subsidiaries or divisions do not engage in disputes without reference to or obtaining the approval of the central co-ordinating entity;
- appropriate provisions in the change control procedures that include escalations to the global level to prevent any local variations undermining the master terms;
- where issues do arise and the centre agrees that escalation is appropriate, a facility for those issues to be dealt with locally in the first instance and then escalated to the central level if the issue cannot be resolved at the local level; and
- clear reporting lines from local territories to the centre and frameworks which facilitate good quality data and management information being made available in a timely fashion.

To underpin any governance framework, the Customer should ensure that it retains (or recruits) a sufficient number of appropriately skilled personnel to manage the Service Provider – both at central and local levels. As is often noted, managing a Service Provider and the delivery of services from a third party requires a different skill set form managing the delivery of those services internally and, as with other types of outsourcing project, weaknesses in the retained organisation are a common source of problems in multi-jurisdictional outsourcings.

The Importance of Preparation

In closing it is worth emphasising that, in order to be aware of the issues that need to be addressed in the Territory Agreements described above, the parties need to undertake timely and thorough local due diligence. As well as taking advice on the impact of existing local laws, attention should also be given to any impending or likely future changes in law that might affect the terms of the deal further down the road. While this may seem obvious, the desire to get a deal done quickly and to minimise internal project costs often creates a pressure to cut corners in this area. However, failure to appreciate, for example, the longer timeframes required for employee consultations to take place in a particular territory or the requirement to obtain regulator consent to the transfer of personal data can have a significant impact on a deal timetable and the ability for a Customer to realise the projected benefits of a deal within the required timelines and thereby seriously damage the Customer's underlying business case. In a multi-jurisdictional outsourcing, as in much else, good preparation is critical.

Mark Leach
Bird & Bird LLP
15 Fetter Lane
London EC4A 1JP
United Kingdom

Tel: *+44 20 7415 6000*
Email: *mark.leach@twobirds.com*
URL: *www.twobirds.com*

Mark is a partner in our Commercial Group and head of our International Outsourcing Group, based in London.

He specialises in outsourcing, long-term partnership and large-scale transformational projects.

On outsourcing matters, he advises both customers and suppliers on a wide range of information technology (IT), communications and business process outsourcing (BPO) transactions. He frequently acts on complex international and offshoring projects in this area and his clients include financial institutions and major corporates (particularly in the aerospace and defence and technology sectors), as well as a number of IT vendors.

Mark has extensive experience of advising suppliers on a range of major public sector and security and defence technology projects and, in addition, regularly advises on systems integration, procurement, managed services transactions, cloud computing and e-commerce contracts and complex software licensing and development deals.

Mark speaks regularly at industry events on outsourcing and commercial technology issues and is recognised as a 'Leading Individual' in the fields of outsourcing and major commercial contracts in the latest editions of the *Chambers Guide to the UK Legal Profession* and *The Legal 500*.

Bird & Bird

Bird & Bird has more than 1,100 lawyers in 28 offices across Europe, the Middle East and Asia and clients based in 118 countries worldwide; we specialise in combining leading expertise across a full range of legal services on an international basis. We aim to deliver tailored local advice and seamless cross-border services.

Since 1898, Bird & Bird has led the way in protecting the ideas that have made some of the world's greatest companies successful and today we are recognised as a global leader in intellectual property. Skilled in both contentious and non-contentious intellectual property law, our team specialise in all areas of IP, including patents, trade marks, trade secrets, copyright and designs and have enormous strength in the areas of IP strategy and litigation.

We are consistently recognised as a top-tier law firm in the major legal guides for IP internationally and this year we were named 'IP Law Firm of the Decade' at the Global Managing IP Awards.

United Kingdom

Simon Shooter

Helen Bryce

Bird & Bird LLP

1 Regulatory Framework

1.1 Are there any national laws that specifically regulate outsourcing transactions?

No, there are not.

1.2 Are there any additional legal or regulatory requirements for certain types of outsourcing transactions, for example: a) public sector transactions; b) business process transactions; c) financial services transactions; d) IT transactions; and e) telecommunications transactions?

a) Depending on its nature and value, a public sector outsourcing may be subject to the Public Contracts Regulations 2015. If caught by the Regulations, the awarding authority may be required to:

- advertise the contract in the Official Journal of the EU and follow special procedures; and
- ensure that all bidders are treated equally.

The Public Contracts Regulations 2015 will also have a significant effect on the:

- timing of the pre-contract procedure;
- award criteria adopted; and
- duration of the outsourcing contract.

b) There are no additional legal or regulatory requirements for business process transactions.

c) The Financial Services and Markets Act 2000 (FSMA) is the main piece of legislation that regulates financial services. The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) are the regulators established and empowered under the FSMA, and each of them issues rules and guidance and supervises the conduct of businesses in this area (as applicable). A firm that is regulated by the FCA or the PRA cannot delegate or contract out of its regulatory obligations when outsourcing and must give advance notice to the FCA or PRA (as applicable) of any proposal to enter into a material outsourcing arrangement and of any material changes to arrangements.

d) There are no additional legal or regulatory requirements for IT transactions.

e) There are no additional legal or regulatory requirements for telecommunications transactions.

1.3 Are there any further legal or regulatory requirements for outsourcing transactions in any particular industry sector?

The following non-exhaustive list sets out the main industry sectors which are subject to sector-specific regulation, which may include requirements on outsourcing. It is beyond the scope of this book to outline all of these sector-specific requirements. We therefore recommend checking with the relevant regulator as to whether any such regulations exist.

- Aviation (Civil Aviation Authority).
- Consumer credit (FCA).
- Education and childcare (Ofsted).
- Energy (Ofgem).
- Financial services (FCA and PRA).
- Food (Food Standards Agency).
- Gambling (Gambling Commission).
- Health and social care (Care Quality Commission).
- Medicines and medical devices (Medicines and Healthcare Products Regulatory Agency).
- Pensions (Pensions Regulator).
- Rail (Office of Rail Regulation).
- Road transport (Driver and Vehicle Standards Agency).
- Security services (Security Industry Authority).
- Telecommunications, broadcasting and postal services (Ofcom).
- Water and sewerage services (Ofwat).

1.4 Is there a requirement for an outsourcing transaction to be governed by local law? If it is not to be local law, is there any generally accepted norm relating to the choice of governing law?

There is no requirement for outsourcing transactions to be governed by local law; however, the norm is for the governing law to be the law where the customer and its business are based.

2 Legal Structure

2.1 What are the most common types of legal structure used for an outsourcing transaction?

The simplest outsourcing structure is a **direct outsourcing** between the customer and the supplier.

In a **multi-sourcing**, the customer enters into contracts with different suppliers for separate elements of its requirements.

In an **indirect outsourcing**, the customer appoints a supplier (usually UK-based) that immediately subcontracts to a different supplier (usually non-UK-based).

Where a customer desires more skin in the game, an alternative option is for the customer and supplier to set up a **joint venture company, partnership or contractual joint venture**, perhaps operating in an offshore jurisdiction.

3 Procurement Process

3.1 What is the most common type of procurement process that is used to select a supplier?

A typical procurement process would usually work as follows:

- The customer draws up a specification of the business that it plans to outsource and a list of potential suppliers. In order to do this, the customer will have to conduct due diligence on the function to be outsourced so as to give it a clear idea of its requirements, and reduce the potential for having to widen the scope during the tender exercise.
- The customer may send a request for information (RFI) and/or an Invitation to Tender (ITT) to potential suppliers, which will generally outline the areas that the customer is considering to outsource and ask questions relating to the supplier's capabilities and competence.
- Following receipt of the RFI/ITT, the customer will assess the responses from the suppliers and shortlist a small number of possible suppliers.
- After shortlisting, more detailed negotiations begin. This could be with a number of shortlisted suppliers or the one preferred bidder, depending upon the size and scale and budget of the outsourcing transaction.

4 Term of an Outsourcing Agreement

4.1 Does national or local law impose any maximum or minimum term for an outsourcing contract?

In general, no. However, in a public sector outsourcing, the term of the contract and any extension may be subject to the Public Contracts Regulations 2015.

4.2 Does national or local law regulate the length of the notice period that is required to terminate an outsourcing contract?

No, this is left to the parties to negotiate.

5 Charging

5.1 What are the most common charging methods used in outsourcing transactions?

The method of charging will depend on the type of services being outsourced, the nature of the supplier's appointment and the balance of risk between the parties.

The most common charging methods are as follows:

- **Cost plus**, where the customer pays the supplier both the actual cost of providing the services and an agreed profit margin.
- Where there will be a regular and predictable volume and scope of services and the customer wants to have greater certainty over its budget, a true **fixed price** will be a better option for a customer.
- Where the level and volume of service is less predictable, the parties may decide to opt for a **pay as you go** charging model whereby the customer pays a pre-agreed unit price for specific items of service (such as volumes of calls taken), often based on a rate card.

5.2 What other key terms are used in relation to costs in outsourcing transactions?

- Charge variation mechanisms.
- Payment terms/interest on late payment.
- Indexation.
- Benchmarking.
- KPIs/SLAs.
- Continuous improvement programmes.

6 Transfer of Assets

6.1 What formalities are required to transfer, lease or license assets on an outsourcing transaction?

Formalities for the transfer of land are dealt with at question 6.2 below.

IP rights and licences

A transfer of UK IP rights must generally be in writing and may require registration of the transfer at the UK Intellectual Property Office, depending on the IP rights involved.

The transfer of IP licences should be by written consent (where the licence is expressed to be personal or there is an express restriction on assignment).

Licences of registered trademarks must be in writing and signed by the licensor. It is also considered best practice to enter into a written agreement to license other types of IP rights. It is also usually advisable (but not a legal requirement) for an exclusive licensee of registered IP rights (such as patents or registered trademarks) to register the exclusive licence with the UK Intellectual Property Office.

Movable property

A written assignment or lease is usually sufficient to transfer or lease movable property for evidential purposes. Where assets are leased, the transfer can require the counterparty's consent.

Key contracts

The assignment of key contracts must be in writing. The parties should check the terms of such contracts at an early stage to ensure that they are able to assign without the counterparty's consent and attempt to obtain such consent if necessary. Alternatively, if the terms of the contract permit, the customer can retain ownership of the contract and allow the supplier to supply the services to the counterparty as agent of the customer on a "back-to-back" basis.

It should also be considered whether the burden of the contract should also transfer to the supplier, either by:

- novation; or

- express indemnity (which leaves some residual risk with the transferor).

The concept of a contract being leased or licensed is not generally recognised under English law.

Data and information

No formalities exist for the transfer, leasing or licensing of data and information. However, parties are advised to include contractual provisions for providing access to such data or information, and regulating how it is used. If there is copyright in the data or information which is transferred, then the copyright will have to be transferred in writing as referred to above.

6.2 What are the formalities for the transfer of land?

In England and Wales, land can be held either with freehold or leasehold title.

Freehold land

Freehold is the outright ownership of property and the land on which it stands.

Transfers of freehold land must be made by deed. For registered land (which is most of the land in England and Wales), the standard form of deed is a prescribed Land Registry form called "TR1". For unregistered land, the form of deed is a matter for negotiation between the buyer and the seller, but often the form TR1 is used.

The seller must always execute the transfer deed. The buyer need only execute the transfer deed where it is entering into a covenant or making a declaration.

Leasehold land

Leasehold is a form of land tenure or property tenure where one party buys the right to occupy land or a building for a given length of time (usually in the form of rent).

Similar to freehold land, the seller (the assignor) and the buyer (the assignee) will often enter into a contract which will contain the terms of the sale (known as an assignment).

The assignment of an existing lease must be made by deed of assignment.

The assignor may also be required to obtain the consent of any landlord and/or any lender in favour of whom a charge has been granted over the leasehold title. The lease will usually state that the consent of a landlord cannot be unreasonably withheld or delayed and consent is typically given in the form of a "Licence to Assign".

Bank or third party consent

In the case of both freehold and leasehold land, it must be considered whether any bank or other third party consents are required. Where needed, the consent must be obtained before the transfer or assignment is entered into.

6.3 What post-completion matters must be attended to?

Stamp Duty Land Tax must be paid and all relevant forms submitted within 30 days of completion if the buyer gave consideration for the transfer. The higher the consideration, the higher the level of Stamp Duty Land Tax, based on consideration thresholds.

6.4 How is the transfer registered?

The buyer of freehold land or the lessee of leasehold land (where the lease is over seven years) must be registered at the Land Registry as the new owner/lessee (as appropriate) of the property within a 30-working-day "priority period" conferred by the Land Registry "priority search" (conducted prior to completion). However, this can be extended if the registration has not been finalised at the end of this period.

7 Employment Law

7.1 When are employees transferred by operation of law?

Unless there is a fundamental change in the nature of the work or how it will be undertaken, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) are likely to apply to outsourcing transactions.

If TUPE does apply, the customer's employees who are assigned (other than on a temporary basis to the service to be outsourced) automatically transfer to the supplier. On a change of supplier, employees wholly or mainly assigned to the outsourced service transfer automatically from the existing supplier to the new supplier. If the outsourcing agreement comes to an end and the customer brings the outsourced services back in-house, the employees of the supplier who are wholly or mainly assigned to the outsourced service transfer back to the customer.

7.2 On what terms would a transfer by operation of law take place?

Under TUPE, employees wholly or mainly assigned to the services transfer all of their existing terms of employment with limited exceptions. Any employment liabilities (e.g. arrears of pay, discrimination claims) and accrued contractual benefits (e.g. holiday entitlement, car allowance) also transfer. The transferee supplier steps into the shoes of the transferor customer.

7.3 What employee information should the parties provide to each other?

The transferor must identify those employees who are or may be in the pool of transferring employees at the time of the transfer. The customer or existing supplier (as applicable) is required to provide the new supplier with employee liability information (prescribed by statute) at least 28 days before the commencement of the outsourcing term.

The transferor will therefore have to collate and disclose information such as the number of employees involved in the outsourcing, their job descriptions and the nature of their contracts to ensure that they are employed by the customer. The parties will also have to consider the following (non-exhaustive factors): (i) whether there are any unions involved; (ii) if so, whether there are any existing collective agreements; and (iii) whether consultations with unions/employee representatives have commenced.

7.4 Is a customer/supplier allowed to dismiss an employee for a reason connected to the outsourcing?

A dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself, unless the dismissal is for an "economic, technical or organisational" (**ETO**) reason and the customer acted reasonably in treating the ETO reason as sufficient to justify dismissal. Dismissals effected before a transfer will usually not fall within the ETO defence.

7.5 Is a supplier allowed to harmonise the employment terms of a transferring employee with those of its existing workforce?

A change to terms and conditions purely to harmonise with those of the supplier's existing workforce is not an ETO reason and is therefore void.

7.6 Are there any pensions considerations?

TUPE specifically exempts rights under occupational pension schemes from transfer which relate to old age, survivor or disability benefits. However, the European Court of Justice has established that benefits falling outside this range may be transferred under TUPE in certain circumstances. Where stakeholder, personal or group personal pension arrangements are in place before the TUPE transfer, the contractual obligations to contribute to these schemes will transfer.

7.7 Are there any offshore outsourcing considerations?

TUPE applies to offshoring insofar as the employees are in the UK before the transfer. In theory, they should transfer and then be made redundant by the transferee supplier. In practice, a redundancy consultation can run alongside a TUPE consultation so the employees become redundant prior to the outsourcing taking effect.

Parties involved in offshore outsourcing should pay attention to local laws when the customer brings the outsourced services back in-house at the end of the outsourcing agreement. It is commonly thought that employment laws outside the European Union are more relaxed than those within, but in fact the opposite is true of many countries commonly used for offshore outsourcing (specifically, regarding dismissals and flexible hours).

8 Data Protection Issues

8.1 What are the most material legal or regulatory requirements and issues concerning data security and data protection that may arise on an outsourcing transaction?

Key issues:

(a) **Applicable laws**: The Data Protection Act 1998 (**DPA**) will apply where the customer is a UK 'data controller' and the supplier is processing the customer's personal data. Depending on the activities and location of the customer, other data protection laws may apply. Note that from 25 May 2018 the General Data Protection Regulation is due to replace the DPA.

(b) **Supplier's role**: Are they a data processor or a data controller on the facts? Note that data controllers have responsibility for compliance with the DPA, although the GDPR will introduce many more responsibilities upon processors.

(c) **Contractual provisions**: The customer must ensure that it imposes all necessary contractual obligations relating to data protection on its data processors (including to act on the instructions of the customer and to put in place appropriate technical and organisational measures to protect personal data). The GDPR will necessitate more detailed processor provisions (e.g. potentially relating to the use of encryption and pseudonymisation). Security breach notification and assistance provisions are common under the DPA and will be essential under the GDPR. Where a supplier is a joint controller, more detailed provisions will be required. Liability provisions will need careful review, especially in the context of maximum fines under the GDPR increasing to the greater of 4% of worldwide turnover or €20 million. GDPR end user rights, such as data portability and the right to erasure, are likely to necessitate additional supplier support. The question of when a GDPR compliance requirement is to commence and who pays for such compliance will need to be agreed in contracts executed before May 2018.

(d) **International transfers**: Where the outsourcing involves the transfer of personal data outside the European Economic Area, data controllers must ensure that the export complies with the DPA's data transfer rules.

(e) **Other legislation**: Other legislation may be relevant depending on the nature of the parties and services, e.g. Freedom of Information Act 2000, Regulation of Investigatory Powers Act 2000 and industry specific legislation such as the Privacy and Electronic Communications (EC Directive) Regulations 2003. The Network & Information Security Directive will also need to be implemented across the EU by 2018 and implementing legislation will contain relevant provisions.

9 Tax Issues

9.1 What are the tax issues on transferring the outsourced business – either on entering into or terminating the contract?

An outsourcing may often constitute a transfer of part of a business and/or assets to the supplier for tax purposes. For example:

(a) **Direct tax on transfer of assets**. This will depend on the type of asset being transferred. The main tax issues are likely to be:

  a. corporation tax on chargeable gains may apply to certain assets;

  b. the disposal of any IP (including goodwill) created or acquired on or after 1 April 2002 will be subject to a separate regime for intangible fixed assets. Except in the case of goodwill, a UK corporate purchaser should be able to obtain a corporation tax deduction for amortization of the cost of such IP; and

  c. a transfer of plant and machinery is unlikely to give rise to a taxable gain. However, the disposal proceeds are likely to be credited to the company's capital allowance pool. This may give rise to a balancing charge or allowance.

  In most circumstances, however, the only assets transferring will be plant and machinery along with the employees.

(b) **VAT**. An asset transfer will generally give rise to VAT on the consideration provided. Even if there is no consideration stated in an outsourcing contract, it is possible that such consideration could be interpreted as a reduction in the ongoing consideration provided under the contract.

Where a part of a business is being transferred this could amount to a "transfer of a going concern" for VAT purposes. The effect of this would be that the transfer is not treated as a supply for VAT purposes. However, such treatment is unlikely in the outsourcing context as, for TOGC treatment to apply, the assets transferred must be part of a business "capable of separate operation". This requires the part business being transferred to have made historic vatable supplies (i.e. to third parties) and as such would not apply to where back office functions are being transferred. For example, in one case where back office services only were transferred there was no TOGC whereas in another case where a bank's cheque clearing system had provided supplies to third parties there was a TOGC.

9.2 Is there any VAT leakage on the supply of services under the outsourcing contract?

If a business does not recover its VAT in full, VAT on the supplies made under the outsourcing contract will give rise to a significant additional cost as compared to keeping the services in-house.

Strategies for dealing with this issue for such "partially exempt" businesses include:

1. setting up the supplier within the customer's VAT group. However, this is difficult to achieve in light of anti-avoidance legislation;
2. structure the supply as a joint employment contract – again care being required given case law showing that HMRC will look beyond the legal status of the arrangements to the substance;
3. structure the arrangement as a cost sharing arrangement which does not give rise to VAT on supplies to its members. However, as this requires that the joint venture entity does not make a profit, this solution will not apply to commercial outsourcing arrangements; or
4. minimise VAT leakage through ensuring supplies are a composite exempt supply or, to unbundle supplies into separate vatable and exempt supplies if allocation of low consideration is attributable to the vatable supplies or the VAT on such supplies is recoverable.

9.3 What other tax issues may arise?

Although tax on transferring assets and VAT are the main tax issues which arise in an outsourcing context, there are other tax issues that may arise. These include:

1. **permanent establishment issues** – on a cross-border contract, could the supplier create a permanent establishment (taxable presence) of its customer in the jurisdiction in which the supplier is based?;
2. **withholding taxes** – payments to the supplier could be subject to withholding taxes, depending on the treatment in the customer's jurisdiction and any tax treaty protection. The persons who bear such taxes would need to be set out in the contract; and
3. **changes to the arrangements** – where the services supplied under an outsourcing contract change (e.g. under change control provisions), this could change the VAT treatment of the services. The persons who bear any risk in this respect will need to be set out in the agreement.

10 Service Levels

10.1 What is the usual approach with regard to service levels and service credits?

When negotiating the contract, the parties usually try together to identify and agree a set of objective, measurable criteria to measure the supplier's performance (key performance indicators (KPIs) or service levels). These service levels need to be combined with a:

- process for recording and reporting on success or failure in achieving the targets; and
- formula under which financial compensation is paid to the customer if targets are not met. These are referred to as service credits or liquidated damages.

The aim of service credits is to compensate the customer for poor service without the need to pursue a claim for damages or terminate the contract, and to motivate the supplier to meet the performance targets.

The supplier will want to ensure that the stated service credits are the sole 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 contract or persistent failures in performance. Service credits are generally enforceable, provided they are a genuine pre-estimate of the customer's loss and not a contractual penalty.

11 Customer Remedies

11.1 What remedies are available to the customer under general law if the supplier breaches the contract?

- Damages.
- Specific performance/injunction (available at the discretion of the court).
- Termination.

11.2 What additional protections could be included in the contract documentation to protect the customer?

In addition to the remedies available at law, the customer could seek the following protections:

- service credits;
- indemnities from the supplier for loss suffered by the customer in specified circumstances;
- other forms of financial penalty, such as loss of exclusivity, a reduction in the minimum price payable to the supplier or the right to withhold payment;
- warranties;
- step-in rights allowing the customer to take over the management of an under-performing service or to appoint a third party to manage the service on its behalf;
- specific provision for termination in defined circumstances (for example, material breach or insolvency);
- a requirement for the supplier to hold insurance and note the customer's interest on its insurance policy;
- a parent company guarantee; and
- 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 easily be found.

11.3 What are the typical warranties and/or indemnities that are included in an outsourcing contract?

Typical supplier warranties are:

- to confirm that it is entitled to enter into the contract and perform its obligations;
- to perform the services with reasonable skill and care in accordance with good industry practice, in a timely and professional manner;
- to perform the services in accordance with all applicable laws and regulations;
- to confirm that material information provided in the pre-tender and tender stages was and remains accurate, complete and not misleading; and
- to make 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).

Typical supplier indemnities are to:

- indemnify the customer against harm suffered due to the supplier's actions/inactions. This can be limited to harm suffered due to default (for example, negligence or breach of statutory duty) or can 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); and
- indemnify the customer against future liability under TUPE.

12 Insurance

12.1 What types of insurance should be considered in order to cover the risks involved in an outsourcing transaction?

- Employer's liability insurance (obligatory in the UK).
- Professional indemnity insurance (for example, to provide cover against claims for negligence in the performance of outsourced services).
- Business interruption insurance.
- Fidelity or employee dishonesty insurance (to provide cover against fraud committed by employees).
- Public liability insurance.
- Land and buildings insurance.
- Directors' and officers' insurance (to cover directors and officers of a company against claims brought against them in that capacity).
- Cyber-liability insurance (to cover against a range of IT-related risks, such as loss of digital assets or data breaches).

13 Termination

13.1 How can a party to an outsourcing agreement terminate the agreement without giving rise to a claim for damages from the terminated party?

Any termination that occurs in accordance with the terms of the contract would be justified without giving rise to a claim for damages from the terminated party.

In addition, the following events are generally considered sufficiently serious to justify immediate termination, regardless of the terms of the contract:

- a repudiatory breach, i.e. a breach of a condition or a breach of a contractual term that would deprive the innocent party of "substantially the whole benefit of the contract";
- a breach that indicates that the counterparty no longer wishes to continue with the contract;
- the other party's insolvency, so that it is unable to perform its duties under the contract; or
- if performance of the contract becomes impossible or if external events conspire to make it radically different from what was originally envisaged by the parties. This is referred to as "discharge by frustration".

13.2 Can the parties exclude or agree additional termination rights?

The parties are free to agree specific termination rights, which can block or extend rights implied by general law.

Examples of further contractual provisions allowing termination are where:

- a party commits a series of minor but persistent breaches;
- a party commits an irremediable material breach (or one which, if remediable, has not been remedied within the agreed cure period);
- an event of *force majeure* (as defined in the contract) has occurred;
- there is a change of control of one of the parties; and
- the parties agree that one/both of them can terminate for convenience upon the provision of a prescribed notice period.

13.3 Are there any mandatory local laws that might override the termination rights that one might expect to see in an outsourcing contract?

No, there are not.

14 Intellectual Property

14.1 How are the intellectual property rights of each party protected in an outsourcing transaction?

In the outsourcing agreement, the parties will define which intellectual property (IP) rights belong to each party at the start of the outsourcing transaction (Background IP). This Background IP will be specifically ring-fenced to clarify that only prescribed use by the other party will be allowed. This will typically be accomplished by way of an IP licence within the scope of the outsourcing agreement. The intention is that any use outside of those parameters will be prohibited.

The parties will also have to consider what new IP rights may come into existence during the course of the outsourcing transaction (Foreground IP). The outsourcing agreement will need to make provision for who will own the Foreground IP and what permission may have to be sought in order to make use of it.

14.2 Are know-how, trade secrets and other business critical confidential information protected by local law?

The laws governing confidential information are not harmonised across the EU (although this will change following the introduction of the EU Trade Secrets Directive after its recent adoption by the European Parliament).

Under English law, parties will typically agree confidentiality provisions in the outsourcing agreement rather than relying on confidentiality protection at common law. Confidentiality provisions in the agreement are likely to include: defining the know-how, trade secrets and confidential information of each party; creating a contractual duty to maintain this information in confidence (subject to some typical agreed carve-outs); specifying its use within the scope of the IP licence (see question 14.1 above); and defining the duration of the confidentiality undertakings (for a fixed period or potentially indefinitely depending on the perceived value of the confidential information).

14.3 Are there any implied rights for the supplier to continue to use licensed IP rights post-termination and can these be excluded from the agreement?

Assuming the parties have drafted the outsourcing agreement with an express licence covering the use of IP rights for a limited term (normally with reference to the duration of the outsourcing transaction), it is highly unlikely the supplier would retain any post-termination rights.

There could be an argument about the supplier's ongoing use of IP in the event the outsourcing agreement is silent on IP rights, so the customer would be advised to carefully consider its IP position before entering into such an outsourcing agreement and then to address these issues expressly within its terms.

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

The position is similar to that outlined in question 14.3, namely know-how will normally be within the scope of the IP licence between the parties and the customer will retain no ongoing right to use the supplier's know-how post-termination.

So as to ensure no ongoing use of know-how, the IP licence, as well as defining the scope of use, will normally make provision for the return and/or destruction of documents or other materials containing such know-how following termination of the outsourcing agreement. As a practical measure, suppliers seeking to avoid ongoing use of their confidential know-how post-termination would be advised to take active steps to ensure compliance with these requirements.

15 Liability

15.1 To what extent can a party limit or exclude liability under national law?

In general, in a business-to-business contract, the parties are free to exclude liability altogether, put a financial cap on liability, restrict the types of loss recoverable or remedies available and/or impose a short time limit for claims subject always to the following:

- under the Unfair Contracts Terms Act 1977 (UCTA), it is not possible to exclude or restrict liability for death or personal injury resulting from negligence. In the case of other loss or damage, the exclusion or restriction of liability for negligence must satisfy UCTA's reasonableness requirement;
- an exclusion or restriction of liability for fraud or fraudulent misrepresentation is unenforceable and should be carved out from any general exclusion of liability;
- exclusions or restrictions of liability for pre-contractual negligent or innocent misrepresentation must satisfy the requirement of reasonableness under UCTA;
- if the parties are dealing on written standard terms of business, any exclusion or restriction of liability for breach of contract must satisfy UCTA's reasonableness requirement. Where business parties have a negotiated agreement, UCTA does not apply to exclusion/restriction of liability for breach of contract; and
- implied terms as to title to and quiet possession of assets cannot be excluded or restricted, while those relating to satisfactory quality, fitness for purpose and certain other matters can only be restricted in business-to-business contracts where this meets UCTA's reasonableness requirement.

15.2 Are the parties free to agree a financial cap on liability?

Yes; subject to the limitations set out in question 15.1 and the reasonableness test under UCTA.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

The choice for the ultimate determination of a dispute that arises under an outsourcing transaction is generally between court litigation or arbitration. Court litigation remains the most common mechanism, in part because, unless the parties agree to another approach, they will be obliged to litigate by default. However, arbitration is an increasingly popular method, particularly given that the process is confidential.

Within dispute resolution provisions under outsourcing contracts, it is common for parties to include certain levels of 'alternative dispute resolution' as preliminary steps to be taken in order to try to resolve a dispute before the final stage of litigation or arbitration. Such steps – which can be agreed to be either mandatory or optional – often include:

- one party giving notice to the other of the nature of the dispute;
- levels of commercial negotiation between the parties about the dispute, first at an operational level with the issue being escalated up to project managers, any relevant steering/project committee and the parties' executives if it cannot be solved within specific periods of time; and
- mediation, being a confidential process under which a neutral third party (who has no binding decision-making power) is appointed to attempt to facilitate the parties in reaching a negotiated settlement.

It is also open for the parties to agree that disputes of a technical nature (or disputes that are particularly industry-specific) can be resolved by expert determination.

17 Good Faith

17.1 Is there any overriding requirement for a customer and supplier to act in good faith and to act fairly according to some objective test of fairness or reasonableness under general law?

There has been a great deal of activity in this area over the last few years, and English law continues to develop through successive decisions of the courts. At present there is no general duty of good faith and fair dealings in English contract law in all contracts. However, in light of the recent case law, it is increasingly likely that litigants will try to imply such obligations into commercial contracts particularly into what might be described as "relational contracts".

Simon Shooter
Bird & Bird LLP
15 Fetter Lane
London EC4A 1JP
United Kingdom

Tel: *+44 20 7415 6000*
Email: *simon.shooter@twobirds.com*
URL: *www.twobirds.com*

Simon is joint-head of our International Commercial Group.

He has a diverse client base ranging from clients who design and build armoured fighting vehicles, through international investment banks to NHS Foundation Trust Hospitals. The unifying factor is the application of practical commercial law and experience to complex business relationships and transactions.

Simon is an acknowledged expert in outsourcing and has over many years engaged and advised on all aspects of outsourcing on a domestic, near shore and far shore basis. Simon has for a long time held a reputation for his experience in complex IT transactions and procurement, much of this experience involves the Financial Services Sector. He started his legal career as a litigator and was involved in a broad range of commercial disputes. This combination of contentious and non-contentious experience gives him significant versatility and the ability to bring valuable perspective to both the strategic and negotiating tables.

Helen Bryce
Bird & Bird LLP
15 Fetter Lane
London EC4A 1JP
United Kingdom

Tel: *+44 20 7415 6000*
Email: *helen.bryce@twobirds.com*
URL: *www.twobirds.com*

Helen provides commercially focused legal advice in a sensible and pragmatic way. She is regularly praised for her personable approach and "can-do" attitude to help her clients achieve their aims.

Helen is a senior associate in our Commercial team based in London.

She advises UK and international clients on a wide range of private and public sector commercial contracts, including large-scale government IT agreements, software licensing, hosting and support contracts, services and framework agreements, e-commerce terms and outsourcings.

Helen has worked with clients in a range of sectors including IT, defence, transport and sport. Her industry experience is strengthened by several in-house secondments to a range of clients including a leading US defence contractor, a sports governing and regulatory body and an international car hire company.

Helen is also a part of our Cyber Security focus group and regularly writes articles in this area.

Bird & Bird has more than 1,100 lawyers in 28 offices across Europe, the Middle East and Asia and clients based in 118 countries worldwide; we specialise in combining leading expertise across a full range of legal services on an international basis. We aim to deliver tailored local advice and seamless cross-border services.

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Sweden

Henrik Bergström

Bird & Bird LLP

Angelica Lundqvist

1 Regulatory Framework

1.1 Are there any national laws that specifically regulate outsourcing transactions?

There are no laws specifically regulating outsourcing in Sweden.

1.2 Are there any additional legal or regulatory requirements for certain types of outsourcing transactions, for example: a) public sector transactions; b) business process transactions; c) financial services transactions; d) IT transactions; and e) telecommunications transactions?

The Public Procurement Act (2007:1091) and the Act on Procurement in the Water, Energy, Transport and Postal Services Sectors (2007:1092) set forth regulatory requirements regarding public procurement, e.g. regarding non-discrimination, equal treatment, transparency and proportionality. The laws set forth specific requirements regarding, e.g., the announcement of the procurement and the specific minimum requirements imposed on a supplier submitting a tender.

The financial sector is highly regulated in Sweden. Financial institutions that pursue business under the Banking and Financing Act (2004:297) and securities companies that pursue business under the Securities Market Act (2007:528) may outsource parts of their operations, provided that the outsourcing is notified to the Swedish Financial Supervisory Authority (Sw. *Finansinspektionen*). The notification must be accompanied by a copy of the outsourcing agreement. The company must still be responsible for the outsourced operations in relation to the customers, and the outsourced operations must be conducted under a controlled and secure manner. The company must still be able to fulfil its obligations under the relevant Act and any other regulations applicable to the business.

The Swedish Electronic Communications Act (2003:389) requires that the provision of publicly available electronic communication networks or services is notified to the Swedish Post and Telecom Authority. Hence, the outsourcing of such networks or services requires notification.

1.3 Are there any further legal or regulatory requirements for outsourcing transactions in any particular industry sector?

Some industry sectors are subject to special regulations, e.g. the healthcare sector and public schools. Such regulations may effect an outsourcing transaction, for example in terms of disclosure of information to third party providers that are not bound by regulatory confidentiality.

1.4 Is there a requirement for an outsourcing transaction to be governed by local law? If it is not to be local law, is there any generally accepted norm relating to the choice of governing law?

There is no such requirement. It is generally accepted to apply Swedish law to Swedish outsourcing agreements.

2 Legal Structure

2.1 What are the most common types of legal structure used for an outsourcing transaction?

The most common legal structures would be the traditional model (framework structure) focusing on the obligations of the supplier and chronologically outlining the transaction, and to some degree increasingly also the vested model approach, whereby the parties agree upon a "desired outcome" that can be objectively measured to determine if the relationship is successful. This outcome can include e.g. cost reductions, revenue increases, improvements and increased market share.

3 Procurement Process

3.1 What is the most common type of procurement process that is used to select a supplier?

Procurement processes are only regulated when it concerns public procurement, there is, e.g., a simplified procedure, open procedure and negotiated procedure. The type of process depends on the value of the procurement and the type of services concerned.

A (private sector) procurement process generally includes the following steps:

- request for proposal;
- invitation to tender (sent to suppliers who have qualified in the first step); and
- due diligence and negotiations (can be conducted with one or more suppliers who have provided tenders).

4 Term of an Outsourcing Agreement

4.1 Does national or local law impose any maximum or minimum term for an outsourcing contract?

Framework agreements in public procurement processes may not have a term longer than four years (including any options to extend the agreement), unless there are extraordinary reasons for a longer term.

If the transaction is not regulated by public procurement regulations, there are no requirements concerning a maximum or minimum term for the outsourcing agreement.

4.2 Does national or local law regulate the length of the notice period that is required to terminate an outsourcing contract?

The parties are free to agree on the length of the notice period. If the parties have not agreed on a notice period, general principles of law set forth that the notice period must be "reasonable". When deciding what is "reasonable", the following circumstances should be considered: (i) length of the relationship; (ii) the value of the agreement; and (iii) the possibility for the parties to make other arrangements. A generally acceptable principle would be a notice period of six months.

5 Charging

5.1 What are the most common charging methods used in outsourcing transactions?

The charging methods vary depending on what type of outsourcing it concerns.

The most common methods are still, however, fixed fees with yearly fee reductions during the agreement period. However, with more flexible agreements you can increase and/or decrease the volume and thereby also the cost. These charging methods tend to be accompanied by user and/or monthly fees based on aggregate volume during a specific time. These "flexible" charging methods are increasingly used in outsourcing transactions today.

5.2 What other key terms are used in relation to costs in outsourcing transactions?

It is not unusual for outsourcing agreements to contain clauses regarding price increase indexation, supplier benchmarking and, if applicable, mitigating risk for currency fluctuations. Audit rights may also be related to the charged fees.

6 Transfer of Assets

6.1 What formalities are required to transfer, lease or license assets on an outsourcing transaction?

There are no formal requirements regarding the transfer or lease of movable property (Sw. *lös egendom*) or regarding the transfer or license of intellectual property.

Regarding transfer and lease of real property (Sw. *fast egendom*), see question 6.2 below.

6.2 What are the formalities for the transfer of land?

Transfer of real property (Sw. *fast egendom*) must be agreed in writing and contain a declaration of conveyance and the purchase price. The agreement must be signed by both parties and the seller's signature must be witnessed by two persons.

Lease of houses, apartments and other premises, such as office space, must be agreed in writing upon the request of one of the parties. The Swedish Land Code (1970:994) also sets forth provisions regarding the obligations of the parties and termination of the lease agreement.

6.3 What post-completion matters must be attended to?

The purchaser of real property (Sw. *fast egendom*) must apply for registration of its title with the Swedish Cadastral Office within three months of the date of purchase.

6.4 How is the transfer registered?

There is no registration requirement regarding movable property (Sw. *lös egendom*), but if the property is left on the seller's premises after the transfer, the transfer should be registered with the Swedish Enforcement Authority in order for the transfer to be enforceable against creditors in the event of the seller's bankruptcy.

The transfer of trademarks, designs and patents should be recorded with the Swedish Patent and Registration Office for evidentiary purposes; however, this is not a requirement. It is also possible, but not required, to record licences for trademarks, designs and patents with the Swedish Patent and Registration Office.

7 Employment Law

7.1 When are employees transferred by operation of law?

The employees are transferred by operation of law where the outsourcing constitutes a "transfer of undertaking". Outsourcing may constitute a transfer of undertaking if it concerns a part of the business which, after the outsourcing, keeps its identity and remains as a "going concern". Normally, the mere outsourcing of certain work tasks will not constitute a transfer of undertaking and trigger the employees' automatic transfer by operation of law. However, where, for example, work equipment, systems, management and staff are also transferred, the transfer rules may be triggered.

If the outsourcing constitutes a transfer of undertaking, the employees who normally work within the concerned part of the business are entitled to transfer to the supplier, but they are also entitled to refuse to transfer.

7.2 On what terms would a transfer by operation of law take place?

The employees will transfer on the same terms as those that applied to the customer/transferor employer. Furthermore, if the transferor employer is bound by a collective bargaining agreement, such collective bargaining agreement may also transfer under certain conditions. It should also be noted that both the transferor employer and the new employer are normally obliged to consult with trade unions prior to the transfer.

7.3 What employee information should the parties provide to each other?

If the outsourcing constitutes a transfer of undertaking, the new employer will need information regarding the number of employees concerned, the applicable terms and conditions, whether any collective bargaining agreement applies, etc. Furthermore, as the new employer will be liable in relation to the employees and for claims on the employer which originated prior to the transfer, the new employer will need to be made of aware of any such potential claims.

7.4 Is a customer/supplier allowed to dismiss an employee for a reason connected to the outsourcing?

In order to dismiss an indefinite-term employee in Sweden, the employer needs so-called "objective grounds". Reasons connected to the outsourcing may constitute such objective grounds. For example, a decision by the customer to outsource part of its business in a manner that will not trigger a transfer by operation of law may create a redundancy situation within the business of the customer. Such redundancy due to the outsourcing would, as a general rule, constitute objective grounds for dismissal with notice in Sweden.

However, where the outsourcing constitutes a transfer of undertaking and the employees are transferred by operation of law, a transferred employee may not be dismissed by reason of the outsourcing/transfer itself. However, if a *bona fide* redundancy situation occurs after the transfer, the new employer will be in the same position as any other employer with regards to the possibility to dismiss employees (irrespective of the transfer). Such redundancy may also include transferred employees.

7.5 Is a supplier allowed to harmonise the employment terms of a transferring employee with those of its existing workforce?

Where the transferor employer is bound by a collective bargaining agreement ("CBA"), but the supplier is not, the supplier will become bound by the transferor's CBA and is required to apply the terms therein, unless the transferor has terminated the CBA 60 days prior to the transfer. If the supplier is bound by another CBA, or if the CBA is terminated by the transferor before the transfer, the supplier will not become bound by the transferor's CBA, but is still obliged to apply the terms therein for the transferring employee for one year.

As regards employment terms that are not governed by a CBA, a supplier would normally harmonise the employment terms of a transferring employee. However, depending on the extent of the required change to employment terms, such harmonisation may need to be handled through a redundancy procedure (where the transferred employees will either be terminated due to redundancy or offered new employment agreements) or agreement with the employees.

7.6 Are there any pensions considerations?

Even where employees are transferred by operation of law, the transferred employees' claims as regards pension are not transferred. However, should the supplier become bound by a CBA as a result of the transfer, the supplier will be required to apply also the pension plan under the CBA for all of its employees.

7.7 Are there any offshore outsourcing considerations?

The Swedish provisions regarding transfer of employees by operation of law also applies to offshore outsourcing. However, in order for the rules to be triggered, the outsourcing must, in offshore situations, concern a part of the business which keeps its identity after the outsourcing.

8 Data Protection Issues

8.1 What are the most material legal or regulatory requirements and issues concerning data security and data protection that may arise on an outsourcing transaction?

Processing of personal data is regulated by the Swedish Personal Data Act (1998:204), which implements the Data Protection Directive 95/46/EC. It should be noted that the Act will be replaced by the General Data Protection Regulation in 2018 and that the Regulation will impose stricter obligations on both the data controller and the data processor.

If the supplier will be processing personal data on behalf of the customer, the supplier will be the processor and the parties will have to enter into a written processing agreement. The agreement must set forth that the processor may only process the personal data in accordance with the controller's instructions and must implement and maintain adequate technical and organisational measures to protect the personal data. When deciding what measures are adequate, the following shall be considered (i) the available technique, (ii) costs, (iii) particular risks with regards to the processed data, and (iv) the sensitivity of the personal data being processed.

9 Tax Issues

9.1 What are the tax issues on transferring the outsourced business – either on entering into or terminating the contract?

Entering into, or terminating, a contract will as such not trigger any tax consequences, i.e. there are no stamp duties or similar on the contract. If the outsourcing involves transferring business (apart from employees) to the supplier, a transfer will be viewed as a sale and thus a taxable event, and any capital gain will be subject to regular corporate income tax (currently 22%). Taxes may be mitigated by "packaging", i.e. transferring the business in a tax exempt share deal.

Payments under a service/outsourcing agreement are generally tax deductible.

9.2 Is there any VAT leakage on the supply of services under the outsourcing contract?

Payments under a service/outsourcing agreement are generally subject to ordinary VAT (currently 25%). VAT leakage is dependent on the tax status of the payer, i.e. if the payer conducts a fully VAT-able business.

In the case of financial outsourcing (so-called factoring), the Swedish Tax Agency has also taken the position that collection measures taken regarding other subjects invoices/receivables are VAT-able services. Consequently, all services in connection to the collection of the invoices/receivables are subject to VAT, regardless

of whether the purpose of the transaction is something else, e.g. providing financing. Since any and all collection measures are likely to be seen as a single "supply", the entire remuneration paid for the service is subject to VAT. This is regardless of whether part of the payment is actually an interest component. When determining the compensation that should be subject to VAT, this should be the difference between the nominal amount of the invoice and the remuneration paid for the invoice (unless a specified amount is charged on the side of the nominal value).

9.3 What other tax issues may arise?

This is not applicable.

10 Service Levels

10.1 What is the usual approach with regard to service levels and service credits?

Service levels and service credits are generally used in outsourcing contracts. The service level schedule is linked to the service description and the set up therefore depends on the type of services at hand.

11 Customer Remedies

11.1 What remedies are available to the customer under general law if the supplier breaches the contract?

There is no specific law regulating the provision of services B2B. Guidance must be sought analogously in laws regulating the provision of services B2C and the sale of movable property (Sw. *lös egendom*) B2B. It should be noted that such remedies are non-mandatory.

The Swedish Sales of Goods Act (1990:931) regulates the sale of movable property B2B. Upon breach of the agreement, the buyer may demand performance, rectification, delivery of substitute goods and a price reduction as remedy. The latter can only be demanded if rectification or substitution is not applicable, or if rectification or substitution does not take place within a reasonable time after the buyer has notified the seller hereof. If the breach is material and the seller realised or should have realised this when entering into the agreement, the buyer may revoke the contract. The buyer is also entitled to damages; and it should be noted that the buyer is entitled to damages for indirect losses if the breach *or* the loss was caused by the seller's negligence or if the goods, at the time of the sale, did not conform to the seller's warranties.

The Swedish Consumer Services Act (1990:932) regulates the supply of services B2C. However, as set out above, upon breach of the agreement, the consumer is entitled to rectification of defects and price reduction. Price reduction is only available if the defect is not rectified within a reasonable time. If the service substantially fails to achieve its purpose and the supplier realised or should have realised this when entering into the agreement, the consumer may revoke the agreement. The buyer is also entitled to damages for losses due to the supplier's breach of the agreement.

11.2 What additional protections could be included in the contract documentation to protect the customer?

The customer is usually protected through specific warranties and indemnities. The right to rectification of defaults, price reductions and damages is usually limited in the outsourcing agreement and, therefore, the remedies under law are generally not applicable.

11.3 What are the typical warranties and/or indemnities that are included in an outsourcing contract?

The following supplier warranties are often included in an outsourcing agreement:

- the supplier has the capacity and authority to enter into and perform its obligations under the agreement;
- compliance with applicable law;
- the services do not infringe third party intellectual property rights; and
- the supplier will obtain and maintain necessary licences, approvals, consents, etc.

Furthermore, if the outsourcing involves transfer of the customer's employees to the supplier, the customer can warrant that only personnel mentioned in the agreement have the right to be transferred and that no employee has any claims against the customer other than that specified in the agreement.

Outsourcing agreements often contain supplier indemnities concerning:

- Taxes.
- Bodily injury and death.
- Confidentiality.
- Data protection.
- Infringement of third party intellectual property rights.

12 Insurance

12.1 What types of insurance should be considered in order to cover the risks involved in an outsourcing transaction?

There should be a general liability insurance in place and (if applicable) a professional liability insurance. There are of course also transactions which could demand other specific/special insurance policies for risks not covered by the above.

13 Termination

13.1 How can a party to an outsourcing agreement terminate the agreement without giving rise to a claim for damages from the terminated party?

Unless otherwise stated in the agreement, a party that terminates the agreement in accordance with the agreed termination rights will not be liable for damages due to the termination. It should be noted, however, that wrongful termination may constitute a material breach of the agreement and could therefore result in damages.

13.2 Can the parties exclude or agree additional termination rights?

The parties are free to agree on the termination rights and can therefore both exclude and add termination rights. For example, it is very common to include a right to terminate with immediate effect if the other party becomes insolvent.

13.3 Are there any mandatory local laws that might override the termination rights that one might expect to see in an outsourcing contract?

According to the Swedish Contracts Act (1915:218), unfair contractual terms may be adjusted or set aside. However, the rule is intended primarily to be applied in situations where the parties have unequal bargaining power and it would generally not be applicable to normal termination rights in an outsourcing contract.

14 Intellectual Property

14.1 How are the intellectual property rights of each party protected in an outsourcing transaction?

In general, this is handled by reciprocal disclaimers stating that each party will retain the title of interest to all of its intellectual property rights.

14.2 Are know-how, trade secrets and other business critical confidential information protected by local law?

The Swedish Trade Secrets Act (1990:409) applies to information concerning a company's business and operations, which the company keeps secret and the disclosure of which would likely cause damage to the company from a competition point of view. Thus, the information must actively be kept secret in order for the Act to be applicable. The Act applies both to information documented in some form and the know-how of individual persons, including undocumented know-how. The act is only applicable to unwarranted infringements of trade secrets, and violations of the Act may result in both criminal (fine or imprisonment) and civil (damages) sanctions.

It should be noted that on 27 March 2016 the European Council approved the European Commission's proposal on the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The Swedish government has initiated an inquiry regarding the implementation of the Directive in Swedish legislation and the report will be presented in May 2017.

14.3 Are there any implied rights for the supplier to continue to use licensed IP rights post-termination and can these be excluded from the agreement?

There are no implied rights to continue to use licensed IP rights post-termination. If the term of the licence is not specifically stated, it would in general be considered to expire when the agreement is terminated.

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

If the customer wants to gain access to and use the supplier's know-how post-termination, it should be regulated in the agreement, e.g. in the exit provisions.

15 Liability

15.1 To what extent can a party limit or exclude liability under national law?

The parties are free to limit or exclude their liability under the agreement, except in relation to damages caused by gross negligence or wilful misconduct.

15.2 Are the parties free to agree a financial cap on liability?

Yes, the parties may agree on a financial cap of the liability.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

In larger transactions, it is common to refer disputes to arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC"). The parties can choose between regular arbitration and expedited arbitration, and SCC provides model clauses for the different arbitration mechanisms, http://sccinstitute.se/tvistlosning/modellklausuler/english/.

17 Good Faith

17.1 Is there any overriding requirement for a customer and supplier to act in good faith and to act fairly according to some objective test of fairness or reasonableness under general law?

According to the Swedish Contracts Act (1915:218), contracts are not valid if (i) it is entered into due to duress or fraud, or (ii) one of the parties has derived undue benefit from its stronger position, taking advantage of the other party's ignorance or bad judgment, and the parties' obligations are unbalanced.

The Act also states that unfair contractual terms may be adjusted or set aside. This applies in relation to (i) unfairness based on circumstances related to the formation of the contract, (ii) unfairness *per se*, and (iii) unfairness as a result of supervening events. Primarily, the provision is intended to be applied in situations where the parties have unequal bargaining power, but could, at least in theory, also be used in exceptional situations where the parties are on equal footing.

According to general principles of law, the parties to a contract have a loyalty obligation, meaning that they have an obligation to adhere to, or attend to, the other party's interests; for example, assignments should be carried out with sufficient care. There is no detailed definition of this general rule and the remedies for breaching it depend on the type of breach and other circumstances in the specific case.

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Henrik Bergström
Bird & Bird LLP
Norrlandsgatan 15
SE-103 95 Stockholm
Sweden

Tel: *+468 506 320 52*
Email: *henrik.bergstrom@twobirds.com*
URL: *www.twobirds.com*

Henrik is a partner and head of the Commercial group based in Stockholm, of which the Privacy and Data Protection group is a part of. He is also a member of the international Media and Tech & Comms groups.

Henrik has significant experience of commercial and transactional work for clients with tech, media and consumer sector focus. He assists and represents clients on issues relating to information technology, especially IT agreements, licensing, outsourcing- and development-related projects. He also advises on commercial contract law, data protection and information security.

Henrik regularly speaks at seminars on issues such as privacy and data protection, outsourcing and cloud services.

Angelica Lundqvist
Bird & Bird LLP
Norrlandsgatan 15
SE-103 95 Stockholm
Sweden

Tel: *+468 506 320 85*
Email: *angelica.lundqvist@twobirds.com*
URL: *www.twobirds.com*

Angelica is an associate in the Commercial group based in Stockholm, of which the Privacy and Data Protection group is a part of. She is also a member of our international Tech & Comms group.

Angelica has extensive experience of working with clients in the information technology sector, especially with regards to eHealth products and solutions. She advises both national and international clients in relation to IT agreements and other commercial contracts, development of IT-services, outsourcing and data protection matters.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk