Sourcing World

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

This first edition of *Sourcing World* will be of great assistance to corporations and their advisers, providing valuable insights and guidance to the local legal requirements and to local and global commercial best practices.

Written by outsourcing experts, every chapter gives a detailed overview of the legal and regulatory framework within each national jurisdiction and of the terms and conditions relevant to finalising an outsourcing deal. In addition, this is one of the first works to cover not only legal and regulatory issues but also in a structured manner to identify commercial practices on key negotiation items, such as benchmarking and remedies.

SECOND EDITION 2015

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

THE EUROPEAN LAWYER REFERENCE

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

Commercial Director
Katie Burrington

Commissioning Editor
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Publishing Assistant
Nicola Pender

Design and Production
Dawn McGovern

Editing and Typesetting
Forewords

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Foreword

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

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

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

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

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

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

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

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

craft outsourcing arrangements that are on the cutting edge and build on the lessons learned from many outsourcing transactions in multiple countries.

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

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

Zurich and Copenhagen, November 2014

Comparative overview

Gorrissen Federspiel Ole Horsfeldt

1. INTRODUCTION

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

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

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

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

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

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

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

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

2. AVERAGE DURATION OF PROCUREMENT PROCESSES

2.1 The average duration of procurement processes in months

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

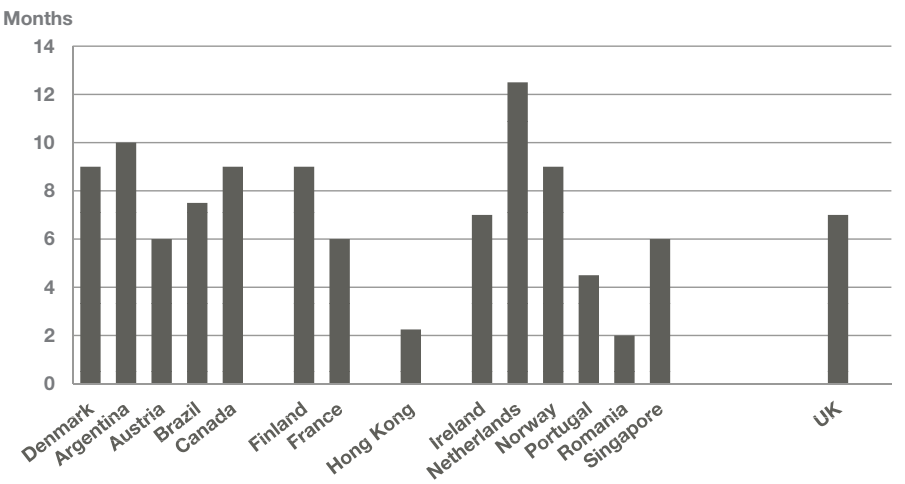

Figure 1: Average duration of the procurement processes

3. MANDATORY STATUTORY REGULATION ON OUTSOURCING

3.1 Mandatory statutory regulation of outsourcing

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

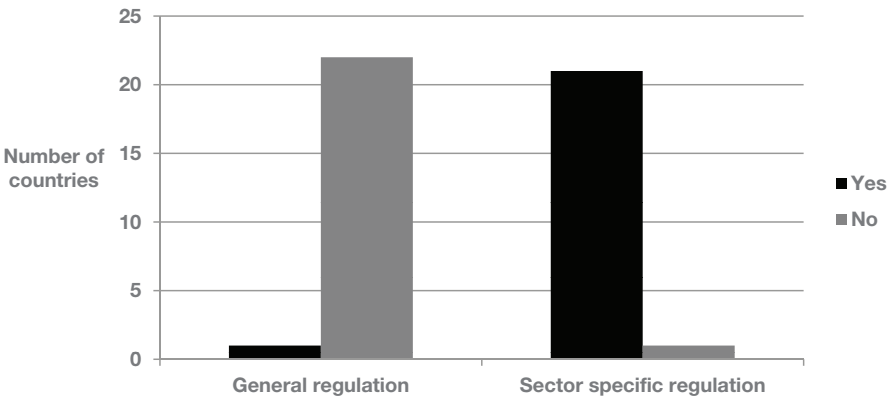

Figure 2: Number of countries with statutory regulation on outsourcing

4. PERSONAL DATA

4.1 Mandatory statutory regulation of processing of personal data

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

5. TRANSFER OF EMPLOYEES AS PART OF AN OUTSOURCING TRANSACTION

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

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

6. TRUE-UP AND BASELINING

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

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

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

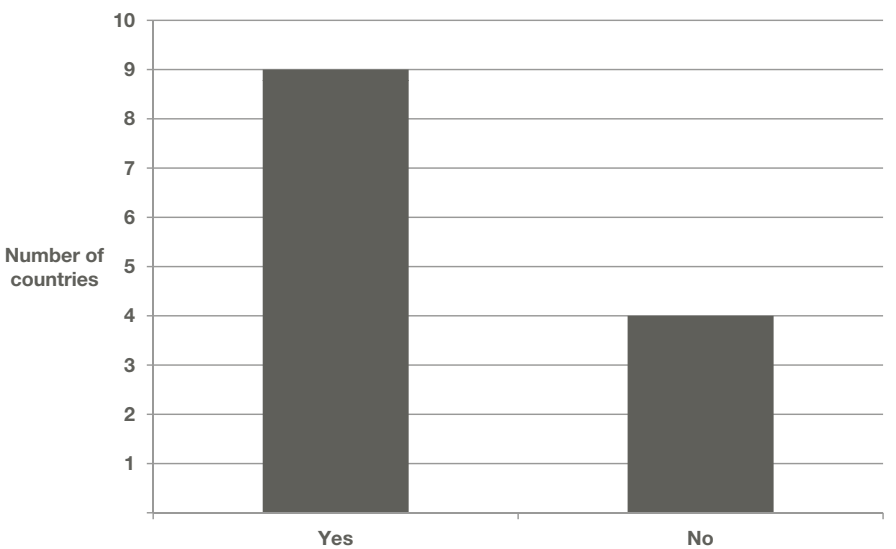

Figure 3: Is true-up or baselining a common commercial practice?

7. BENCHMARKING

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

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

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

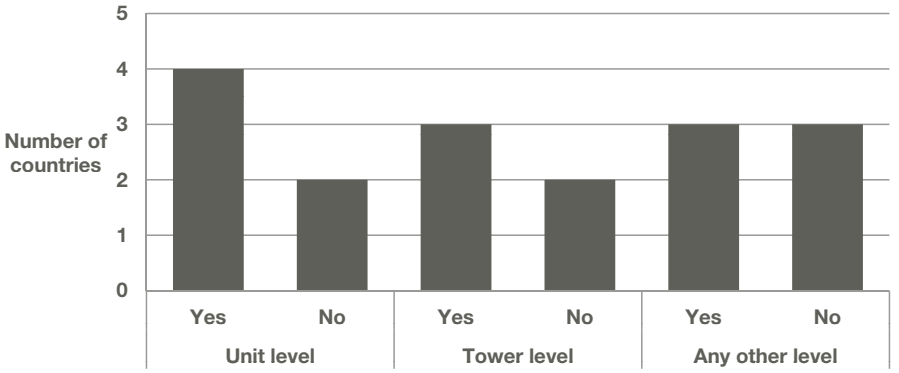

Figure 4: Is it common commercial practice to benchmark at...?

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

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

8. DURATION OF AN OUTSOURCING ARRANGEMENT

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

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

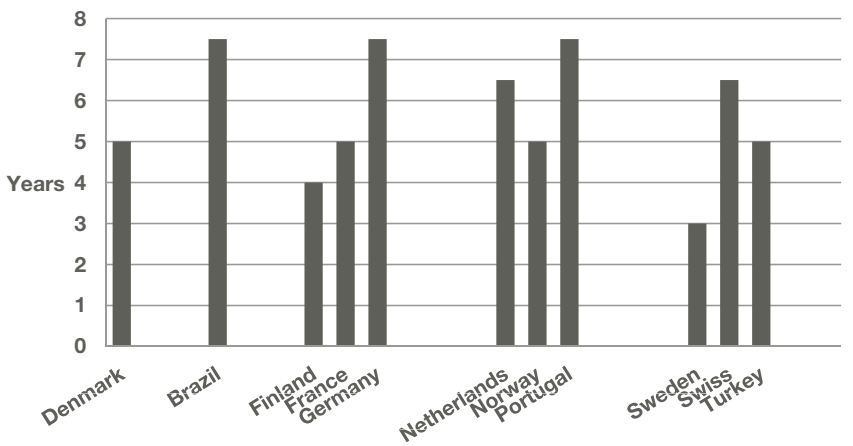

Figure 5: Common duration of an outsourcing arrangement

9. TERMINATION FOR CONVENIENCE BY THE CUSTOMER

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

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

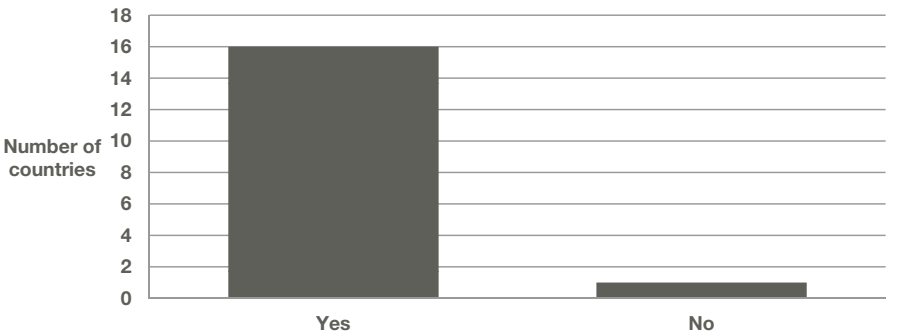

Figure 6: Is it common practice for the customer to have a right to terminate for convenience?

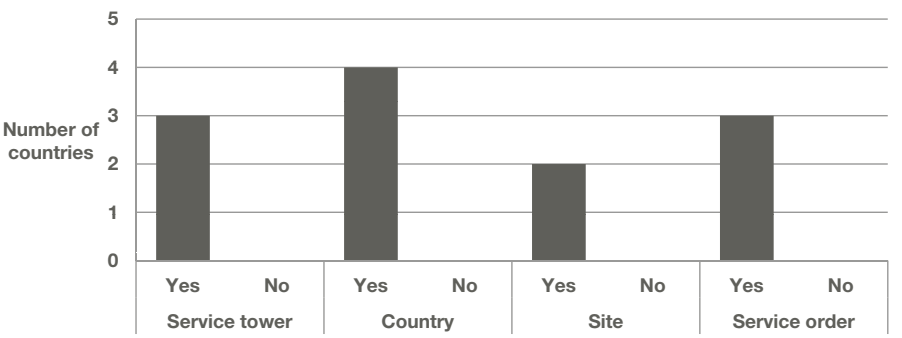

Figure 7: Which parts of an agreement may a customer commonly terminate for convenience?

Italy

Orsingher Ortu – Avvocati Associati Domenico Colella

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

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

In Italy, outsourcing emerged as a large-scale phenomenon in the 1960s because of the significant gap in labour costs between small and large companies.

The Italian outsourcing market is driven by a few large contracts and is still focused primarily on IT outsourcing (ITO), which accounts for approximately 70 per cent of the market. It mostly consists in the maintenance of computer networks and systems, management and control of data centres, and hardware and software support.

Business process outsourcing (BPO) transactions are still very limited in number and value compared to ITO deals, although they are in constant development. The main sectors where BPO is typically used are the administration and accounting areas, call centres, HR management, logistics and facility management.

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

Cloud computing is expanding within the Italian market as it represents an interesting and viable alternative to traditional business models for local enterprises in terms of flexibility, innovation and cost-efficiency. Cloud infrastructure and application services are often components of outsourcing transactions, even in small deals. However, there are still a number of aspects that impede the complete development of this technology and that are perceived as critical by potential customers, such as data protection, contractual and regulatory issues (especially in industry sectors that are heavily regulated, such as the banking and insurance sectors).

1.3 Describe the current supplier landscape

Commercial trends show a growth in large international providers of outsourcing services, such as Accenture, IBM, Infosys Technologies, Sodexo, Wipro Technologies, ISS, Tata Consultancy Services, Aramark and Convergys. Indian service providers are progressively increasing their market share in Italy, especially in BPO and IT infrastructure deals.

Additionally, there are a number of Italian players holding a significant market share in specific areas of specialisation:

- Almaviva and Comdata for call centres and telemarketing services;

- Engineering in the public sector, with particular regard to the health sector;
- Group Cedacri, Bassilichi Group, Phoenix Informatica Bancaria and Scai Group within the banking, finance and insurance markets;
- Capgemini for consulting services in the information technology area;
- Adp Italia for HR outsourcing; and
- Softlab for facility management services.

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

2.1 Describe generally the procurement process.

Public sector

Section 54 of the Public Contract Code (Legislative Decree No. 163, dated 12 April 2006) provides different procedures for the awarding of public contracts:

- open procedure: any relevant operators may submit a tender in accordance with the modalities and terms set forth in the call for tenders;
- restricted procedure: any operator may request to participate in accordance with the modalities and terms set forth in the call for tenders; however, only the operators invited by the contracting authority may submit their respective tender;
- negotiated procedure: the contracting authority consults selected operators and negotiates the terms of contract with one or more of them; and
- competitive dialogue: the contracting authority conducts a dialogue with the candidates admitted to the procedure for the development of one or more suitable alternatives that meet its requirements, and on the basis of which the chosen candidates are invited to tender.

Private sector

The procurement process in private sector entails different steps:

(i) the customer profiles the market for potential suppliers and sends them a request for information (RFI). A non-disclosure agreement (NDA) is usually included or attached to the RFI;
(ii) according to the RFI content and criteria, the customer sends a request for proposal to a shortlist of prospective suppliers by specifying the required scope;
(iii) following an evaluation of the suppliers' responses, the customer sends them a request for their best and final offer (BAFO), in which it details all the information necessary for the final offer. The BAFO may also be accompanied by a statement of work;
(iv) prospective suppliers may carry out an initial due diligence for clarifying the scope of the services to be performed and may make an estimate of the costs, taking into account the contract length and other relevant aspects of the transaction;

(v) the customer selects one supplier and executes a memorandum of understanding. The selected supplier carries out full due diligence in order to review resources, confirm the scope of services and existing service level agreements (SLAs); then
(vi) the parties negotiate and execute the final outsourcing agreement, which typically consists in a set of contracts.

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

A private procurement process for the execution of medium to large outsourcing arrangements has an average duration of three to six months and generally involves two/three vendors being invited to join the process. Fast-track procurement processes are adopted in small to medium outsourcing deals and consist in the simplification of the steps of the procurement process and/or reduction of the number of operators invited to bid.

2.3 Which roles and tasks are generally performed by business advisors, including legal advisors?

Business advisors play a key role in the context of medium/large outsourcing transactions, alongside customers' in-house technical teams, in:

- defining the scope of the services to be outsourced;
- identifying technical assumptions, prerequisites and potential areas of concern; and
- evaluating and identifying potential vendors on the basis of common trends and best practices of the relevant industries.

Legal advisors, on the other hand, support the process by structuring and negotiating the relevant contractual framework.

3. STATUTORY RULES, INDUSTRY SPECIFIC REQUIREMENTS AND REGULATIONS

3.1 Which statutory rules govern sourcing transactions in general?

Italian law governs outsourcing transactions if the parties to the contract have expressly chosen such legal system to be the applicable law to the agreement. In the absence of the parties' choice, Italian law governs outsourcing transactions if the contract has close connections with the Italian territory (Convention 80/934/EEC, opened for signature in Rome on 19 June 1980).

If Italian law is applicable, outsourcing transactions would be mostly regulated by the Italian Civil Code (CC), in particular by:

- sections 1559–70 concerning supply agreements; and
- sections 1655–77 on contract works.

Additional regulations are enacted for specific sectors by the competent authorities (see section 3.2 below).

3.2 What are the legal or regulatory requirements concerning outsourcing in any industry sector?

Financial and banking sector

From time to time, the Bank of Italy and the Italian Securities and Exchange Commission (Consob) enact regulations concerning the outsourcing by bank and financial intermediaries of certain activities, such as internal audit, compliance, information system of cash processing, payroll processing, anti-money laundering and IT systems.

A bank that intends to outsource, in whole or in part, specific functions such as the internal audit function, before the execution of the related agreement must give prior notice to the Bank of Italy, explaining the business reasons and modalities of the outsourcing (Circular No. 229/1999 as amended on 10 April 2007). The outsourcing agreement must be made in writing and must define:

- the subject matter, the respective rights and obligations of the parties, the expected service levels and the frequency of controls;
- the right to renegotiate the outsourcing conditions in case of changes in the bank's operations and structure;
- the duration of the agreement, the conditions for its renewal and the parties' respective commitments upon termination;
- the procedure for, and frequency of, the reports on controls to be submitted to the bank's authorised representatives; and
- the right granted to the bank, its auditors and the supervisory authorities to access any data related to the outsourced activities and the supplier's premises.

The outsourcing does not exempt the bank's authorised representatives from its own responsibilities.

Further regulations concern:

- the outsourcing of functions of essential and/or important nature and investment activities by intermediaries that carry out investment services (Regulation issued on 29 October 2007 by the Bank of Italy and Consob);
- the organisation, procedures and internal controls in case of outsourcing of anti-money laundering functions (Regulation issued on 10 March 2011 by the Bank of Italy and Consob);
- the outsourcing of portfolio management and counter services (Bulletin No. 7 of the Bank of Italy, issued in July 2002), which provides for a number of limitations and requirements in respect of the outsourcing of such services;
- the outsourcing of call centre services (Bulletin No. 10 of the Bank of Italy, issued in October 2001);
- the outsourcing of cash processing (Bank of Italy communication dated 16 March 2011); and
- the outsourcing of activities carried out by financial intermediaries registered in 'special lists' (Bank of Italy Circular No. 216, dated 5 August 1996 and updated on 15 October 2002).

Telecommunications

A company must notify the Italian Ministry of Economic Development of its intention to commence the provision of electronic communications networks or services. The company is authorised as of the date of the above notification. The prosecution of the business activities may be denied by the Ministry not later than 60 days from the delivery of the notification. In the absence of the refusal of the Ministry within the mentioned term, the general authorisation is considered as having been issued (section 25 of Italian Legislative Decree No. 259, dated 1 August 2003).

Additionally, the authorised telecommunication services provider must be enrolled in the Register of Communications Operators managed by the Telecommunications Authority.

Insurance sector

Pursuant to the Regulation No. 20 of 26 March 2008 (Regulation) issued by the Italian Supervising Authority (currently IVASS), companies providing insurance services can enter into outsourcing arrangements in specific business areas provided that such arrangements do not:

- compromise the quality of the customer's governance;
- affect the financial results of the customer and the continuity of its activities;
- affect the customer's ability to provide a continuous and satisfactory service to its clients; and
- entail an unjustified increase in operational risk.

In any case, insurance companies cannot outsource activities that involve insurance risks.

The outsourcing agreement must be in writing and must satisfy the requirements provided for in sections 31–33 of the Regulation.

IVASS verifies the compliance of the outsourcing arrangement and the delivery of the relevant services with the applicable regulations, and can oblige the company to modify or terminate the outsourcing agreement.

An insurance company that intends to outsource essential functions must give a prior notice to IVASS, within 45 days before completion of the outsourcing arrangement, by indicating:

- the details of the supplier;
- information concerning the functions to be transferred;
- the duration of the outsourcing agreement; and
- the place where the outsourced activity will take place.

In case of outsourcing of internal audit, risk management and compliance functions, the insurance company must send to IVASS a prior notice, together with a copy of the outsourcing agreement. The agreement can be performed after 60 days from receipt of copy of the outsourcing agreement by IVASS (sections 29–37 of the Regulation).

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

The customer has the right to monitor the supplier's activities (at the customer's expense). If the customer verifies that the supplier's performance is not compliant with the outsourcing agreement, it may request the supplier to perform its contractual obligations within a reasonable time. A failure by the supplier to fulfil its obligations within the specified term is grounds for the termination of the contract and the compensation for damages suffered by the customer (section 1662 CC). In case of outsourcing of business functions in sectors that are subject to the supervision of a certain authority, inspection rights and access to the supplier's records must generally be granted to such authority (refer to section 3.2 above).

See also sections 6 and 8.5 below.

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

A number of services may only be performed by licensed professionals/entities (eg banking and financial, insurance services, accounting services, legal and other professional services). Italian law defines the requirements and qualifications that are applicable to the performance of such services on a case-by-case basis.

See also section 3.2 above.

3.5 What are the requirements for regulatory notification or approval of outsourcing transactions in any industry sector?

See section 3.2 above.

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

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

As a general rule, in outsourcing transactions, the customer is the data controller of the personal data concerning its employees, clients, etc. The supplier may processes personal data on behalf of the controller as a 'data processor'.

Pursuant to section 29 of Legislative Decree No. 196, dated 30 June 2003 (DPC), the supplier, as the data processor:

- must be selected from entities that can ensure compliance with the provisions in force on account of their experience, capabilities and reliability; and
- must abide by the tasks and instructions (typically detailed in the service agreement) given by the data controller, who supervises their compliance.

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

Data protection

Sections 7–27 DPC set forth the general data protection principles that apply to all processing operations carried out by any natural or legal person, public administration, body, association or other entity.

The most relevant obligations of the customer, as data controller, are:

- to file a notification with the Italian Data Protection Authority ('DPA') in the cases set forth by the DPC;
- to provide the data subjects (its employees, clients and suppliers which are not legal entities) with an information statement (the minimum content of which is defined by section 13 DPC);
- to obtain, in the cases set forth by the law, a preventive and informed consent by the data subjects. If consent is needed, it shall only be deemed to be effective if it is freely given and it specifically regards a clearly identified processing operation (section 23 DPC);
- to organise the processing of personal data in a way that ensures the accuracy of the data collected and the constant updating thereof;
- to make sure that the data are stored *'for the time that is strictly necessary for the purposes for which the data were collected or subsequently processed'*;
- to adequately protect personal data by implementing the technical security measures set forth in the DPC;
- to provide any employee in charge of personal data processing with suitable instructions; and
- to ensure that all data subjects can exercise the right to know at any time *'the source of the personal data'*, *'the rationale applied to the processing, if the latter is carried out with the help of electronic means'* and *'the identification data concerning the data controller and data processors'*.

The allocation of the above obligations depends on the contractual arrangements between the parties.

Confidentiality of customer data

The DPC does not set out specific rules concerning customer data, which are generally protected through the provision of confidentiality covenants in the relevant service agreement or in a separate document (ie NDA or LOI).

Certain customer's data (such as client lists and other sensitive commercial information) may be protected as trade secrets pursuant to sections 98 and 99 of the Italian Intellectual Property Code. In addition, the confidentiality of customer data is protected in accordance with the legal general principle to act in good faith (section 1375 CC).

Banking secrecy

Italian law does not provide for a specific regulation on banking secrecy, which is merely recognised as a banking practice. The DPA encouraged the adoption of a code of conduct and professional practice (Resolution No. 8 of the Italian DPA, dated 16 November 2004) applying to information systems

managed by private entities with regard to consumer credit, reliability and timeliness of payments.

Notwithstanding the foregoing, several exceptions are set forth in criminal and civil procedure codes, anti-mafia law provisions, anti-money laundering law provisions and surveillance activity of the Bank of Italy.

Other professional secrecies

Italian law distinguishes between two types of 'secret':

- trade secrets, which concern the company's processes, design, practices, commercial methods, know-how and any information which grants to the business any economic advantage over competitors. The disclosure or use of scientific or trade secrets constitutes an infringement of Article 99 of the Intellectual Property Code and may be sanctioned with imprisonment for up to two years if made for profit purposes (section 623 of Italian Criminal Code); and
- professional secrets, which bind self-employed personnel in accordance with specific sector regulations. Disclosure without just cause or use for profit purposes is sanctioned with imprisonment for up to one year or a fine from EUR 30.00 to 516.00 (section 622 of Italian Criminal Code).

4.3 Which rules govern the transfer of data outside your jurisdiction?

Data transfers to EU member states (and to non-EU states that the European Commission had acknowledged as affording an adequate level of protection) is permitted without any restriction. Conversely, data transfers (even temporary) from the Italian territory to outside the EU is permitted only upon the conditions set forth in sections 43 and 44 DPC: in principle, the transfer of personal data to a non-EU state is permitted if authorised by the Italian DPA (however, see sections 4.4 and 4.5 below).

4.4 Are data transfer agreements contemplated or in use?

The following data transfer agreements (or alternative systems) have effect pursuant to the DPC.

The European Commission has issued sets of model clauses that allow the lawful transfer of personal data to non-EU states (section 26, paragraph 4 of Directive 95/46/EC).

Alternatively, the binding corporate rules (BCR) adopted by multinational groups are suitable to allow the transfer of personal data. BCR are internal rules which provide a global policy regarding the international transfers of personal data within entities of the same corporate group. BCR are subject to the preventive authorisation of the competent national DPAs.

Finally, the European Commission with the Decision 520/2000/EC approved the Safe Harbor Framework elaborated by the US Department of Commerce. This provides seven general principles, which substantially reflect the DPC provisions. A US organisation that intends to adhere to the Safe Harbor Framework must self-certify its compliance with the principles contained therein.

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

According to section 44 DPC, no notification/approval is necessary for the transfer of personal data to non-EU states if the data exporter and the data importer have incorporated into their contract the EU Commission approved standard model export clauses. However, the model export clause inserted into a contract should not be materially amended (ie the EU approved model should be complied with) and in particular the governing law of the contract should be the one of the country where the data export is established. Otherwise, specific approval of the model clause by the Italian DPA is required. Amendments to the notification with DPA and additional requirements could be requested in specific circumstances.

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

Italian law does not provide for a specific regulatory framework as applicable to cloud computing and does not offer adequate safeguards on the matter.

The use of cloud-based services entails several issues from a privacy prospective:

- the actual allocation of roles between the parties involved;
- the actual location of the personal data collected and stored. Data generally migrate from the customer's local systems to the remote computer system of the supplier; and
- data security and confidentiality.

Italian DPA has recently issued a 'Decalogue' with practical suggestions and tips, aimed at helping companies to select the most appropriate business solution before outsourcing the management of personal data to the cloud or implementing new organisational models.

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

Section 15 DPC sets forth a general provision according to which whoever causes damage to another as a consequence of the processing of personal data shall be liable to compensate damages, unless it provides evidence that all appropriate measures to avoid them were taken. Sections 167–72 DPC state the criminal sanctions that will apply for specific cases of data protection infringement.

Usually, the supplier is the data processor and processes personal data on the customer's behalf. Any decision concerning purposes, methods and security measures is up to the data controller, who is the person in charge in case of privacy infringements; therefore, the delegation of responsibility to the data processor would not exempt the data controller from its liability in case of privacy infringements. It is thus customary for the supplier to be asked to enter into an indemnification agreement in favour of the customer for damages caused in the processing of personal data.

5. ASSET DEAL, LEGAL CONCEPTS AND MECHANICS

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

Movable property

Italian law does not provide formal requirements for the transfer of movable property, except for registered movable assets (ie cars, ships, aircrafts and aeroplanes). In such a case, the related transfer agreement must be executed in writing and registered in the relevant public register.

Immovable property

The agreement concerning the transfer of immovable property must be made in writing, executed before a notary public and subsequently registered with the competent Tax Authority and Land Registry.

In case of transfer of business as a going concern, the related agreements also entail the transfer of the immovable property by operation of law (section 2556 CC). In addition to the above-mentioned formalities, the agreement that transfers the going concern must be recorded in the competent Register of Enterprises.

IP rights and licences

According to section 110 of Law No. 633, dated 22 April 1941, the transfer and/or licensing of IP rights must be evidenced in writing.

The agreement is effective *vis-à-vis* third parties only if it is recorded in the competent register managed by the Copyright Office.

Contracts

A contract can be transferred to a third party with the consent of the other party provided that the obligations have not yet been performed. If the party gives its consent in advance, the transfer will be in force as of its notification to the other party or its acceptance (sections 1406–10 CC).

With reference to the transfer of a business as a going concern, unless otherwise agreed, contracts are assigned to the transferee by operation of law (section 2558 CC). However, the other party to the contract must be notified of the transfer and can withdraw for just cause within three months from receipt of the notice. Such automatic transfer does not apply to contracts that relate solely to the parties (ie contracts executed *intuitu personae*).

5.2 Are there particular considerations for the transfer of assets offshore?

The transfer of assets offshore is regulated by the same provisions and requirements as highlighted in section 5.1 above. Additional export control and licence requirements as well as specific regulations may apply, depending on the circumstances (eg the country where the assets are transferred to).

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

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

6.1.1 to a supplier in an initial outsourcing?

The outsourcing transaction structured as a transfer of business entails the automatic transfer of employees from the customer (transferor) to the supplier (transferee). The term 'business' means any pre-existing, organised and autonomous group of assets and persons that, following the transfer, is capable of maintaining its identity (*Pfizer Italia S.r.l. v* M., Italian Supreme Court Decision No. 21917, dated 9 September 2013).

According to section 2112 CC, the transferred employees maintain their rights and obligations under their employment agreement.

With reference to self-employed personnel:

- agreements concerning the business (ie agency contracts) are automatically transferred from the transferor to the transferee, unless otherwise agreed between the parties; and
- agreements that relate solely to the parties (ie consulting agreements) do not entail the automatic transfer to the transferee and thus require the worker's consent.

Conversely, if the outsourcing transaction is not structured as a transfer of business, the transfer of employees is subject to the general principles of the CC. The respective employment agreements are not transferred by operation of law, but only with the employees' consent (section 1406 CC; *Finmeccanica v Manital Cons. Servizi Integrati and others*, Italian Supreme Court, Decision No. 22125, dated 16 October 2006). Without the employees' consent, the assignment of the employments agreements is not binding and is ineffective for the parties involved.

6.1.2 to a supplier on a change of supplier?

The provisions applicable to the initial outsourcing also regulate the change of supplier, as well as any subsequent outsourcing (see section 6.1.1 above).

6.1.3 back to the customer on termination of an outsourcing?

Termination of an outsourcing does not involve the automatic retransfer of the employees to the customer unless otherwise agreed upon in the outsourcing agreement (eg the transaction is structured as a lease of business).

6.2 If employees transfer by operation of law, which terms and effects apply?

The employment relationship in force with transferred employees continues unchanged in all its aspects (ie mandatory insurance status, seniority, salaries and any other compensation due, rights relating to qualification or job performed, etc) upon the transferee, without any interruption due to the modification of the employer.

In particular:

- the employees are entitled to exercise against the transferee the rights that could be exercised *vis-à-vis* the transferor;
- the transferee and transferor are jointly liable for the credits of the employees as existing prior to the transfer (section 2112, paragraph 2, CC);
- mandatory contributions existing at the time of the transfer must be paid by the transferor; and
- all the transferor's employees (whose jobs concern the transferred business) who are not transferred to the transferee have a right of first refusal in case of hirings made by the transferee within one year from the date of the business transfer, or the period provided for in the applicable national collective bargaining agreement (NCBA), if longer.

Despite the preservation of employees' rights, the terms and conditions of the employment agreement may change (even in a detrimental sense) according to the NCBA applied by the transferee (see Collective agreements below).

Pensions and benefits

Given that the employment relationship entered into with the transferred employees continues unchanged in all its aspects upon the transfer, the employees' pension rights and benefits are not affected by the transfer of business.

Collective agreements

The transferee is required to apply the economic and regulatory measures provided by the NCBA in force at the date of the transfer until its expiration, unless the NCBA is replaced by another NCBA that is applicable to the transferee's company (section 2112, paragraph 3, CC). The replacement of the applicable NCBA concerns only NCBAs of the same level and faces few limitations:

- the NCBA applied by the transferee cannot affect the rights already accrued by the transferred employees by virtue of the employment relationship with the transferor; and
- the NCBA cannot be applied retroactively, ie the transferred employees are not entitled to the benefits granted to the employees of the transferee prior to the transfer.

6.3 How can the customer (contractual or other) retain particular employees, or make them redundant?

Retained employees

The employer who transfers a business can retain any of the employees assigned to the transferred business. Such employees continue their employment relationship with the transferor and cannot claim any rights against the transferee.

Resignations of employees
Transferred employees can withdraw from the employment agreement for just reason within three months from the transfer of the business if their employment conditions have been materially modified. The employees have in any case the right to receive the indemnity in lieu of notice period.

Dismissal of employees
The transfer of business does not involve a modification of the organisational and productive structure, but simply implies a change in the business's ownership. Therefore, the dismissal of employees (both from the transferor and transferee side) as a consequence of the transfer of business must be considered void. Dismissed employees are entitled to bring action against their employer, under certain conditions, in order to obtain the remedies of re-employment and compensation for the damages suffered.

However, the law allows the carrying out of collective dismissals for redundancy reasons, as long as technical and operating legal requirements are fulfilled, in accordance with the applicable procedures of prior information to and consultation with trade unions.

Calculation of redundancy pay
In case of redundancy, the relevant employee is entitled to receive:
- a severance indemnity; and
- further severance payments as extra monthly payments, unused holiday entitlements, leave of absence, and a portion of the 13th and 14th instalments of their remuneration provided by the applicable NCBA for the relevant year.

If the employer were to decide not to keep the redundant employee at work during the notice period, the employee would be entitled to receive the indemnity in lieu of notice period (which is usually the common practice).

6.4 To what extent can a supplier harmonise terms and conditions of transferring employees with those of its existing workforce?
A harmonisation of the terms and conditions of the transferred employees with those of the existing workforce may be achieved during the consultation procedure with the trade unions (see section 6.6 below).

6.5 Can the parties structure the employee arrangements of an outsourcing as a secondment?
Although it is not frequent in the context of an outsourcing transaction, the employee arrangements can be structured as a secondment.

Secondment is lawful if:
- a specific, relevant and concrete interest of the customer exists and it persists throughout the secondment period; and
- it has a temporary nature (Circular of the Ministry of Labour dated June 24, 2005 No. 28).

The employee's consent is not required unless the secondment entails a changing of the job functions. The customer remains the employee's formal employer, so continues to direct and coordinate the secondee.

6.6 Describe notice, information and/or consultation obligations of the customer and/or supplier in relation to employees or employees' representatives

When the outsourcing is structured as a transfer of business with more than 15 employees, both the transferor and the transferee must notify the relevant trade unions in writing within 25 days before a business transfer agreement is entered into between the parties. The notice must contain:

- the date or proposed date of the transfer;
- the reasons for the transfer;
- its legal, economic and social consequences from an employment standpoint; and
- any measures that need to be taken in the employees' interest.

The trade unions might require to be consulted within seven days from receipt of the above notification. In this case, the transferor and the transferee must start a consultation procedure with the relevant trade unions, upon their written request. If an agreement is not reached within 10 days, the consultation is considered as completed. The absence of an agreement with the trade unions does not prevent the transfer of business, but it may increase the risks of legal proceedings, work stoppages and/or strikes.

Conversely, if an agreement is reached with the trade unions, it generally provides for:

- specific rules for harmonising the collective treatment of transferred employees with the contractual terms and conditions as applied to the employees of the transferee;
- the maintenance of the collective treatment actually in force as applied to the transferred employees; and
- guarantees on the occupational levels existing at the time of the transfer of business.

The transferor must notify the involved employees of the transfer of business, its effective date and the conditions of employment no later than the completion date of the transfer.

6.7 Describe the consequences (civil and/or criminal) of non-compliance with any of above requirements

Any failure to comply with the aforesaid consultation procedure constitutes an unfair behaviour towards the trade unions, sanctioned through the procedure provided for by the Statute of Employees (section 28 of Law No. 300, dated 20 May 1970; *Guarneri v Prov. Agrigento*, Decision No. 24093, dated 13 November 2009; and *G.C. and others v K.*, Decision No. 17072, dated 22 August 2005).

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

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

Before outsourcing a business process and/or function, the customer typically identifies:

- the scope of the business process and/or function to be outsourced;
- the key requirements and prospective service levels;
- the regulatory issues, tax and other risks related to the outsourcing; and
- the service qualifications and expertise offered by the suppliers selected and the prospective pricing models.

Conversely, the supplier's due diligence is aimed at analysing the customer's needs for developing a tailored solution. Due diligence is particularly focused on:

- the customer's business, assets, service requirements and levels, internal costs, scope and timing, depending on the nature and complexity of the outsourcing; and
- the legal requirements and service-related responsibilities.

Where the information obtained is inaccurate, the supplier may resort to true-up remedies, such as:

- the provision of grace periods and/or transition phases in order to adjust the scope of the services, service levels and charges; and
- predefined criteria for the variation of services and relevant charges.

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

The definition by the supplier of assumptions and service prerequisites is a common practice. The assumptions and prerequisites set forth by the supplier typically concern, among others:

- the value of the transferred assets;
- the data on which pricing is calculated; and
- technical aspects related to the provision of the services.

In addition, RACI matrices and similar contractual undertakings are agreed upon in order to allocate the relevant responsibilities between the parties. The concept of dependencies and/or cooperation duties between the parties rests upon the legal general principle to act in good faith (section 1375 CC), as well as on the principle that one party to an agreement cannot be held liable for default of performance of a certain obligation if such default was not directly attributable to such party (section 1228 CC). The failure by the customer to comply with its duties under the outsourcing arrangements prevents the customer from enforcing any SLA and obtaining liquidated damages or, in general, any compensation for damages.

7.3 How are services usually measured upon service commencement?

The parties typically agree upon transition phases during which services are measured on the basis of methodologies such as the customer's historic SLA,

the best efforts approach and statistical indicators. Similar methodologies may be applied to service baselines and charges.

8. CHARGING, ADJUSTMENT OF FEES, AUDITING, BENCHMARKING

8.1 Describe the charging methods commonly used in an outsourcing

Charging methods usually depend on the type and nature of the outsourced services. Services can be charged on the basis of:

- fixed price;
- pay as you go;
- cost-plus (the cost of the services plus a certain margin, possibly linked to a mechanism that shares risks and rewards between the parties); or
- additional resource charge (ARC) and reduced resource credit (RRC) models (ie a minimum commitment and a variable element in relation to differing volumes or service levels). In this case, a deadband is typically agreed upon for ARCs and RRCs (up to 20–25 per cent of the initial service baseline), and increases or reductions of service charges are applicable should the ARCs or RRCs exceed the agreed deadband.

8.2 Describe customary change management procedures

Outsourcing transactions are frequently long-term relationships which necessarily entail amendments due to changes in legal requirements or in technology, or the expansion or reduction of the customer's business. For this reason, outsourcing transactions usually include a structured change management procedure, with detailed instructions concerning:

- controls and levels of authorisation needed to determine changes;
- the nature of the changes that justify additional payments; and
- formal procedures to request and agree upon a change in the services, which typically includes the specification of a time-frame and, as the case may be, an escalation process to define the change.

Parties may also agree upon a 'fast track procedure' that is applicable to standardised requests of amendments or short-live changes.

It should be noted that Italian law provides for a legal regime on service variations under sections 1659, 1660 and 1661 CC that is usually derogated by the parties.

8.3 Are there other adjustment mechanisms?

Indexations and charging variations calculated, for instance, on the percentage increase in the relevant consumer price index may apply.

Pursuant to section 1664 CC, a supplier must be compensated for unforeseeable changes in labour costs, costs of materials and similar changes. However, such provision is usually derogated or disregarded in the context of outsourcing transactions.

8.4 Describe the contract rules for disputed charges and related consequences

Alternative dispute resolution methods and escalation processes are commonly applied in case of disputed charges. The customer and supplier may contractually agree that disputed charges are subject to the determination of an independent expert, appointed by the parties, within a certain term. In the absence of an agreement between the parties, the appointment of the expert may be referred to a third party. The expert's determination is usually issued in writing, and is final and binding upon the parties.

It is a common practice to limit the right of the supplier to interrupt or suspend the provision of the services in case of disputed charges.

With regard to set-off clauses and dispute resolution issues, see sections 11.5 and 14 below.

8.5 What are the contractual rules usually applied to auditing?

The customer's inspection and audit rights are usually regulated in the context of outsourcing transactions in Italy, and such rights can be exercised by the customer in order to verify compliance with the contract and applicable legal requirements by the supplier. It is not common practice to define a maximum number of audits to be carried out during the contractual term, although the following provisions would typically be inserted in the relevant contractual arrangements:

- prior notice to the supplier in order to proceed with the audit;
- provisions aimed at avoiding disruptions in the supplier's business activities;
- confidentiality undertakings for the benefit of the supplier; and
- allocation of the relevant expenses (eg the costs and expenses of the audit are paid by the customer unless any non-conformity is ascertained).

8.6 Describe common benchmarking methodologies

Benchmarking processes may be applicable to the entire agreement or to certain service towers, or may deal with specific aspects, such as service levels and charges.

The benchmarking mechanism is negotiated between the parties and conducted on a regular basis (eg annually) or upon request (parties may agree a cap of requests).

Benchmarking activities are carried out by a third party appointed by the parties (a list of pre-approved third parties may be defined).

The outcome of the benchmarking exercise may lead to automatic adjustments in the contractual components being the subject matter of the benchmarking, although maximum adjustments and/or deadbands may be agreed upon. Termination rights may also be determined, depending on the specific circumstances.

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

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

9.1.1 transfers of assets?

If the outsourcing is structured as transfer of business as a going concern, it is not subject to VAT but is subject to a registration tax at a proportional rate, depending on the nature of the assets composing the business (9 per cent on real estate assets, 3 per cent on movable assets and intangible assets, 0.5 per cent on receivables). The various tax rates are levied on the different asset prices as defined in the purchase agreement.

Conversely, the transfer of assets (ie immovable property, trademarks or patents) is subject to VAT, provided that the operation has been carried out in the habitual or exclusive exercise of business and within the Italian territory.

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

The provision of services under the outsourcing arrangement is subject to VAT, at the ordinary rate of 22 per cent.

9.1.3 service charges or other taxes at source?

Profits generated by the outsourcing agreement are subject to corporate income tax (*Imposta sul reddito delle società* – IRES), currently at 27.5 per cent, and regional income tax (IRAP), at a rate of from 3.9 to 6.97 per cent (depending on the sector of activity and the region in which the activity is carried out, if certain conditions are met).

9.1.4 withholding taxes?

N/A.

9.1.5 stamp duty?

N/A.

9.1.6 corporate tax?

No other corporate taxes are applicable in addition to VAT, IRES and IRAP.

9.1.7 other tax issues?

N/A.

9.2 What precautions are usually taken to arrange for tax efficiency?

Tax optimisation is taken into consideration when structuring an outsourcing deal especially if the transaction involves a number of jurisdictions (eg appropriate measures are adopted in order to avoid the occurrence of permanent establishments in certain jurisdictions as a consequence of the provision of the relevant services).

The customer may seek protection in case of tax liabilities through appropriate warranties and indemnification coverage from the supplier.

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

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

Considering that the benefits arising from outsourcing are more effective within a medium to long time-frame, the term of the related agreements varies from three to five years on average. Notice periods for non-renewal of outsourcing agreements are typically in the range of 12–18 months. Italian law does not provide for specific provisions in respect of the foregoing.

Recent trends have shown a reduction in the term of outsourcing agreements in order to meet the growing needs for flexibility, due to the unpredictability of the current economic landscape. Therefore, customers are more inclined to prefer short-term rather than medium/long-term results.

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

An outsourcing agreement may be terminated for different reasons:

- fundamental breach: the non-defaulting party may, at its sole discretion, ask for, in addition to compensation for damages suffered, the fulfilment or the termination of the agreement (sections 1453–55 CC);
- express termination clause: the parties may expressly agree that the contract terminates if an identified obligation is not fulfilled in the manner prescribed in the agreement (section 1456 CC);
- essential term: if a certain term, agreed for the performance by one party of its obligation, is considered essential for the other party, the latter may ask that such obligation if fulfilled by the other party within three days. In case of failure by the relevant party to fulfil such obligation, the agreement is terminated by operation of law;
- discharge of contract by frustration: if the performance of one party's obligation becomes impossible because of a sudden frustration, the contract may be terminated by the parties (sections 1463 and 1464 CC); or
- termination of contract for supervening unconscionability: if the performance of a certain obligation becomes extremely burdensome because of the occurrence of extraordinary and unexpected events, the agreement may be terminated by the interested party (section 1467 CC).

See section 10.4 below in respect of termination for convenience.

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

Typically, the contractual circumstances under which termination rights are granted are:

- non-compliance of the services with the contractual terms, technical specifications and requirements;
- supplier's breach of law;

- supplier's failure to enter into or renew insurance policies; or
- supplier's change of control, particularly if the transfer is in favour of service providers being blacklisted by the customer.

10.4 Are there termination for convenience rights?

The customer may cancel the contract at will by indemnifying the supplier for any expenses incurred and profits lost (section 1671 CC). However, the parties may contractually derogate from such provision by defining (i) additional and/or different termination rights in favour of the customer and, more rarely, in favour of the supplier and (ii) more specific formulas to calculate termination fees due to the supplier in case of termination of the agreement by the customer. Termination for convenience generally requires a notice to be sent by the terminating party to the other within a certain notice period.

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

Italian law does not provide for implied rights for the customer and/or supplier to continue to use licensed IP rights or gain access to relevant know-how following the termination of the outsourcing agreement. Therefore, the parties address such issue by agreeing upon appropriate contractual provisions.

See section 10.6 below.

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

In order to avoid potential disputes, it is highly recommended to define in the outsourcing agreement a detailed set of rules as applicable to termination management and migration of services upon termination. For instance, such provisions shall include:

- the scope and term of the supplier's assistance with respect to the migration of services;
- the disclosure by the supplier of know-how or any other information that is necessary to migrate the services;
- the attribution of rights to use any relevant intellectual property following termination;
- the assignment of agreements with third parties that may be necessary to ensure a continuing performance of the services;
- the training of customer's personnel; and
- the transfer of assets shared by the parties during the outsourcing.

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

Disputes commonly concern the scope and extent of migration services and confidentiality restrictions as opposed by the former supplier *vis-à-vis* the

upcoming service provider. The most effective means to avoid such disputes is to set up appropriate and detailed contractual provisions addressing such issues.

11. REMEDIES, RISK MANAGEMENT AND PROACTIVE MEASURES

11.1 Which remedies and/or reliefs are available to the customer under law for bad or non-performance by the supplier?

In case of bad or non-performance by the supplier, the customer can, at its sole discretion, ask for:

- the fulfilment or the termination of the agreement; and
- compensation for damages suffered (section 1453 CC).

Damages may only be awarded to the customer as an immediate and direct consequence of the contractual breach, and include:

- any loss incurred by the customer; and
- the loss of expected earnings.

The compensation for damages is:

- limited to the damages foreseeable at the time the obligation arose, as long as the failure or delay does not depend on the supplier's wilful misconduct;
- reduced by an amount equal to the advantage achieved by the customer as an immediate and direct consequence of the supplier's breach;
- reduced if the customer has contributed to the breach; and
- not awarded if the customer could have avoided the damage by using ordinary and reasonable diligence.

11.2 Which customer protections are typically included in the contract to supplement statutory remedies/relief?

In addition to statutory remedies, the customer usually requires the inclusion in the contract of:

- warranty and indemnification clauses (see section 11.3 below);
- service credits and penalties;
- audit rights (see section 8.5 above);
- step-in rights; and
- reporting and governance provisions.

11.3 Which warranties and indemnities are typically included in a contract?

Warranties

Typically, warranty clauses concern:

- non-conforming or defective services (section 1667 CC). Such warranty is excluded if the customer accepted the services or it knew, or could have known, the non-conformity or defects, unless the supplier acted in bad faith;
- the compliance of the supplier and/or services with any applicable regulations and a third party's proprietary rights;

- the employment of skilled personnel in compliance with local regulations on the employment matters;
- the payment by the supplier of taxes, social security and mandatory insurance contributions;
- the implementation of any statutory measures regarding the protection of health and safety in the workplace; and
- the implementation of an organisation model aimed at preventing certain offences committed by employees and managers.

Indemnities

The supplier's indemnification towards the customer include:

- a third party's claims and/or infringement of the third party's IP rights by the supplier; and
- non-compliance by the supplier with tax, labour and social security provisions.

Certain obligations to indemnify the supplier may be assumed by the customer, for instance, in respect of infringement of third parties' IP rights as previously used by the customer, as well as in the case of the customer's violation of any applicable law or order of any governmental authority.

11.4 Describe the common limitation and/or exclusion of liability

A contractual clause aimed at excluding or limiting either party's liability for wilful misconduct or gross negligence is considered null and void (section 1229 CC).

Notwithstanding the foregoing, the parties may limit the extent of their liabilities to a fixed amount previously agreed between them (eg a limitation of supplier's liability equal to the fees paid by the customer during the twelve months preceding the claim), but such cap would apply to cases of excusable negligence only.

11.5 Are there statutory set-off rights and can they be contractually excluded or limited?

Statutory set-off rights require that the respective debts of the parties are due, liquid and enforceable.

However, the above-mentioned conditions can be contractually derogated or excluded by the parties (eg the customer may require that any contractual penalties due by the supplier can be set off against the consideration agreed between the parties).

12. INSURANCE

12.1 What types of insurance are readily available in your jurisdiction?

Typically, outsourcing agreements require the supplier to enter into and maintain at its own cost insurance policies for the duration of the contract, the insured amount of which is usually agreed with the customer. Such insurance policies cover, among others, professional liability, business protection, third-party liability and property damage.

13. SUBCONTRACTING AND ASSIGNMENT

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

Subcontracting

The supplier cannot subcontract the performance of the services without the customer's consent (section 1656 CC).

Unless otherwise agreed between the parties, the subcontractor is responsible and liable for the performance of its obligations *vis-à-vis* the supplier. Therefore, the same is entitled to raise any claims towards the latter (and not against the customer) (*Società Reci in liquidazione v Andreoli and others*, Italian Supreme Court Decision No. 16917, dated 2 August 2011).

Assignment of obligation

A certain party can assign the obligations arising from a contract to a third party with the consent of the other party provided that the obligations have not yet been performed. If the party gives its consent in advance, the transfer becomes effective as of its notification to the other party or its acceptance (see section 5.1, Contracts above).

If the other party does not release the assignor from its obligations, the assignor is jointly liable with the assignee for the performance of the assigned obligations (section 1408 CC).

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

As long as subcontracting is allowed or otherwise authorised by the customer, the supplier must disclose the subcontractors' details to the customer and ensure that the subcontractors are in possession of the same requirements, skills and technical expertise as those agreed between the parties. The supplier remains in any case responsible and liable for the acts and omissions of any subcontractor.

Assignment within the parties' corporate groups is usually accepted, whereas the transfer of the agreement or specific contractual rights or obligations to third parties is subject to a number of limitations or entirely excluded.

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

14.1 Describe statutory rules and practice regarding contract management, governance and escalation

In the absence of mandatory provisions, dispute resolution tools and escalation procedures may vary significantly on a case-by-case basis, depending on the nature and scope of the outsourcing agreement.

Typically, the first step of the dispute resolution procedure involves the respective representatives of the contracting parties. If the resolution of the dispute is not achieved within the agreed time-frame, the dispute is escalated to the top management or board level.

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

With reference to applicable law, see section 3.1 above.

Any dispute arising out of, or in connection with, the outsourcing agreement can be referred to:

- a competent national court (as the case may be, specifically chosen by the parties); or
- one arbitrator or a panel of arbitrators. In such case, the parties must define the language of the arbitration, the relevant venue and the regulations applicable to the arbitration process.

Contact details

FOREWORD

Dr Lukas Morscher
Lenz & Staehelin
Bleicherweg 58
8027 Zurich
Switzerland
T: +41 58 450 80 00
F: +41 58 450 80 01
E: lukas.morscher@lenzstaehelin.com
W: www.lenzstaehelin.com

Ole Horsfeldt
Gorrissen Federspiel
H. C. Andersens Boulevard 12
1553 Copenhagen V
Denmark
T: +45 33 41 41 41
F: +45 33 41 41 33
E: oho@gorrissenfederspiel.com
W: www.gorrissenfederspiel.com

ARGENTINA

Marcelo Bombau
M & M Bomchil
Suipacha 268
Piso 12
C1008AAF
Ciudad A. de Buenos Aires
Argentina
T: +54 11 4321-7500
+54 11 4321-7503
F: +54 11 4321-7555
E: marcelo.bombau@bomchil.com
W: www.bomchil.com

AUSTRIA

Wolfgang Tichy & Günther Leissler
Schönherr Rechtsanwälte GmbH
Tuchlauben 17
A-1014 Vienna
Austria
T: +43 1 53437 50227
F: +43 1 53437 6100
E: w.tichy@schoenherr.eu
g.leissler@schoenherr.eu
W: www.schoenherr.eu

BRAZIL

Fábio Luiz Barboza Pereira
Veirano Advogados
Av. Brigadeiro Faria Lima, 3477
16º andar
04538-133 - São Paulo SP
Brazil
T: + 5511 2313 5700
F: + 5511 2313 5990
E: fabio.pereira@veirano.com.br
W: www.veirano.com.br

CANADA

Sunny Handa & Hélène Deschamps Marquis
Blake, Cassels & Graydon LLP
600 de Maisonneuve Boulevard West
Suite 2200
Montréal QC H3A 3J2
Canada
T: +1 514 982 4008 (SH)
+1 514 982 4042 (HDM)
F: +1 514 982 4099
E: sunny.handa@blakes.com
helene.deschampsmarquis@blakes.com
W: www.blakes.com

CZECH REPUBLIC

Lenka Suchánková & Tomas Schollaert
Pierstone
Na Příkopě 9
110 00 Prague 1
Czech Republic
T: +420 224 234 958
E: lenka.suchankova@pierstone.com
tomas.schollaert@pierstone.com

W: www.pierstone.com

DENMARK

Ole Horsfeldt
Gorrissen Federspiel
H. C. Andersens Boulevard 12
1553 Copenhagen V
Denmark
T: +45 33 41 41 41
F: +45 33 41 41 33
E: oho@gorrissenfederspiel.com
W: www.gorrissenfederspiel.com

FINLAND

Mikko Manner, Anna Haapanen &
Juhani Sinkkonen
Roschier, Attorneys Ltd.
Keskuskatu 7 A
FI-00100 Helsinki
Finland
T: +358 20 506 6519 (MM)
+358 20 506 6597 (AH)
+358 20 506 6538 (JS)
E: mikko.manner@roschier.com
anna.haapanen@roschier.com
juhani.sinkkonen@roschier.com
F: +358 20 506 6100
W: www.roschier.com

FRANCE

Thierry Dor & Foulques de Rostolan
Gide Loyrette Nouel
26 cours Albert 1er
75008 Paris
France
T: +33 1 40 75 60 00
F: +33 1 40 75 69 83
E: dor@gide.com
E: rostolan@gide.com
W: www.gide.com

GERMANY

Prof. Dr Peter Bräutigam
Noerr LLP
Brienner Straße 28
80333 Munich
Germany
T: +49 89-28628-145
F: +49 89-280110
E: peter.braeutigam@noerr.com
W: www.noerr.com

HONG KONG

Chuan Sun & Victoria White,
Freshfields Bruckhaus Deringer
11th Floor, Two Exchange Square
Central
Hong Kong
T: +852 2846 3400
F: +852 2810 6192
E: chuan.sun@freshfields.com
victoria.white@freshfields.com
W: www.freshfields.com

INDIA

Sajai Singh
J. Sagar Associates
2 Frontline Grandeur
14 Walton Road
Bangalore 560 001
India
T: +91 80 435 03627
F: +91 80 435 03617
E: sajai@jsalaw.com
W: www.jsalaw.com

ITALY

Domenico Colella
Orsingher Ortu – Avvocati Associati
Piazza di Campitelli, 3
00186 Roma
Italy
T: +39 06 45599200
F: +39 06 69970021
E: domenico.colella@orsingher.com
W: www.orsingher.com

THE NETHERLANDS

Edward de Lange & Jort de Jong
Loyens & Loeff NV
Postbus 2888, 3000 CW Rotterdam
Blaak 31, 3011 GA Rotterdam
The Netherlands
T: +31 10 224 62 24

F: +31 10 412 58 39
E: edward.de.lange@loyensloeff.com
jort.de.jong@loyensloeff.com
W: www.loyensloeff.com

NORWAY

Espen Werring & Thor Jusnes
Haavind AS Bygdøy allé 2
Pb 359 Sentrum
NO-0101 Oslo
Norway
T: +47 22 43 30 00
F: +47 22 43 30 01
E: e.werring@haavind.no
t.jusnes@haavind.no
W: www.haavind.no

PORTUGAL

Octávio Castelo Paulo & Luís Neto Galvão
Sociedade Rebelo de Sousa
& Advogados Associados, R.L.
Rua D. Francisco Manuel de Melo, 21
1070-085 Lisbon
Portugal
T: +351 21 313 20 00
F: +351 21 313 20 01
E: octavio.paulo@srslegal.pt
luis.galvao@srslegal.pt
W: www.srslegal.pt

REPUBLIC OF IRELAND

Wendy Hederman & Philip Nolan
Mason Hayes & Curran
South Bank House, Barrow Street
Dublin 4
Ireland
T: +353 1 614 5000
F: +353 1 614 5001
E: pnolan@mhc.ie
whederman@mhc.ie
W: www.mhc.ie

ROMANIA

Cătălin Băiculescu
Ţuca Zbârcea & Asociaţii
Victoriei Square
4-8 Nicolae Titulescu Ave.
America House
West Wing, 8th Floor, Sector1
Bucharest 011141
Romania
T: +40 21 204 88 90
F: +40 21 204 88 99
E: catalin.baiculescu@tuca.ro
W: www.tuca.ro

SINGAPORE

Ian Ferguson & Matthew Hunter
Olswang Asia LLP
10 Collyer Quay
Ocean Financial Centre
#05-01
Singapore 049315
T: +65 6720 8278
F: +65 6720 8279
E: ian.ferguson@olswang.com
matthew.hunter@olswang.com
W: www.olswang.com

SPAIN

Jorge Llevat & Alejandro Negro Sala
Cuatrecasas, Gonçalves Pereira
Almagro, 9 – 28010
Madrid
Spain
T: +34 91 524 77 17
+34 93 290 55 85
F: +34 91 524 71 24
+34 93 290 55 38
E: jorge.llevat@cuatrecasas.com
alejandro.negro@cuatrecasas.com
W: www.cuatrecasas.com

SWEDEN

Thomas Lindqvist & Bojana Saletic
Hammarskiöld & Co
PO Box 2278
103 17 Stockholm
Sweden
T: +46 8 578 450 00
F: +46 8 578 450 99
E: thomas.lindqvist@hammarskiold.se
bojana.saletic@hammarskiold.se
W: www.hammarskiold.se

SWITZERLAND

Dr Lukas Morscher
Lenz & Staehelin
Bleicherweg 58
8027 Zurich
Switzerland
T: +41 58 450 80 00
F: +41 58 450 80 01
E: lukas.morscher@lenzstaehelin.com
W: www.lenzstaehelin.com

TURKEY

Gokhan Enkur & Vehbi Geray Bilimer
Pelister Atayilmaz Enkur Law Office
Maya Meridien Plaza
Ebulula Mardin Cad. No:16/30
Akatlar Istanbul 34335
Turkey
T: +90 212 351 88 86
F: +90 212 351 88 87
E: gokhan.enkur@pae-law.com
vehbi.bilimer@pae-law.com
W: www.pae-law.com

UNITED KINGDOM

Ian Ferguson, Dominic Dryden & Matthew Hunter
Olswang LLP
90 High Holborn
London WC1V 6XX
UK
T: +44 20 7067 3000
F: +44 20 7067 3999
E: ian.ferguson@olswang.com
dominic.dryden@olswang.com
matthew.hunter@olswang.com
W: www.olswang.com

UNITED STATES OF AMERICA

Brad L Peterson
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
USA
T: +1 312 701 8568
F: +1 312 706 8187
E: bpeterson@mayerbrown.com
W: www.mayerbrown.com